NORTH CAROLINA REPORTS

VOLUME 323

SUPREME COURT OF NORTH CAROLINA

7 SEPTEMBER 1988

4 JANUARY 1989

RALEIGH
1989

CITE THIS VOLUME
323 N.C.

TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

JAMES G. EXUM, JR.

Associate Justices

LOUIS B. MEYER
HENRY E. FRYE
BURLEY B. MITCHELL, JR.
JOHN WEBB
HARRY C. MARTIN
WILLIS P. WHICHARD

Retired Chief Justices

WILLIAM H. BOBBITT
SUSIE SHARP
JOSEPH BRANCH

Retired Justices

I. BEVERLY LAKE
DAVID M. BRITT
J. FRANK HUSKINS

Clerk

J. GREGORY WALLACE

Librarian

LOUISE H. STAFFORD*

ADMINISTRATIVE OFFICE OF THE COURTS

Director

FRANKLIN E. FREEMAN, JR.

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

---

*Appointed effective 1 August 1989 to replace Frances H. Hall who retired 31 July 1989.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN	Williamston
3A	DAVID E. REID, JR.	Greenville
3B	HERBERT O. PHILLIPS III	Morehead City
4A	HENRY L. STEVENS III	Kenansville
4B	JAMES R. STRICKLAND	Jacksonville
5	NAPOLEON B. BAREFOOT	Wilmington
	ERNEST B. FULLWOOD[1]	Wilmington
6A	RICHARD B. ALLSBROOK	Halifax
6B	CY A. GRANT[2]	Windsor
7A	CHARLES B. WINBERRY	Rocky Mount
7BC	FRANK R. BROWN	Tarboro
	G. K. BUTTERFIELD[3]	Wilson
8A	JAMES D. LLEWELLYN	Kinston
8B	PAUL MICHAEL WRIGHT	Goldsboro

Second Division

9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
10A-D	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	DONALD W. STEPHENS	Raleigh
	HOWARD E. MANNING, JR.	Raleigh
	GEORGE L. GREENE[4]	Raleigh
11	WILEY F. BOWEN	Dunn
12A-C	DARIUS B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
	GREGORY A. WEEKS[5]	Fayetteville
13	GILES R. CLARK	Elizabethtown
14A-B	ANTHONY M. BRANNON	Durham
	J. MILTON READ, JR.	Durham
	ORLANDO F. HUDSON, JR.[6]	Durham
	ALBERT LEON STANBACK, JR.[7]	Durham
15A	J. B. ALLEN, JR.	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16A	B. CRAIG ELLIS	Laurinburg
16B	JOE FREEMAN BRITT[8]	Lumberton
	DEXTER BROOKS[9]	Pembroke

Third Division

17A	MELZER A. MORGAN, JR.	Wentworth
17B	JAMES M. LONG	Pilot Mountain

DISTRICT	JUDGES	ADDRESS
18A-E	W. Douglas Albright	Greensboro
	Thomas W. Ross	Greensboro
	Joseph R. John	Greensboro
	W. Steven Allen, Sr.[10]	Greensboro
	Howard R. Greeson, Jr.[11]	High Point
19A	James C. Davis	Concord
19B	Russell G. Walker, Jr.	Asheboro
19C	Thomas W. Seay, Jr.	Spencer
20A	F. Fetzer Mills	Wadesboro
20B	William H. Helms	Monroe
21A-D	Judson D. DeRamus, Jr.	Winston-Salem
	William H. Freeman	Winston-Salem
	James A. Beaty, Jr.[12]	Winston-Salem
22	Preston Cornelius[13]	Mooresville
	Lester P. Martin, Jr.[14]	Mocksville
23	Julius A. Rousseau, Jr.	North Wilkesboro

Fourth Division

24	Charles C. Lamm, Jr.	Boone
25A	Claude S. Sitton	Morganton
25B	Forrest A. Ferrell	Hickory
26A-C	Frank W. Snepp, Jr.	Charlotte
	Kenneth A. Griffin	Charlotte
	Robert M. Burroughs	Charlotte
	Chase Boone Saunders	Charlotte
	W. Terry Sherrill	Charlotte
	Shirley L. Fulton[15]	Charlotte
27A	Robert W. Kirby	Gastonia
	Robert E. Gaines	Gastonia
27B	John Mull Gardner	Shelby
28	Robert D. Lewis	Asheville
	C. Walter Allen	Asheville
29	Hollis M. Owens, Jr.	Rutherfordton
30A	James U. Downs, Jr.	Franklin
30B	Janet Marlene Hyatt	Waynesville

SPECIAL JUDGES

I. Beverly Lake, Jr.	Raleigh
Marvin K. Gray	Charlotte
Samuel T. Currin	Raleigh

EMERGENCY JUDGES

Henry A. McKinnon, Jr.	Lumberton
Samuel E. Britt	Lumberton

DISTRICT	JUDGES	ADDRESS
	JAMES H. POU BAILEY	Raleigh
	JOHN R. FRIDAY	Lincolnton
	D. MARSH MCLELLAND	Graham
	EDWARD K. WASHINGTON	High Point
	L. BRADFORD TILLERY	Wilmington
	ROBERT A. COLLIER, JR.	Statesville
	THOMAS H. LEE	Durham

1. Elected and took office 11-30-88 to replace L. Bradford Tillery who retired 8-1-88.
2. Elected to new position and sworn in 1-1-89.
3. Elected to new position and sworn in 1-1-89.
4. Elected to new position and sworn in 1-1-89.
5. Elected to new position and sworn in 1-3-89.
6. Elected to new position and sworn in 1-1-89.
7. Appointed 2-7-89 to replace Thomas H. Lee who retired 12-31-88.
8. Elected to new position and sworn in 1-1-89.
9. Elected to new position and sworn in 1-1-89.
10. Elected to new position and sworn in 1-2-89.
11. Elected and took office 1-3-89 to replace Ralph Walker who retired 12-30-88.
12. Elected to new position and sworn in 1-1-89.
13. Appointed 12-1-88 to replace Robert A. Collier, Jr. who retired 7-31-88.
14. Elected to new position and sworn in 1-1-89.
15. Elected to new position and sworn in 1-1-89.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
	J. RICHARD PARKER	Manteo
2	HALLETT S. WARD (Chief)	Washington
	JAMES W. HARDISON	Williamston
	SAMUEL C. GRIMES	Washington
3	E. BURT AYCOCK, JR. (Chief)	Greenville
	JAMES E. RAGAN III	Oriental
	JAMES E. MARTIN	Grifton
	H. HORTON ROUNTREE	Greenville
	WILLIE LEE LUMPKIN III	Morehead City
	WILTON R. DUKE, JR.[1]	Greenville
	DAVID A. LEECH[2]	Greenville
4	KENNETH W. TURNER (Chief)	Rose Hill
	STEPHEN M. WILLIAMSON	Kenansville
	WILLIAM M. CAMERON, JR.	Jacksonville
	WAYNE G. KIMBLE, JR.	Jacksonville
	LEONARD W. THAGARD	Clinton
5	GILBERT H. BURNETT (Chief)	Wilmington
	CHARLES E. RICE	Wrightsville Beach
	JACQUELINE MORRIS-GOODSON	Wilmington
	ELTON G. TUCKER	Wilmington
	JOHN W. SMITH II[3]	Wilmington
6	NICHOLAS LONG (Chief)	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston-Woodville
	HAROLD P. MCCOY, JR.	Scotland Neck
7	GEORGE M. BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	ALBERT S. THOMAS, JR.	Wilson
	QUENTIN T. SUMNER	Rocky Mount
	SARAH F. PATTERSON[4]	Rocky Mount
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Goldsboro
	RODNEY R. GOODMAN, JR.	Kinston
	JOSEPH E. SETZER, JR.	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	CHARLES W. WILKINSON, JR.	Oxford
	J. LARRY SENTER	Franklinton
	HERBERT W. LLOYD, JR.[5]	Henderson
10	GEORGE F. BASON (Chief)	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	L. W. PAYNE	Raleigh
	WILLIAM A. CREECH	Raleigh

DISTRICT	JUDGES	ADDRESS
	JOYCE A. HAMILTON	Raleigh
	FRED M. MORELOCK	Raleigh
	JERRY W. LEONARD	Raleigh
	DONALD W. OVERBY[6]	Raleigh
	JAMES R. FULLWOOD[7]	Raleigh
11	WILLIAM A. CHRISTIAN (Chief)[8]	Sanford
	EDWARD H. MCCORMICK	Lillington
	O. HENRY WILLIS, JR.	Dunn
	TYSON Y. DOBSON, JR.[9]	Smithfield
	SAMUEL S. STEPHENSON[10]	Angier
12	SOL G. CHERRY (Chief)	Fayetteville
	ANNA ELIZABETH KEEVER	Fayetteville
	PATRICIA ANN TIMMONS-GOODSON	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	JAMES F. AMMONS, JR.[11]	Fayetteville
13	WILLIAM C. GORE, JR. (Chief)	Whiteville
	JERRY A. JOLLY	Tabor City
	D. JACK HOOKS, JR.	Whiteville
	DAVID G. WALL	Elizabethtown
14	DAVID Q. LABARRE (Chief)	Durham
	RICHARD CHANEY	Durham
	KENNETH C. TITUS	Durham
	CAROLYN D. JOHNSON	Durham
	WILLIAM Y. MANSON[12]	Durham
15A	WILLIAM S. HARRIS, JR. (Chief)	Graham
	JAMES KENT WASHBURN	Burlington
	SPENCER B. ENNIS	Burlington
15B	STANLEY PEELE (Chief)	Chapel Hill
	PATRICIA HUNT	Chapel Hill
	LOWRY M. BETTS	Pittsboro
16A	WARREN L. PATE (Chief)[13]	Raeford
16B	JOHN S. GARDNER (Chief)[14]	Lumberton
	CHARLES G. MCLEAN	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	GARY M. LOCKLEAR[15]	Pembroke
	ROBERT F. FLOYD, JR.[16]	Fairmont
17A	PETER M. MCHUGH (Chief)	Wentworth
	ROBERT R. BLACKWELL	Yanceyville
	PHILIP W. ALLEN	Yanceyville
17B	JERRY CASH MARTIN (Chief)	Mount Airy
	CLARENCE W. CARTER	King
18	J. BRUCE MORTON (Chief)[17]	Greensboro
	ROBERT E. BENCINI	High Point
	WILLIAM L. DAISY	Greensboro
	EDMUND LOWE	High Point
	SHERRY FOWLER ALLOWAY	Greensboro
	LAWRENCE C. MCSWAIN	Greensboro
	WILLIAM A. VADEM	Greensboro

DISTRICT	JUDGES	ADDRESS
	THOMAS G. FOSTER, JR.[18]	Greensboro
	JOSEPH E. TURNER[19]	Greensboro
19A	FRANK M. MONTGOMERY (Chief)	Salisbury
	ADAM C. GRANT, JR.	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
	ROBERT M. DAVIS, SR.	Salisbury
19B	WILLIAM M. NEELY (Chief)	Asheboro
	RICHARD M. TOOMES	Asheboro
	VANCE B. LONG[20]	Asheboro
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE	Pinehurst
	TANYA T. WALLACE	Rockingham
21	ABNER ALEXANDER (Chief)	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	ROBERT KASON KEIGER	Winston-Salem
	ROLAND HARRIS HAYES	Winston-Salem
	WILLIAM B. REINGOLD	Winston-Salem
	LORETTA BIGGS	Kernersville
	MARGARET L. SHARPE[21]	Winston-Salem
22	ROBERT W. JOHNSON (Chief)[22]	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE THOMAS FULLER	Lexington
	KIMBERLY T. HARBINSON	Taylorsville
	WILLIAM G. IJAMES, JR.[23]	Mocksville
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	EDGAR B. GREGORY	Wilkesboro
	MICHAEL E. HELMS	Wilkesboro
24	ROBERT HOWARD LACEY (Chief)	Newland
	ROY ALEXANDER LYERLY	Banner Elk
	CHARLES PHILIP GINN	Boone
25	L. OLIVER NOBLE, JR. (Chief)	Hickory
	TIMOTHY S. KINCAID	Newton
	RONALD E. BOGLE	Hickory
	JONATHAN L. JONES	Valdese
	NANCY L. EINSTEIN[24]	Lenoir
	ROBERT E. HODGES[25]	Morganton
26	JAMES E. LANNING (Chief)	Charlotte
	L. STANLEY BROWN	Charlotte
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	WILLIAM H. SCARBOROUGH	Charlotte
	RESA L. HARRIS	Charlotte
	ROBERT P. JOHNSTON	Charlotte

DISTRICT	JUDGES	ADDRESS
	RICHARD ALEXANDER ELKINS	Charlotte
	MARILYN R. BISSELL	Charlotte
	RICHARD D. BONER[26]	Charlotte
	H. WILLIAM CONSTANGY, JR.[27]	Charlotte
	H. BRENT MCKNIGHT[28]	Charlotte
27A	LAWRENCE B. LANGSON (Chief)	Gastonia
	TIMOTHY L. PATTI	Gastonia
	HARLEY B. GASTON, JR.	Belmont
	CATHERINE C. STEVENS	Gastonia
	DANIEL J. WALTON[29]	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	J. KEATON FONVIELLE	Shelby
28	EARL JUSTICE FOWLER, JR. (Chief)	Arden
	PETER L. RODA	Asheville
	ROBERT L. HARRELL	Asheville
	GARY S. CASH	Asheville
29	LOTO GREENLEE (Chief)[30]	Marion
	THOMAS N. HIX	Mill Spring
	STEVEN F. FRANKS[31]	Hendersonville
	ROBERT S. CILLEY[32]	Brevard
30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

---

1. Elected to new position and sworn in 12-5-88.
2. Elected and sworn in 12-5-88 to replace J. Randal Hunter.
3. Elected to new position and sworn in 12-5-88.
4. Elected to new position and sworn in 12-5-88.
5. Elected and sworn in 12-5-88 to replace Ben U. Allen who retired 12-5-88.
6. Elected to new position and sworn in 12-5-88.
7. Appointed and took oath 3-10-89 to replace George L. Greene who took office on Superior Court 1-1-89.
8. Appointed Chief Judge 12-1-88 to replace Elton Pridgen who retired 11-30-88.
9. Elected to new position and sworn in 12-5-88.
10. Elected and sworn in 12-5-88 to replace William A. Christian who became Chief Judge.
11. Appointed 11-7-88 to replace Lacy S. Hair who retired 10-31-88.
12. Appointed 3-15-89 to replace Orlando F. Hudson, Jr. who took office on the Superior Court 1-1-89.
13. Appointed Chief Judge in new district and sworn in 1-1-89.
14. Deceased 4-19-89.
15. Elected to new position and sworn in 12-5-88.
16. Elected and sworn in 12-5-88 to replace Adelaide G. Behan who did not seek reelection.
17. Appointed Chief Judge 12-5-88 to replace Paul Williams.
18. Elected and sworn in 12-5-88 to replace J. Bruce Morton who became Chief Judge 12-5-88.
19. Elected to new position and sworn in 12-5-88.
20. Elected to new position and sworn in 12-5-88.
21. Elected to new position and sworn in 12-5-88.
22. Appointed Chief Judge 12-1-88 to replace Lester P. Martin, Jr. who took office on Superior Court 1-1-89.
23. Appointed 1-22-89 to replace Robert W. Johnson who became Chief Judge.
24. Appointed 9-21-88 to replace Stewart L. Cloer who resigned 8-26-88. Elected to new position and sworn in 12-5-88.
25. Appointed 2-1-89 to replace Nancy L. Einstein.
26. Elected to new position and sworn in 1-1-89.
27. Appointed 3-3-89 to replace T. Patrick Matus III who resigned 12-31-88.
28. Elected and sworn in 12-5-88 to replace Shirley Fulton who took office on Superior Court 1-1-89.
29. Elected and sworn in 12-5-88 to replace Berlin H. Carpenter, Jr. who did not seek reelection.
30. Appointed Chief Judge 12-5-88.
31. Elected and sworn in 12-5-88 to replace Loto Greenlee who became Chief Judge.
32. Elected and sworn in 12-5-88 to replace Zoro J. Guice, Jr.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

LACY H. THORNBURG

Administrative Deputy Attorney General

JOHN D. SIMMONS III

Deputy Attorney General for Policy and Planning

ALAN D. BRIGGS

Deputy Attorney General for Training and Standards

PHILLIP J. LYONS

Chief Deputy Attorney General

ANDREW A. VANORE, JR.

Senior Deputy Attorneys General

JEAN A. BENOY
H. AL COLE, JR.
JAMES J. COMAN
ANN REED DUNN
WILLIAM W. MELVIN
EUGENE A. SMITH

Special Deputy Attorneys General

ISAAC T. AVERY III
DAVID R. BLACKWELL
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
ELISHA H. BUNTING, JR.
JOAN H. BYERS
LUCIEN CAPONE III
J. MICHAEL CARPENTER
T. BUIE COSTEN
JAMES P. ERWIN, JR.
WILLIAM N. FARRELL, JR.
JANE P. GRAY
JAMES C. GULICK
RALF F. HASKELL
CHARLES M. HENSEY
I. B. HUDSON, JR.
RICHARD N. LEAGUE
DANIEL F. MCLAWHORN
CHARLES J. MURRAY
DANIEL C. OAKLEY
JAMES B. RICHMOND
HENRY T. ROSSER
JACOB L. SAFRON
JO ANNE SANFORD
TIARE B. SMILEY
JAMES PEELER SMITH
EDWIN M. SPEAS, JR.
RALPH B. STRICKLAND, JR.
REGINALD L. WATKINS
ROBERT G. WEBB
HAROLD W. WHITE, JR.

Assistant Attorneys General

ARCHIE W. ANDERS
WILLIAM H. BORDEN
WILLIAM F. BRILEY
STEVEN F. BRYANT
MABEL Y. BULLOCK
ROBERT E. CANSLER
KATHRYN J. COOPER
JOHN R. CORNE
KIMBERLY L. CRAMER
FRANCIS W. CRAWLEY
LAURA E. CRUMPLER
JANE T. FRIEDENSEN
DEBRA K. GILCHRIST
ROY A. GILES, JR.
MICHAEL D. GORDON
L. DARLENE GRAHAM
JEFFREY P. GRAY
RICHARD L. GRIFFIN
NORMA S. HARRELL
WILLIAM P. HART
JENNIE J. HAYMAN
WILSON HAYMAN
HOWARD E. HILL
RICHARD A. HINNANT, JR.
LEMUEL W. HINTON
ALAN S. HIRSCH
CHARLES H. HOBGOOD, JR.
DORIS A. HOLTON
LAVEE H. JACKSON
J. ALLEN JERNIGAN
DOUGLAS A. JOHNSTON
LORINZO L. JOYNER
GRAYSON G. KELLEY
DONALD W. LATON
M. JILL LEDFORD
FLOYD M. LEWIS
KAREN E. LONG
ELIZABETH G. MCCRODDEN
BARRY S. MCNEILL
RODNEY S. MADDOX
JOHN F. MADDREY
JAMES E. MAGNER, JR.
ANGELINE M. MALETTO
THOMAS L. MALLONEE, JR.
GAYL M. MANTHEI
THOMAS G. MEACHAM, JR.
DAVID S. MILLER
RANDY L. MILLER
THOMAS R. MILLER
DAVID R. MINGES
VICTOR H. E. MORGAN, JR.
LINDA A. MORRIS
MARILYN R. MUDGE
G. PATRICK MURPHY
DENNIS P. MYERS
DAVID M. PARKER
J. MARK PAYNE
ROBIN P. PENDERGRAFT
MEG S. PHIPPS
NEWTON G. PRITCHETT, JR.
WILLIAM B. RAY
GRAYSON L. REEVES, JR.
JULIA F. RENFROW
NANCY E. SCOTT
ELLEN B. SCOUTEN
BARBARA A. SHAW
ROBIN W. SMITH
T. BYRON SMITH
RICHARD G. SOWERBY, JR.
D. DAVID STEINBOCK, JR.
KIP D. STURGIS
SUEANNA P. SUMPTER
W. DALE TALBERT
DONALD R. TEETER
PHILIP A. TELFER
SYLVIA H. THIBAUT
JANE R. THOMPSON
MELISSA L. TRIPPE
JOHN C. WALDRUP
JAMES M. WALLACE, JR.
MARTHA K. WALSTON
JOHN H. WATTERS
JAMES A. WELLONS
TERESA L. WHITE
THOMAS B. WOOD
SARAH C. YOUNG
THOMAS J. ZIKO
THOMAS D. ZWEIGART

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams, Jr.	Elizabeth City
2	Mitchell D. Norton	Washington
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6	David H. Beard, Jr.	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald M. Jacobs	Goldsboro
9	David R. Waters	Oxford
10	Colon Willoughby	Raleigh
11	John W. Twisdale	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Michael F. Easley	Bolivia
14	Ronald L. Stephens	Durham
15A	Steve A. Balog	Graham
15B	Carl R. Fox	Pittsboro
16A	Jean E. Powell	Raeford
16B	J. Richard Townsend	Lumberton
17A	Thurman B. Hampton	Wentworth
17B	H. Dean Bowman	Dobson
18	Horace M. Kimel, Jr.	Greensboro
19A	James E. Roberts	Concord
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	William Warren Sparrow	Winston-Salem
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Calvin B. Hamrick	Gastonia
27B	William Carlos Young	Shelby
28	Robert W. Fisher	Asheville
29	Alan C. Leonard	Rutherfordton
30	Roy H. Patton, Jr.	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	MARY ANN TALLY	Fayetteville
15B	J. KIRK OSBORN	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON II	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	ROWELL C. CLONINGER, JR.	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED

ORDER OF THE COURT

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

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

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

PETITIONS TO REHEAR

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA
CITED AND CONSTRUED

Art. I, § 19	State v. Allen, 208
	State v. McLaughlin, 68
	State v. Quick, 675
	State ex rel. Utilities Comm. v. N.C. Natural Gas Corp., 630
Art. I, § 23	State v. Deanes, 508
	State v. Quick, 675
Art. I, § 24	State v. Allen, 208

RULES OF APPELLATE PROCEDURE
CITED AND CONSTRUED

Rule No.	
10(b)(2)	State v. Hunt, 407

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 23rd day of February 1989 and said persons have been issued certificates of this Board.

JOSEPH E. DOTI ..... Columbus, applied from the State of New York Second Department
PHILIP S. CHUBB ..... Charlotte, applied from the State of Ohio
LARRY E. COEY ..... Elyria, Ohio, applied from the State of Ohio
HUGH ROBERT OVERHOLT ..... Fort Belvoir, Virginia applied from the State of Arkansas
MARK D. SANFORD .. Davidson, Michigan, applied from the State of Michigan
GEORGE L. CHAPMAN ..... Toledo, Ohio, applied from the State of Ohio
RAYMOND WILLIAM BRAUN ..... Charlotte, applied from the State of Ohio
WALTER MARTIN DENNIS ..... Knoxville, Tennessee applied from the State of Tennessee
JOHN A. HEILIG ..... Norfolk, Virginia, applied from the State of Virginia
MARTHA JEANNE HILL MERICAL ..... Charleston, West Virginia applied from the State of West Virginia
SUE ANN GENRICH BERRY ..... Oak Ridge, Tennessee applied from the State of Tennessee

Given over my hand and Seal of the Board of Law Examiners this the 3rd day of March, 1989.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named person was admitted to the North Carolina Bar by the Board of Law Examiners on the 24th day of February 1989 and said person has been issued a license certificate.

RICHARD BLAKE ATKINS ..... Tulsa, Oklahoma

Given over my hand and Seal of the Board of Law Examiners this the 7th day of March.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 17th day of March 1989 and said persons have been issued license certificates.

JOHN CHANDLER ADAMS ..... Asheville
KATHRYN PERDUE ADAMS ..... Greensboro
SUSAN ALICIA AIKEN ..... Kernersville
THOMAS EDWARD AUSTIN, JR. ..... Norcross, Georgia
BRYAN ELLIOT BEATTY ..... Raleigh
BRADLEY KENT BENSON ..... Winston-Salem
LISA BRACHMAN ..... Chapel Hill
ANNE WENTWORTH BRILL ..... Cary
STEPHEN COOK BRISSETTE ..... Raleigh
ROGER GREENWOOD BROOKS ..... Wayne, New Jersey
JILL ADELIA BRYAN ..... Charlotte
MELANIE JEAN CARROLL ..... Hamlet
ELIZABETH J. CAVINESS ..... Siler City
ROBYN R. COMPTON ..... Greensboro
WILLIAM MARK CUMALANDER ..... Fuquay-Varina
HARRY KARRICK DAUGHERTY, JR. ..... Charlotte
CHERYL KIEL DAVIDOWITZ ..... Greensboro
MARSHALL FULTON DOTSON, III ..... Greensboro
MARGARET HOLLEY EARLS ..... Greensboro
EVELYN S. EARNEST ..... Winston-Salem
KENNETH HALL EPPLE, JR. ..... Greensboro
JAMES HENRY FAISON, III ..... Rocky Point
YOLANDA JUETTA FEIMSTER ..... Charlotte
BONNIE HELFGOTT FISHER ..... Greenville
CHARLES THEOPHILUS G. FRANCIS ..... Winston-Salem
VINCENT L. GABLE ..... Boone
LISSA J. GARDNER ..... Raleigh
LEE WINFRED GAVIN ..... Raleigh
FRANCES CAROLINE GIBSON ..... Charlotte
DONALD EDWIN GILLESPIE, JR. ..... Greensboro
WALTER ROTH GLENNING ..... Denver
DAVID STOTT GORDON ..... Charlotte
VERA STELLA GOUDES ..... Charlotte
MARY LEE HALL ..... Raleigh
LINDA J. HARTWELL-SCOTT ..... Greensboro
JOSEPH ALLISON HAYWORTH, JR. ..... High Point
MICHAEL DOUGLAS HILL ..... Charleston, South Carolina
W. RICKERT HINNANT ..... Winston-Salem
CAROL JAN HOLCOMB ..... Chapel Hill
LYNNE MARIE HOLTKAMP ..... Rougemont
GRIER JEWELL HURLEY ..... Buies Creek
ROSE ELLEN JACOBSOHN ..... Charlotte
JEFFREY WILLARD JONES ..... Winston-Salem
ROBERT DAVID JOSEPH ..... Greensboro
RICHARD BEVINS KALE, JR. ..... Greenville, South Carolina

STEPHEN WATTS KEARNEY	Raleigh
KAREN LEIGH KEIGER	Winston-Salem
GARY BRANDON KIVETT	Spruce Pine
EDUARDUS GERARDUS KLUITERS	Charlotte
BARBARA DICKERSON KOCHER	Apex
JAN T. KROBOTH	Goldsboro
DAVID JOSEPH KUHN	Wilson
WARREN KEITH LAIL	Charlotte
BRADLEY ROBERT LAMB	Pittsboro
GEORGE THOMAS LEE	Raleigh
LARRY ROLANDO LINNEY	Asheville
JANA S. LUCAS	Carrboro
ROBERT HOWARD LUTZ	Kings Mountain
DEBORAH ANNE MALIZIA	Chapel Hill
SCOTT WORTH MARTIN	Chapel Hill
STEVE RAY MATHENY	Cliffside
JOHN THOMAS MATTESON	Raleigh
ALVIN GARNELL MATTHEWS	Fayetteville
REGINA LAVONNE MCKINNEY	Fayetteville
RUTH ANN MCKINNEY	Chapel Hill
CYNTHIA ANNE MILLS	Greenville
SHARON PARKER MORGAN	Stone Mountain, Georgia
BRAME PERRY MORRISON, JR.	Raleigh
CHRISTOPHER BOYD MOXLEY	New Bern
SARAH MORGAN NIMS	Chapel Hill
MAUREEN KELLEY O'CONNOR	Cary
HOWARD ALAN PELL	Sanford
WILLIAM RIVERS PENN	Chapel Hill
LEO J. PHILLIPS	Winston-Salem
DEBRA RAGIN-JESSUP	Winston-Salem
JOHN SPENCER RAINEY, JR.	Enfield
TIMOTHY RASMUSSEN	Marble
ERNEST REEVES, JR.	Chapel Hill
MICHAEL KURT REID	Raleigh
JAMES ALBERT RENO	Garner
KEVIN L. ROCHFORD	High Point
MICHELE ROUFAIL	Washington, D.C.
SUSAN GWIN RUCH	Winston-Salem
DANIEL ALAN MEREDITH RULEY	Parkersburg, West Virginia
RANDALL GREGORY RUSCH	Durham
JEFFREY GLENN SCOTT	Hillsborough
ROBERT R. SEIDEL	Chapel Hill
FRANK HORNOR SHEFFIELD, JR.	Hillsborough
JANET LEE SHIRES	Long Beach
BRYON MORRIS SMITH	Jacksonville
TIMOTHY DEAN SMITH	Raleigh
JOSEPH ALDERSON SMITH, JR.	Raleigh
GUY THOMAS STRANDEMO	Raleigh
SHARON ALICE STURGES	Winston-Salem
PAUL AUGUSTINE SUHR	Raleigh

DOUGLAS JAMES TATE ..... Raleigh
LINDA CAROL TICE-STITTSWORTH ..... Durham
MARJORY J. TIMOTHY ..... Charlotte
DIEDRA WILSON WARD ..... Albemarle
WILLIAM GRAHAM WATTS ..... Greensboro
WILLIAM DEVIN WEBB, II ..... Wilson
ROBERT N. WECKWORTH, JR. ..... Greensboro
KATHRYN CLARK WELLS ..... Memphis, Tennessee
LAURETTE WILLIAMS WEST ..... Durham
FRED ALAN WHITFIELD ..... Greensboro
DAVID ROBERT WILES ..... Charlotte
LARRY JAMES WILSON ..... Chapel Hill

Given over my hand and Seal of the Board of Law Examiners this the 20th day of April, 1989.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 14th day of April 1989 and said persons have been issued license certificates.

CHRISTOPHER J. BLAKE ..... Raleigh
RICHARD S. BOULDEN ..... Glenview, Illinois
DAVID TODD BUCKINGHAM ..... Raleigh
DAYTON THOMAS COLE ..... Boone
SHERRY LYNN CORNETT ..... Wake Forest
MARGARET VAN SCHOICK COSTLEY ..... Greensboro
TRACY THOMAS COTTINGHAM, III ..... Birmingham, Alabama
JONATHAN STUART FRANK ..... Charlotte
JUDITH E. GARMON ..... Greensboro
LAURIE B. GENGO ..... Raleigh
TERESA MARY GILL ..... Chapel Hill
SHERI A. HARRISON ..... Charlotte
BARBARA ELIZABETH HILL ..... Rock Hill, South Carolina
CARL BRENT HUBBARD ..... Charlotte
BRUCE ALAN LEE ..... Greensboro
PHILLIP RICHARD LINGAFELT ..... Roanoke, Virginia
CLAUDIA PAP MANGEL ..... Durham
JEFFREY ROBERT MCFADDEN ..... Winston-Salem
PETER NATHANIEL MERRILL ..... Carrboro
ROBERT NEWTON PAGE, IV ..... Carthage
HUNTER CAVIN QUICK ..... Charlotte
HUDSON CLATE STANSBURY, JR. ..... Tacoma, Washington

JOHN VAIL ..... Morganton
GREGORY CANARD WARD ..... Greensboro
ROBERT DEAN CRAIG ..... Birmingham, Alabama
GREGORY J. MURPHY ..... Charlotte

Given over my hand and Seal of the Board of Law Examiners this the 27th day of April, 1989.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons duly passed the examinations of the Board of Law Examiners and said persons have been issued license certificates.

MARIO EUGENIO PEREZ ..... Greenville
License Date: April 14, 1989
ROBERT BILLINGS NEWKIRK, III ..... Alexis
License Date: April 14, 1989
MICHAEL DANA KAPLOWITZ ..... Eastchester, New York
License Date: April 28, 1989

I further certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners and said persons have been issued certificates of this Board:

DEAN M. COON ..... Gansevoort, New York
applied from the State of New York
License Date: April 14, 1989
JOSEPH P. HENRY .. Winston-Salem, applied from the State of West Virginia
License Date: April 14, 1989
JANE KESTENBAUM ..... Durham, applied from the State of New York
License Date: April 14, 1989
JAMES EDWARD KLINE ..... Toledo, Ohio, applied from the State of Ohio
License Date: April 14, 1989
ANNE E. MOSHER ..... Baltimore, Maryland
applied from the State of Pennsylvania
License Date: April 14, 1989
THOMAS L. PHILLIPS ..... Clayton, applied from the State of Virginia
License Date: May 12, 1989

Given over my hand and Seal of the Board of Law Examiners this the 16th day of May, 1989.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named person duly passed the examination of the Board of Law Examiners as of the 19th day of May, 1989 and said person has been issued a license certificate.

RANDOLPH BRIAN ASH MONCHICK ..... Chapel Hill

Given over my hand and Seal of the Board of Law Examiners this the 24th day of May, 1989.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named person duly passed the examination of the Board of Law Examiners and said person has been issued a license certificate:

EILEEN G. COFFEY ..... Raleigh
License Date: May 26, 1989

I further certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners and said persons have been issued certificates of this Board:

CHARLES H. SULLIVAN, JR. Weaverville, applied from the State of New York
License Date: June 9, 1989

RONALD MARK WEINER .... Matthews, applied from the State of Connecticut
License Date: June 9, 1989

RALPH W. BARBIER, JR. ..... Grosse Pointe Woods, Michigan
applied from the State of Michigan
License Date: June 9, 1989

GEORGE B. BOYLE ..... Cary, applied from the State of New York
License Date: June 9, 1989

JOE B. COGDELL, JR. ..... Charlotte, applied from the State of Oklahoma
License Date: June 9, 1989

DEBRA RAE NICKELS .... Fuquay-Varina, applied from the State of Nebraska
License Date: June 9, 1989

GLENN E. HARRIS ..... Marble, applied from the District of Columbia and
the State of Virginia
License Date: June 9, 1989

Given over my hand and Seal of the Board of Law Examiners this the 14th day of June, 1989.

FRED P. PARKER III
Executive Secretary
Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners and said persons have been issued certificates of this Board:

RONALD PAUL CULLINAN ..... Lakeland, Florida
applied from the State of New York
License Date: July 26, 1989

ROBERT CARROLL SLAUGHTER, III ..... Lumberton
applied from the State of Virginia
License Date: July 26, 1989

ALAN TAYLOR SMITH ..... Fayetteville, applied from the State of Wisconsin
License Date: July 26, 1989

DENNIS W. MOUNTAIN ..... Chapel Hill, applied from the State of Michigan
License Date: July 26, 1989

RICHARD WILLIAM FARRELL ..... Stamford, Connecticut
applied from the State of Connecticut
License Date: July 26, 1989

WILLIAM CLAYTON CONNOR ..... Greensboro
applied from the State of Oklahoma
License Date: July 26, 1989

JOHN LAWLER HASH .... Clemmons, applied from the State of West Virginia
License Date: July 26, 1989

PAUL ANTHONY RYKER ..... Huntington, West Virginia
applied from the State of West Virginia
License Date: July 26, 1989

Given over my hand and Seal of the Board of Law Examiners this the 31st day of July, 1989.

FRED P. PARKER III
Executive Secretary
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. DOCK McKOY, JR., A/K/A DOCK McCOY, A/K/A DOCK McKAY, A/K/A PAUL McCOY

No. 585A85

(Filed 7 September 1988)

1. **Criminal Law §§ 102.13, 120.1— capital case—comments by trial court and prosecutor on appellate review**

The trial court's statement during a routine explanation of the court reporter's duties that "the Supreme Court can review" this case, and the prosecutor's jury argument that defendant, if convicted, can appeal questions of law but not the jury's findings of fact, could not reasonably be construed to diminish the jury's responsibility for its decisions and thus did not fatally undermine the jury's verdict of guilty of first degree murder and its conclusion that death is the appropriate punishment.

2. **Jury § 6.3— voir dire of prospective jurors—sympathy toward intoxicated defendant**

The trial court did not abuse its discretion by failing *ex mero motu* to prohibit the prosecutor in a first degree murder case from asking several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense, since the questions did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts but were properly allowed in the exercise of the prosecutor's right to secure an unbiased jury.

3. **Criminal Law § 75.10— refusal to sign written waiver of rights—oral waiver**

The trial court's finding that defendant made an express waiver of his rights before interrogation was supported by an S.B.I. agent's testimony that defendant refused to sign a written waiver because he could not see it but stated that he understood his rights and agreed to talk with the officers.

4. **Criminal Law § 75.8— no expressed desire to terminate interview—supporting evidence**

The trial court's finding that defendant never expressed a desire to terminate an interview was supported by an S.B.I. agent's testimony that defendant asked to take a break because he was tired and that defendant subsequently agreed to resume the conversation.

5. **Criminal Law § 75— voluntariness of confession and waiver of rights—totality of circumstances—necessity for police coercion**

The appellate court will look to the totality of circumstances in determining the voluntariness of a confession and the waiver of *Miranda* rights. However, police coercion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the due process clause of the Fourteenth Amendment.

6. **Criminal Law § 75.10— voluntariness of waiver of rights and confession—previous convictions**

A finding that defendant had previously been convicted of two felonies and that he told an officer that, because of this experience, he understood "all that stuff" (*i.e.*, his rights) supported the conclusion that defendant's waiver of his rights and his confession were voluntary.

7. **Criminal Law § 75.15— voluntariness of confession—mild intoxication**

The fact that defendant may have experienced some lingering, mild intoxication at the time of his confession does not preclude the conclusion that he confessed voluntarily. Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury.

8. **Criminal Law § 75.14— low I.Q.—voluntariness of confession**

Although a psychiatrist testified that defendant's I.Q. placed him in the borderline range of intellectual functioning, the evidence permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess where it showed that defendant spoke rationally during his extensive conversation with officers; he held a job prior to the shooting in question and was described by his supervisor as a good worker; and he had the mental capacity to testify at trial.

9. **Criminal Law § 75.14— mental disorders—voluntariness of confession—conflicting psychiatric and lay testimony**

A psychiatrist's testimony that defendant's mental disorders would prevent him from making a truly voluntary confession did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession where an S.B.I. agent, who had ample opportunity to observe defendant at the time he waived his rights and confessed, gave substantial testimony indicating that defendant was able to comprehend his discussion with law officers.

10. **Criminal Law § 75.10— voluntariness of waiver of rights and confession—totality of circumstances**

The totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda*

rights and that his in-custody statements were made freely, understandingly, and voluntarily.

11. Criminal Law § 102.7— jury argument concerning psychiatrist—absence of prejudice

The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's potentially misleading jury argument in a first degree murder case that "if the law recognized them [psychiatrists] as the experts on what the condition of somebody's mind was, you wouldn't be hearing the case" where the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say, and he then urged the jurors to consider not only the expert testimony but also that of the other witnesses.

12. Criminal Law § 102.6— jury argument—competency to stand trial as evidence of sanity

The trial court did not abuse its discretion in overruling defendant's objection to the prosecutor's jury argument suggesting that the fact that defendant was competent to stand trial indicated that his sanity defense lacked merit since the argument did not misstate the law but in effect urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the crime, and since the trial court gave clear and correct instructions on insanity.

13. Criminal Law § 102.6— jury argument—misstatement of law as one interpretation—objection sustained

The trial court did not abuse its discretion in sustaining the State's objection to defense counsel's jury argument that, in order to convict defendant of first degree murder, the jury would have to find that a psychiatrist who testified that defendant lacked the mental capacity to premeditate and deliberate at the time of the crime "was wrong about it beyond a reasonable doubt," since the argument could have been interpreted as stating the correct proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder or as incorrectly implying that the State bore the burden of proving the insanity defense. Assuming error, defendant failed to carry his burden of showing prejudice where the trial court's charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt.

14. Criminal Law § 135.9— emotional disturbance mitigating circumstance—jury's failure to find—defendant's expert testimony not uncontradicted or inherently credible

The testimony of defendant's two psychiatric experts that defendant was suffering from significant psychological disorders at the time of a shooting was neither uncontradicted nor inherently credible so as to make the sentencing determination unreliable because of the jury's failure to find the statutory mitigating circumstance that "defendant was under the influence of mental or emotional disturbance" where the testimony of other witnesses regarding defendant's mental and emotional state at the time of the shooting conflicted

with that of defendant's experts, and where neither of defendant's experts examined him until several weeks or months after the crime. N.C.G.S. § 15A-2000(f)(2) (1983); Eighth and Fourteenth Amendments to the U. S. Constitution.

15. Criminal Law § 102.6— jury argument—commitment not to sympathize with intoxicated defendant

The trial court in a first degree murder case did not abuse its discretion by failing to intervene *ex mero motu* when the district attorney reminded the jurors during his closing argument of their commitments not to have sympathy for defendant because he was intoxicated.

16. Criminal Law § 135.9— capital sentencing procedure—mitigating circumstances—requirement of jury unanimity—constitutionality

The trial court's sentencing instructions in a first degree murder case were not erroneous and unconstitutional under the decision of *Mills v. Maryland*, 486 U.S. --- (100 L.Ed. 2d 384) because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing.

17. Criminal Law § 135.4— capital sentencing procedure—individualized sentencing and guided sentencer discretion—constitutionality

The North Carolina capital sentencing procedure allows for individualized sentencing by (1) allowing the jury to find circumstances in mitigation, both submitted circumstances and any other circumstances the jury deems to have mitigating value, (2) allowing the jury to consider all relevant evidence in deciding whether to recommend a sentence of death, and (3) requiring the jury, before recommending that defendant be sentenced to death, to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty. The capital sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty by (1) requiring the State to prove the existence of an aggravating circumstance beyond a reasonable doubt, (2) requiring the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence, and (3) then allowing the jury to consider only that evidence which is relevant, *i.e.*, the evidence which the jury had unanimously "found," in sentencing the defendant. The capital sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion in conformity with federal constitutional requirements.

18. Criminal Law § 135.8— capital case—aggravating factors relied on—no right to disclosure

The trial court in a capital case did not err in denying defendant's motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing.

19. Criminal Law § 135.9— capital case—mitigating circumstances—burden of proof

The trial court in a capital case did not err in placing the burden of proving the existence of mitigating circumstances on defendant rather than on the State.

20. Criminal Law § 135.7— capital case—affirmative answer to issue four—death penalty required

The trial court did not err in instructing the jury in a capital case that it must recommend a death sentence if it answered issue four affirmatively.

21. Criminal Law § 135.8— prior violent felony aggravating circumstance—constitutionality

The aggravating circumstance that defendant had a prior conviction of a felony involving the use or threat of violence to the person is not unconstitutionally vague and overbroad either facially or as applied in this case.

22. Criminal Law § 135.10— first degree murder—death penalty not disproportionate

A sentence of death imposed upon defendant for first degree murder was not disproportionate or excessive, considering both the crime and the defendant, where the crime was committed against a law officer while he was engaged in his official duties; the killing followed a considerable period during which law officers and a neighbor attempted to persuade defendant to stop randomly shooting his gun and after defendant told the officer to "leave or I'll kill you"; and the jury found that defendant had previously been convicted of a felony involving the use of violence to the person in that he had pled guilty to second degree murder.

Chief Justice EXUM dissenting.

Justice FRYE joins in this dissenting opinion.

Justice FRYE dissenting.

Chief Justice EXUM joins in this dissenting opinion.

Justice MARTIN dissenting in part.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Freeman, J.*, at the 29 July 1985 session of Superior Court, STANLY County. Heard in the Supreme Court 14 March 1988; additional arguments heard 22 August 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State (original brief and argument); Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, Steven F. Bryant, Assistant Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State (supplemental brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, for defendant-appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of the first degree murder of Deputy William Kress Horne of the Anson County Sheriff's Department. The jury found as aggravating circumstances that defendant previously had been convicted of a felony involving violence and that the murder was committed against a deputy sheriff while engaged in the performance of official duties. It found as mitigating circumstances that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired and that defendant has borderline intellectual functioning.

The jury recommended the death penalty, and the trial court sentenced accordingly. We find no error.

Haywood Haskell lived beside defendant outside of Wadesboro. On 22 December 1984, Haskell was working on his wife's car. He observed defendant fire two shots into the air. Haskell suggested that defendant's shooting could endanger the neighborhood children, but defendant responded that "everybody else is shooting" and "well, it's Christmas."

Haskell telephoned the Anson County Sheriff's Department, and Deputy Calvin Lambert responded. After discussing the situation with Haskell, Lambert walked onto defendant's porch and attempted to talk with him. Lambert asked defendant to step out onto the porch, but defendant remained inside. Lambert told defendant not to shoot his gun because he was drunk and might hurt someone. He then returned to his car and observed defendant's home for several minutes before leaving the area.

Later, Haskell saw defendant lying in front of his outhouse. Because defendant could not stand unaided, a neighbor helped him to his house. Defendant had locked himself out, and the neighbor helped him gain entry by prying open a window. A few minutes later defendant hailed Duke Cox, a neighborhood teenager, and asked Cox to help him fix the window. Cox attempted to help, but he soon left because defendant refused to provide a hammer. When Cox walked away, defendant accused him of stealing some money and fired three shots in his direction.

Prompted by this incident, Haskell again called the sheriff's department. Deputies Robert Usery and Kress Horne responded. They asked defendant to come outside; defendant responded by threatening to kill them if they did not leave. More officers arrived, and Usery decided to investigate in back of defendant's house while Horne stood behind the patrol car and continued to talk to defendant. While Usery circled behind defendant's house, Horne drew his revolver and braced himself across the patrol car. Defendant pushed open his screen door and fired one shot that hit Horne in the face. Horne later died from the resultant injuries.

The other officers surrounded the house, and Usery advised defendant that he would use tear gas if defendant did not come out. Hearing no response, Usery threw a tear gas canister into the house. After defendant fired two shots, the officers returned a short burst of fire. Defendant then walked out, and the officers took him into custody. Because defendant was bleeding from two wounds, the officers transported him to the Anson County Hospital.

There, Dr. Merceda Perry examined defendant. Perry found two bullet wounds, and he noticed a strong odor of alcohol. He treated a puncture wound on defendant's buttocks and a deep laceration on his forehead, which he closed with sutures. Initially,

Perry found that defendant responded incoherently to his questions. At approximately 6:30 p.m., Perry ordered a blood alcohol test which indicated that defendant's blood alcohol level was equivalent to a .26 reading on the breathalyzer scale. Although defendant remained intoxicated, he had become more coherent by 7:20 p.m., the last time Perry saw him. In Perry's opinion, defendant would have become more coherent still by 8:30 p.m. At 8:15 p.m., Perry released defendant into the custody of S.B.I. Agent Carl Jackson for delivery to Central Prison in Raleigh.

Jackson and two deputy sheriffs placed defendant in a van and drove him to the sheriff's department, where warrants were served on him. They then drove toward Raleigh. When defendant complained that he was thirsty, the officers purchased two soft drinks, which defendant consumed. Jackson read defendant his rights, and defendant orally agreed to waive them. Defendant refused to sign a written waiver because his head injury prevented him from seeing the waiver form. Defendant made several statements during the trip admitting that he killed Deputy Horne because Horne "pressured" him.

GUILT PHASE

[1] Defendant contends that the jury's verdict of guilt, and its conclusion that death is the appropriate punishment, are "fatally undermined" by the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review. The factual basis of the argument is as follows:

First, at the outset of the trial the court identified the court reporter to the jurors and explained:

> The lady right down here in front of me in the blue dress is Melody Courtney. She's a court reporter. She will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

Defendant did not object to this statement, and the court continued its general explanation of the duties of various court personnel.

Second, in his closing guilt-phase argument, the prosecutor stated the following:

> And you may say, well, what is our role? Now, the Judge will tell you what your role as a trial juror happens to be. As we understand your role, you are the finders of fact, simply that. You don't decide what the law is. You don't interpret the law. The law is given to you by the Judge and he tells you what the meaning of that law is, and he will tell you how you—he will tell you how to apply that law which he gives to you to the facts that you have found from the sworn testimony.
>
> The jury is simply a fact—a body that finds facts. That's all you're here for. There is no appeal in your finding of facts. There is a right of appeal to any interpretation of laws and application of laws which are present in this case. The defendant, if convicted, as we say he certainly should be from the evidence and under the law, he can appeal on points of law,—
>
> MR. STOKES: OBJECTION.
>
> MR. LOWDER: —questions of law,—
>
> THE COURT: OVERRULED.
>
> MR. LOWDER: —but he cannot appeal from your findings of fact.

The legal basis of defendant's argument is grounded, essentially, in this Court's decisions in *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975), and *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979), and in the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985). The pertinent aspects of these cases are as follows:

In *White*, the prosecutor argued:

> "[Y]ou will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say."

White, 286 N.C. at 402, 211 S.E. 2d at 449. The trial court sustained defendant's objection and instructed the jury: "[D]on't consider what he said about the Supreme Court." Later, as it began its charge, the court gave the following instruction:

> "I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit."

Id. at 402-03, 211 S.E. 2d at 449. We explained that an argument suggesting that the jury can "depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant." *Id.* at 403, 211 S.E. 2d at 450. The prosecutor's argument, we said, "was clearly intended to overcome the jurors' natural reluctance to render a verdict of guilty of murder in the first degree by diluting their responsibility for its consequences." *Id.* at 404, 211 S.E. 2d at 450. While the court accurately stated that this Court will only review questions of law, the instructions were nonetheless held inadequate to cure the impropriety because they "did not fully enlighten the jury as to the nature of the Supreme Court's review of a case on appeal and as to the difference between 'triers of the facts' and judges of the law." *Id.* Moreover, we said, the jury probably understood the statement that "the Supreme Court will review this case" to mean that the trial court assumed that there would be a guilty verdict. *Id.* at 404, 211 S.E. 2d at 450-51. For these reasons, we granted the defendant a new trial. *Id.* at 404, 211 S.E. 2d at 451.

In *Jones*, the prosecutor argued: "[I]f you do err in this case he [defendant] has the right of appeal." *Jones*, 296 N.C. at 497, 251 S.E. 2d at 427. Because an appellate court will not review the factfinder's verdict in the guilt phase, we observed that the prosecutor had made an inaccurate statement. Moreover, the argument's "overriding vice" was that it "effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper . . . ." *Id.* at 500, 251 S.E. 2d

at 428. We held that the argument could have caused the jury to believe that this Court would share its burden of reaching a verdict, and we thus granted defendant's request for a new trial. *Id.*

In *Caldwell*, the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable." *Caldwell*, 472 U.S. at 325, 86 L.Ed. 2d at 237. In addition, the trial court stated that the jury's decision would be "reviewable automatically as the death penalty commands." *Id.* The United States Supreme Court vacated defendant's death sentence, stating that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29, 86 L.Ed. 2d at 239.

These cases stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ("[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper."). That proposition is not implicated, however, by the facts here, which are distinguishable from those in the above cases.

In *White*, the prosecutor told the jury that "[if] any error is made *in this court*, [the Supreme] Court will say." *White*, 286 N.C. at 402, 211 S.E. 2d at 449 (emphasis added). The jury clearly could have interpreted the phrase "in this court" to include its errors as well as the court's errors. Here, by contrast, the prosecutor clearly stated that defendant could not appeal from the jury's findings of fact.

Further, in *White* the court stated to the jury that "the Supreme Court *will* review this case." *Id.* at 402, 211 S.E. 2d at 449 (emphasis added). This Court concluded that by that "positive statement . . . the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E. 2d at 450-51. Here, by contrast, the court only noted the pos-

sibility of appeal by stating—in the context of a routine explanation of the court reporter's duties—that "the Supreme Court *can* review" this case. (Emphasis added.) This statement implies no assumption of guilt and only conveys information commonly known. We conclude that this brief comment—at the outset of the trial and in the context of an explanation of the court reporter's duties—could not have influenced, adversely to defendant, the jury's perception of its responsibility for its decisions.

Likewise, in *Jones*, the prosecutor argued to the jury: "[I]f *you* do err in this case he [defendant] has the right of appeal." *Jones*, 296 N.C. at 497, 251 S.E. 2d at 427 (emphasis added). Here, as noted above, the prosecutor instead clearly stated that defendant could not appeal from the jury's findings of fact. The challenged argument was simply an explanation of the jury's function and of the application of the law to the facts.

Finally, in *Caldwell* the prosecutor argued to the jury: "[Y]our decision is not the final decision. . . . Your job is reviewable. . . . [T]he decision you render is automatically reviewable by the Supreme Court." *Caldwell*, 472 U.S. at 325-26, 86 L.Ed. 2d at 237. As noted above, the United States Supreme Court vacated the death sentence on the ground that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328-29, 86 L.Ed. 2d at 239. It stated: "[T]he uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." *Id.* at 333, 86 L.Ed. 2d at 242.

Again, unlike in *Caldwell*, the prosecutor here did not argue that the jury's determination of defendant's guilt and punishment was not final. Instead, he clearly informed the jury that there was no appeal from its findings of fact. The risk condemned in *Caldwell*, *viz*, "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court," *id.* at 330, 86 L.Ed. 2d at 240, thus is not present here.

For the foregoing reasons, we do not find *White*, *Jones*, and *Caldwell* controlling. Instead, we conclude that this case is more

like *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). The trial court in *Finch* remarked: "[T]ake what the court says about the law, and what it is in the case. *If the Court is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from the Court.*" *Id.* at 135, 235 S.E. 2d at 821 (emphasis in original). We held that these statements did not suggest that the verdict would be reviewed or that the mandated punishment would be withheld; they simply informed the jury that the law, as stated by the trial court, could be reviewed. *Id.* at 137, 235 S.E. 2d at 822.

Here, as in *Finch*, nothing in the statements by the court or the prosecutor could reasonably be construed to diminish the jury's responsibility for its decisions. The trial court only informed the jury that this Court "*can* review" the case. (Emphasis added.) "Mere reference to the process of appellate review does not invalidate a death sentence." *Mazzan v. State*, 733 P. 2d 850, 851 (Nev. 1987). Viewed in context, the prosecutor's argument stressed the jury's role as the final factfinder rather than diluting its sense of responsibility for its verdict. *See id.* at 851 ("argument did not shift responsibility to the appellate court, but rather heightened the sentencing jury's awareness of the gravity of its task"); *Riley v. State*, 496 A. 2d 997, 1025 (Del. 1985), *cert. denied*, 478 U.S. 1022, 92 L.Ed. 2d 743 (1986) ("In no sense may it reasonably be said that the prosecutor was either misstating the law, misleading the jury as to its role, or minimizing its sentencing responsibility."). We thus conclude that the trial court did not abuse its discretion by allowing the argument. *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). These assignments of error are overruled.

[2] Defendant next contends that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to reject his voluntary intoxication defense. Defendant failed to object to the prosecutor's questions at trial. Ordinarily, such failure constitutes a waiver of the right to assert the alleged error on appeal. *State v. Oliver*, 309 N.C. 326, 334, 307 S.E. 2d 304, 311 (1983). However, in light of our practice of scrupulous review in death sentence cases "to the end [that] it

may affirmatively appear that all proper safeguards" have been afforded the defendant, *State v. Whitley*, 288 N.C. 106, 108, 215 S.E. 2d 568, 570 (1975) (quoting *State v. Fowler*, 270 N.C. 468, 469, 155 S.E. 2d 83, 84 (1967)), we elect to review the issue.

The prosecutor asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. The questions varied slightly, but the thrust of each was:

> If it is shown to you from the evidence and beyond a reasonable doubt that defendant was intoxicated at the time of the alleged shooting, would this cause you to have sympathy for him and allow that sympathy to [a]ffect your verdict?

Each juror responded negatively to the question.

Counsel is allowed wide latitude in examining jurors on voir dire; regulation of the form of the questions lies within the trial court's discretion. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E. 2d 60, 68 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976). A defendant seeking to establish reversible error must demonstrate prejudice as well as a clear abuse of that discretion. *State v. Avery*, 315 N.C. 1, 20, 337 S.E. 2d 786, 797 (1985).

In *Vinson*, we explained:

> [H]ypothetical questions so phrased as to be ambiguous and confusing or containing incorrect or inadequate statements of the law are improper and should not be allowed. Counsel 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. . . . The court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts.
>
> Types of questions which have been considered improper include "those asking a juror what his verdict would be if the evidence were evenly balanced; if he had a reasonable doubt of a defendant's guilt; if he were convinced beyond a reasonable doubt of a defendant's guilt; or questions asking him

whether he would, in a specified hypothetical situation, vote in favor of the death penalty. . . ."

Vinson, 287 N.C. at 336-37, 215 S.E. 2d at 68 (citations omitted); *accord State v. Avery*, 315 N.C. at 20, 337 S.E. 2d at 797.

The questions here were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. They did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing. Moreover, they did not tend to "stake out" the jurors as to their potential verdict or how they would vote under a given state of facts. The questions did not "fish for answers to legal questions before the judge ha[d] instructed the jury." *State v. Clark*, 319 N.C. 215, 221, 353 S.E. 2d 205, 208 (1987).

Addressing the propriety of similar questions, our Court of Appeals has upheld the State's questioning prospective jurors as to whether they could be fair and impartial in a case involving a proposed sale of marijuana. *State v. Williams*, 41 N.C. App. 287, 254 S.E. 2d 649, *disc. rev. denied*, 297 N.C. 699, 259 S.E. 2d 297 (1979). It held that the State's questions tended only to "secure impartial jurors," while not causing them to commit to a future course of action. *Id.* at 291-92, 254 S.E. 2d at 653.

As in *Williams*, the prosecutor here was simply inquiring into the sympathies of prospective jurors in the exercise of his right to secure an unbiased jury. *See State v. Lee*, 292 N.C. 617, 621, 234 S.E. 2d 574, 577 (1977) (State entitled to unbiased jury; primary purpose of voir dire is to secure such). A promise not to sympathize with a defendant because of his intoxication is not the equivalent of a commitment to ignore the effect of intoxication in the resolution of legal issues. The questions and responses did not "stake out" the jurors to disregard the trial court's instructions on the effect of intoxication in determining defendant's guilt or innocence, or his sentence, under the law applicable to the facts presented. We thus hold that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit this line of questioning. *See State v. Clark*, 319 N.C. 215, 353 S.E. 2d 205 (proper for prosecutor to ask prospective jurors if the fact that the State was relying on circumstantial evidence would cause them any problems); *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E. 2d 920 (1984) (proper for defense counsel to ask prospective jurors if they

could follow instructions to consider defendant's criminal record only in determining his credibility).

Defendant next assigns error to the trial court's refusal to suppress evidence of his inculpatory post-arrest statements. He argues that he did not make a voluntary waiver of his *Miranda* rights and did not make his statements voluntarily.

After a voir dire hearing to determine the admissibility of defendant's statements, the trial court made findings of fact and conclusions of law, in pertinent part, as follows:

> [T]hat the defendant was arrested at the scene of the crime . . . [at] approximately six o'clock p.m. on December the 22nd, 1984; that he was charged with assault with a deadly weapon with intent to kill, three counts; that he was thereafter taken to the Anson County Hospital and treated for a wound to his head and to his buttocks; and that he was thereafter taken by van to . . . Central Prison for safekeeping; . . . that he was interrogated in the van enroute . . .; that the temperature and conditions inside the van were comfortable; . . .; that prior to any question or interrogation the defendant was advised of his constitutional rights . . .; that these rights were read to him; that he was advised of his rights at approximately 8:43 p.m., advised of his right to remain silent and [that] anything he said would be used against him as evidence in court, and advised of [his] right to have an attorney present before and during any questioning; that he was advised of a right to have an attorney appointed, if he couldn't afford one, the State . . . would appoint him one; that he was advised of his right to . . . stop answering questions at any time and not to resume until he had an attorney present if he wanted one; that he was advised of these rights by Special Agent Carl Jackson . . . of the [S.B.I.]; . . . that [Jackson] . . . was introduced as a law enforcement officer; and that he was also advised of his rights in the presence of Henry Watkins . . . and George Pratt . . . [;] . . . that the defendant replied orally in English that he understood all of this stuff, that he had been tried for his life in 1951, and that he had heard all of this stuff before, and that he understood his rights; that he stated that he did not want a lawyer present and that he stated that he would talk, but that he didn't

want to sign anything because he could not see[;] . . . that he was interrogated in English by [Jackson] and at a later point questions were asked by [Watkins] and Pratt[;] . . . that the defendant is approximately sixty-five years old and he speaks and understands English[;] . . . that his educational background is very limited, that he has an I.Q. of approximately—between 74 and 89[;] . . . that his physical condition at the time of the interrogation was that he had been released from the hospital, that he had been treated for an injury to his eye; that his left eye was swollen shut; that he was blind in his right eye; that he had an injury to his hip from a gunshot wound; that both of these wounds had been treated by a physician at the Anson County Hospital; that he was in good condition otherwise; that he was sitting up and that other than the bandage he appeared basically [in] the same condition as he does in court today; that at one point . . . the defendant requested something to drink and . . . was provided with two soft drinks, which he consumed[;] . . . that the defendant had a slight to moderate odor of alcohol about his person and that at the time of the interrogation at 8:43 and thereafter that he was not under the influence of alcohol or drugs[;] . . . that the defendant was coherent, that he was understanding and that he was not confused and not complaining[;] . . . that the answers in relation to the questions asked were extremely reasonable, responsive and appropriate[;] . . . that no promises, offers of reward or inducement[s] by any law enforcement officers were made in order for the defendant to make a statement[;] . . . that there were no threats or suggest[ions] of violence or show of violence by any law enforcement officers made to persuade or induce the defendant to make a statement[;] . . . that the defendant made no statement desiring to stop the questions, but at one point he did request to be allowed to rest, and that he was allowed to rest for approximately seventeen minutes[;] . . . that the defendant made no request for an attorney during any of the questioning, and that the defendant expressly stated he did not want an attorney present; that the defendant . . . expressly stated that he did understand his rights; that he was unable to sign the written waiver, but that he did, in fact, make an expressed oral waiver to [Jackson]. And based on these findings of fact the Court would conclude as a

> matter of law that under the totality of the circumstances none of the constitutional rights, neither Federal nor State, of the defendant were violated by his arrest, detention, interrogation, or confession; that there were no promises, offers of reward, or inducement[s] to the defendant to make a statement; that there were no threat[s] or suggest[ions] of violence or show of violence to persuade or induce the defendant to make a statement; that the statements made by the defendant to [Jackson] . . . were made freely, voluntarily and understandingly; that the defendant was in full understanding of his constitutional rights to remain silent, of his right to counsel, and all other rights; and that he freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the officers above mentioned.

The court then overruled defendant's objection to admission of the statements.

Defendant contends that the above findings are not supported by the evidence. At a voir dire hearing on the admissibility of a confession, the trial court must determine whether the State has met its burden of showing by a preponderance of the evidence that the confession was voluntary. *State v. Corley*, 310 N.C. 40, 52, 311 S.E. 2d 540, 547 (1984). However, appellate courts do not apply the preponderance of the evidence test. *Id.* Rather, the findings are conclusive on appeal if they are supported by competent evidence in the record. *Id.; State v. Perdue*, 320 N.C. 51, 59, 357 S.E. 2d 345, 350 (1987). Despite conflicting evidence, "[n]o reviewing court may properly set aside or modify those findings if so supported." *State v. Jackson*, 308 N.C. 549, 569, 304 S.E. 2d 134, 145 (1983). However, the conclusions of law are fully reviewable. *State v. Perdue*, 320 N.C. at 59, 357 S.E. 2d at 350.

At the voir dire hearing, the trial court heard testimony from Dr. Merceda Perry, S.B.I. Agent Carl Jackson, and Dr. Robert Rollins. Perry, a doctor at the Anson County Hospital, testified that:

Defendant arrived at the Anson County Hospital at around 6:30 p.m. Perry examined defendant and found that he had suffered a laceration to his forehead and a puncture wound to his buttocks. While these injuries are normally painful, defendant ex-

pressed only discomfort. Defendant appeared intoxicated, and he had difficulty answering questions coherently. Defendant did not receive any narcotic medication, and he was not hallucinating. A little after 6:30 p.m., defendant underwent a blood alcohol test which indicated a blood alcohol level equivalent to a .26 reading on the breathalyzer scale. To accelerate defendant's recovery from his intoxication, Perry administered intravenous fluids, dextrose and water. After defendant received these fluids, his mental and physical condition improved considerably; he became more coherent and cooperative. When Perry last saw defendant, around 7:20 or 7:25 p.m., defendant had become far more lucid than he was when Perry arrived. In Perry's opinion, defendant's condition would have continued to improve over the next hour. Perry released defendant from the hospital so that he could be transported to Raleigh.

S.B.I. Agent Jackson testified that:

Jackson and two deputy sheriffs picked up defendant at the Anson County Hospital. The officers first drove their van to the Anson County Sheriff's Department where defendant was served with three warrants for assault with a deadly weapon with intent to kill. The officers then drove toward Raleigh to deliver defendant to Central Prison. Jackson advised defendant of his constitutional rights by reading from the S.B.I. interrogation form. In response, defendant stated: "I was tried for my life, and I understand all this stuff." At 8:43 p.m., Jackson read defendant an explicit waiver of rights. Defendant stated that he understood the waiver and that he would talk to the officers; however, he did not want to sign the waiver because he could not see it. After agreeing to waive his rights, defendant complained that he was thirsty, and the officers purchased two soft drinks, which defendant consumed.

Jackson made sure defendant knew he was talking with law enforcement officers. Jackson also informed defendant that they were transporting him to Central Prison for safekeeping. Jackson then began questioning defendant about the day's events. Defendant made incriminating statements that Jackson later recounted in his testimony to the jury. At 10:20 p.m., defendant wanted a break because he was tired, and Jackson stopped questioning him.

At 10:37 p.m., Jackson tapped defendant on the shoulder and asked if he was asleep. Defendant indicated that he was not sleep-

ing and that he was cold; the officers covered him with a sheet and turned up the heat. Jackson asked defendant to continue his story, but defendant became annoyed with Jackson. The other officers asked defendant if he would answer their questions, and defendant agreed. Defendant proceeded to make further incriminating statements that Jackson related to the jury. In particular, defendant explained that he shot Deputy Horne because "he pressured me the wrong way." An officer asked defendant if he was fearing for his life, and defendant replied: "I'm fearing for my life right now." After the officers assured defendant that he was in no danger, the discussion continued. At 10:55 p.m., defendant remarked that he was tired and his hip was beginning to hurt. The officers then terminated the interview.

During the interview defendant appeared rational, and his statements made sense. Defendant was able to sit upright in the van by himself. Defendant did complain about stiffness in his hip. He appeared sober despite a slight to moderate odor of alcohol about his person.

Defendant is blind in his right eye, and his left eye was swollen shut because of the injury to his forehead. When defendant complained of being cold, the officers turned up the heat and maintained a comfortable temperature in the van. Jackson did not offer defendant any reward in return for a statement. Jackson did not coerce or pressure him to make a statement. Defendant never asked for an attorney. Jackson knew that defendant had been convicted of first degree murder in 1951 and felonious assault with intent to kill in 1977.

Robert Rollins, a forensic psychiatrist, testified that:

Defendant suffers from mixed personality disorder including features of paranoid thinking, impaired abstract thinking, impaired judgment and impaired perception. He also suffers from organic delusional syndrome, manifested by false beliefs. Generally antisocial, defendant tends to overreact violently to perceived threats. Defendant engages in episodic alcohol abuse, but, according to defendant's supervisor, he was a good worker who did not drink on the job. When defendant was admitted to Dorothea Dix Hospital in February 1985, he achieved an I.Q. test score of seventy-four, which places him in the "borderline range of in-

tellectual functioning." However, he did achieve an I.Q. score of eighty-nine in May 1980.

Based on Dr. Perry's description of defendant's condition and treatment on the night of the shooting, Rollins believed that defendant's intoxicated condition would have improved over time. Nonetheless, defendant would have been substantially intoxicated when the interrogation took place, and this intoxication would have exacerbated defendant's mental disabilities. Because of his mental disorders, defendant would not have been capable of voluntarily waiving his rights at the time of the interview.

The above voir dire testimony establishes that the pertinent findings are supported by competent evidence. They thus are binding on this Court. *State v. Perdue*, 320 N.C. at 59, 357 S.E. 2d at 350.

[3] In addition to a general challenge to the findings, defendant specifically disputes the finding that he made an express waiver of his rights. He contends that, rather than merely declining to sign a waiver he could not see, he in fact refused to waive his rights. Agent Jackson explicitly testified, however, that defendant stated that he understood his rights and agreed to talk with the officers. This evidence supports the trial court's finding.

[4] Defendant also specifically challenges the finding that he never expressed a desire to terminate the interview; he contends that he invoked his rights by asking the officers to terminate the questioning at 10:20 p.m. Jackson expressly testified, however, that defendant wanted to take a break because he was tired, and that he subsequently agreed to resume the conversation. Thus, the finding is again supported by the evidence.

Defendant further contends that the findings do not support the conclusions that he made a voluntary confession and waiver of his *Miranda* rights. While the findings, if supported by evidence, are binding upon this Court, the conclusions of law are fully reviewable. *Id.* The legal significance of the findings is a question of law for this Court. *State v. Jackson*, 308 N.C. at 582, 304 S.E. 2d at 152.

[5] In determining the voluntariness of the confession and the waiver of *Miranda* rights, we look to the totality of the circumstances. *Id.* at 581, 304 S.E. 2d at 152. However, police coer-

cion is a necessary predicate to a determination that a waiver or statement was not given voluntarily within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 93 L.Ed. 2d 473 (1986). Because the purported waiver and the statement arose within the same set of circumstances, we discuss the voluntariness of the confession as a single issue. *Cf. State v. Corley*, 310 N.C. at 48, 311 S.E. 2d at 545 (despite compliance with *Miranda*, ultimate question determining admissibility of confession is whether it in fact was made voluntarily).

[6] Defendant previously had been convicted of two felonies. He told Agent Jackson that because of this experience, he understood "all this stuff" (*i.e.*, his rights). Prior experience with the criminal justice system "is an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly." *State v. Fincher*, 309 N.C. 1, 20, 305 S.E. 2d 685, 697 (1983) (defendant's one prior arrest considered significant in determining voluntariness of confession); *see also State v. Jackson*, 308 N.C. at 582, 304 S.E. 2d at 153. This circumstance thus supports the conclusions that the waiver and the confession were voluntary.

[7] While intoxication is a circumstance critical to the issue of voluntariness, intoxication at the time of a confession does not necessarily render it involuntary. *State v. Perdue*, 320 N.C. at 59-60, 357 S.E. 2d at 350-51. It is simply a factor to be considered in determining voluntariness. *See* Annot. "Sufficiency of Showing that Voluntariness of Confession or Admission was Affected by Alcohol or Other Drugs," 25 A.L.R. 4th 419 (1983 and Supp. 1987). The confession "is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E. 2d 200, 205 (1981).

At about 6:30 p.m. defendant had a blood alcohol level equivalent to a .26 reading on the breathalyzer scale, and he appeared intoxicated. Dr. Perry administered fluids to defendant to accelerate his recovery from his intoxication. During the next hour, Perry observed considerable improvement in defendant's mental and physical condition. Both Perry and Rollins agreed that defendant's condition would have continued to improve over time. The officers did not begin questioning defendant until some two

hours after the blood alcohol test. Agent Jackson explicitly testified that defendant appeared to be sober during the interview. Jackson also stated that defendant spoke rationally and coherently. The trial court specifically found that defendant was not under the influence of alcohol during the interview. There was ample evidence to support this finding. *See State v. McClure*, 280 N.C. 288, 291, 185 S.E. 2d 693, 695 (1972). Therefore, the fact that defendant may have experienced some lingering, mild intoxication at the time of the confession did not preclude the conclusion that he confessed voluntarily. *State v. Perdue*, 320 N.C. at 59-60, 357 S.E. 2d at 350-51; *see also Bryant v. State*, 16 Ark. App. 45, 696 S.W. 2d 773 (1985) (less than an hour after defendant signed a waiver of his *Miranda* rights, he had a blood alcohol level of .28; waiver held voluntary). Rather, defendant's intoxication was relevant to his credibility, which was a question for the jury. *State v. McClure*, 280 N.C. at 290-91, 185 S.E. 2d at 695 (citing *State v. Logner*, 266 N.C. 238, 145 S.E. 2d 867, *cert. denied*, 384 U.S. 1013, 16 L.Ed. 2d 1032 (1966)).

[8] While important, subnormal mentality—standing alone—will not render a confession inadmissible. *State v. Taylor*, 290 N.C. 220, 231, 226 S.E. 2d 23, 29 (1976) (citing *State v. Thompson*, 287 N.C. 303, 318, 214 S.E. 2d 742, 752 (1975), *modified as to death penalty*, 428 U.S. 908, 49 L.Ed. 2d 1213 (1976)). If a person has the mental capacity to testify and to understand the meaning of his statements, he has sufficient mental capacity to make a voluntary confession. *Id.*

Rollins testified that defendant's I.Q. placed him in the borderline range of intellectual functioning; however, there was no testimony that defendant did not have sufficient intelligence to understand the meaning of his words. Moreover, Perry reported that after defendant received fluids he responded coherently to questions. Defendant spoke rationally during his extensive conversation with the officers. He held a job prior to the shooting, and his supervisor described him as a good worker. He also had sufficient mental capacity to testify at trial. The evidence thus permitted a conclusion that defendant had sufficient mental capacity to waive his rights and voluntarily confess.

[9] Rollins testified that defendant's mental disorders would prevent him from making a truly voluntary confession. However,

Jackson had ample opportunity to observe defendant at the time the waiver and statements were made, and he gave substantial testimony indicating that defendant was able to comprehend the discussion. When a non-expert has had a reasonable opportunity to observe a defendant and to form an opinion based on such observation, he may testify as to his opinion of the defendant's mental condition. *State v. Taylor*, 290 N.C. at 232, 226 S.E. 2d at 30. The evidence thus did not preclude a conclusion that defendant's mental disorders did not prevent his making a voluntary confession.

The evidence did not indicate that defendant's blindness or injuries at the time of his confession had any bearing on the voluntariness of his waiver and statement. They were not shown to have precluded understanding or a free exercise of the will. *Cf. State v. White*, 291 N.C. 118, 123, 229 S.E. 2d 152, 155 (1976) ("Illiteracy does not preclude understanding or a free exercise of the will.").

Finally, we note the absence of circumstances that we have often emphasized in our consideration of voluntariness:

> [Defendant] was not deceived or tricked about the nature of the crime involved or the possible punishment. . . . He was not subjected to prolonged uninterrupted interrogation. He was not subjected to physical threats or shows of violence. No promises were made to him in return for his confession.

State v. Jackson, 308 N.C. at 582, 304 S.E. 2d at 152-53 (citations omitted). The absence of these circumstances supports the conclusion that the waiver and statements were made voluntarily. *See Colorado v. Connelly*, 479 U.S. 157, 93 L.Ed. 2d 473.

[10] For the foregoing reasons, after a thorough review of the record we conclude that the totality of the circumstances permitted the trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights and that his statements were made freely, understandingly, and voluntarily. We thus find no error in the denial of defendant's motion to suppress these statements.

[11] Defendant next challenges the overruling of his objection to the prosecutor's argument concerning the expert testimony of defendant's psychiatrists. The prosecutor argued:

> Well, I want to tell you this about psychiatric testimony. If they were the so-called experts of all times and if the law recognized them as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case.
>
> MR. STOKES: OBJECT.
>
> THE COURT: OVERRULED. Go ahead[.]
>
> MR. LOWDER: The law says that you may hear from the so-called expert witnesses, yes, and you can consider that, but it also says that you may take into account what other people have said about him. We've had other witnesses that told you about him. We had his neighbor right across the street to tell you how he was acting on this day.

Defendant contends that under N.C.G.S. § 8C-1, Rule 702, the law does recognize an expert forensic psychiatrist, qualified and accepted by the court, as an expert witness on "what the condition of somebody's mind was." He asserts that the prosecutor deliberately misstated the law in order to mislead the jury.

It is well established in this jurisdiction that "[t]estimony regarding mental capacity is not confined to expert witnesses alone." *State v. Evangelista*, 319 N.C. 152, 162, 353 S.E. 2d 375, 382-83 (1987). "Anyone who has had a reasonable opportunity to form an opinion is permitted to give his opinion upon the issue of mental capacity." *Id.* at 162, 353 S.E. 2d at 383; *see also State v. Davis*, 321 N.C. 52, 55-58, 361 S.E. 2d 724, 726-27 (1987). The evidence here included both expert and non-expert opinion testimony on defendant's sanity at the time of the shooting. The argument in question was an exhortation to the jury to consider both kinds of testimony in resolving this question.

In isolation, the statement "if the law recognized them [psychiatrists] as the expert[s] on what the condition of somebody's mind was, you wouldn't be hearing the case" could be misleading. However, the prosecutor went on to state correctly that the law permits hearing from the experts and considering what they have to say. He then urged the jurors to consider not only the expert testimony but also that of the other witnesses. "Arguments of counsel are largely in the control and discretion of the trial court. The appellate courts ordinarily will not review the exercise of that discretion unless the impropriety of counsel's remarks is

extreme and is clearly calculated to prejudice the jury." *State v. Huffstetler*, 312 N.C. 92, 111, 322 S.E. 2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). Viewed in context, the potentially misleading portion of the prosecutor's argument was not so "extreme and . . . clearly calculated to prejudice the jury" as to warrant a holding that the trial court abused its discretion in overruling defendant's objection.

[12] Defendant next assigns error to the prosecutor's argument suggesting that the fact that defendant was competent to stand trial indicated that his insanity defense lacked merit. Defendant contends that this argument tended to confuse the jury by blending the issues of competency to stand trial and insanity.

Although potentially misleading, the argument did not misstate the law. It simply urged the jury to consider evidence of defendant's state of mind at the time of trial in passing upon his state of mind at the time of the shooting. The trial court gave clear and correct instructions on insanity. *See State v. Evangelista*, 319 N.C. at 161, 353 S.E. 2d at 382. In light of the foregoing, we decline to find an abuse of discretion in the failure to sustain defendant's objection to the argument.

[13] Defendant next contends that the trial court erred by sustaining the State's objection to a portion of his closing argument. Dr. Rollins had testified that defendant was legally insane at the time of the shooting and that he lacked the mental capacity to premeditate and deliberate the act. Addressing the relevance of Dr. Rollins' testimony, defense counsel argued:

> And he said too that at that time, on that evening, December the 22nd, 1984, that he could not premeditatedly [sic] or deliberate to shooting the deputy. That's what he said. How is that significant? His Honor—I believe he will charge you that in order for you to find the defendant guilty of first degree murder, that before you can do that, you've first got to be satisfied beyond a reasonable doubt [that] certain elements of the crime are met. Among those, one of the elements of first degree murder is that there was premeditation and deliberation, unlawful killing of a human being with premeditation and deliberation. Premeditation and deliberation. That thought went into it. That there was time to think, to reflect, to choose to do the thing.

Dr. Rollins with all of his years of experience and with all of the work that went into his examination of Dock McCoy says he could not premeditate and deliberate at that time.

You've got to find before you can convict this man of first degree murder not only could he but that he did, so, in effect, what you've got to find is that not only was Dr. Rollins wrong about it, but that he was wrong about it beyond a reasonable doubt.

The following then occurred:

MR. LOWDER: We OBJECT to that.

MR. STOKES: That's a fair comment.

MR. LOWDER: We ask the Judge to rule on that objection.

. . .

THE COURT: I'll have to SUSTAIN that OBJECTION.

Defendant contends that his argument properly stated the proposition that the State bore the burden of proving beyond a reasonable doubt the premeditation and deliberation element of first degree murder. The State asserts that the argument implied that the State bore the burden of disproving the insanity defense, which is an inaccurate statement of our law. *State v. Mize*, 315 N.C. 285, 293-94, 337 S.E. 2d 562, 567 (1985). We conclude that the argument is reasonably subject to either of these interpretations. Although counsel should be allowed wide latitude in arguing to the jury, the control of the exercise of this privilege ordinarily lies in the sound discretion of the trial court. *State v. Robbins*, 319 N.C. 465, 505, 356 S.E. 2d 279, 303, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987). Because the jury could have interpreted defendant's argument to misstate the law as applied to the facts, we find no abuse of discretion in the sustaining of the objection.

Further, the charge correctly and unambiguously emphasized the State's burden of proving premeditation and deliberation beyond a reasonable doubt. *See State v. Mize*, 315 N.C. at 293, 337 S.E. 2d at 567. In light of this, and in view of the record as a whole, we do not believe there is a reasonable possibility that the jury would have reached a different result if the court had over-

ruled the objection. Thus, assuming error, *arguendo*, defendant has not carried his burden of showing prejudice. N.C.G.S. § 15A-1443(a) (1983).

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

[14] Defendant contends that he is entitled to a new sentencing hearing because the jury failed to find the statutory mitigating circumstance that "the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2) (1983). Defendant presented two psychiatrists who testified that he was suffering from significant psychological disorders at the time of the shooting. He argues that there thus was uncontradicted and inherently credible evidence to support the existence of this mitigating circumstance, and that the jury's refusal to find this circumstance makes the sentencing determination unreliable in violation of the Eighth and Fourteenth Amendments.

We conclude that other evidence regarding defendant's mental and emotional state at the time of the shooting conflicted with that presented by defendant's experts. Prior to the shooting, defendant had held the same job for four years, and his supervisor described him as a good employee. On the day of the shooting, defendant was able to aim and fire his shotgun. When confronted by Haskell, defendant was able to explain that he was firing his shotgun into the air because "it's Christmas." At several points prior to the shooting, defendant conversed with the officers. After receiving medical treatment for his gunshot wounds, defendant was able to answer Dr. Perry's questions coherently. During the ride to Raleigh, defendant "appeared to be rational in all respects." Defendant gave a detailed narration of the day's events, and he explained that the reason he shot Horne was because Horne "pressured" him. Agent Jackson testified that defendant responded logically, and with clarity of recollection and expression, to questions posed by the officers. Defendant's own witness, Dr. Lara, testified that he found no evidence that defendant suffered from hallucinations, delusions, or "an ongoing psychosis."

We also reject defendant's assertion that the testimony of his psychiatric experts was inherently credible. Defendant's mental

and emotional state *at the time of the crime* is the central question presented by the submission of the mitigating circumstance in question; however, neither of defendant's experts examined him until several weeks or months after the crime. *See State v. Smith*, 305 N.C. 691, 705-06, 292 S.E. 2d 264, 273-74, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982) (State's evidence concerning defendant's mental capacity conflicted with defendant's expert's after-the-fact opinions; "jury's duty to decide what to believe"). The jury was not required to believe defendant's evidence simply because the State did not specifically refute the testimony of defendant's experts. "Determining the credibility of evidence is at the heart of the fact-finding function." *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 456 (1983).

Because the evidence concerning defendant's mental and emotional state was neither uncontradicted nor inherently credible, we find no merit in this argument. *See State v. Smith*, 305 N.C. at 706, 292 S.E. 2d at 274 ("all of the evidence" did not support the existence of a mitigating circumstance; defendant thus not entitled to peremptory instruction thereon).

[15] Defendant next contends that his rights under the Eighth and Fourteenth Amendments were violated by the trial court's allowing the District Attorney, in closing argument, to remind the jurors of their commitments not to have sympathy for defendant because he was intoxicated. The argument was as follows:

> Number seven, [defendant's] ability to remember the events of December the 22nd, 1984, is actually impaired, they contend. And that's the last one. I don't know. He was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't. I don't know. He can remember what he did because he told the officers about it.

Defendant did not object to this argument at trial. We thus can find an abuse of discretion in the trial court's failure to intervene *ex mero motu* only if impropriety in the argument was "gross indeed." *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E. 2d 752, 761 (1979). We find no gross impropriety. We have held above that the trial court did not abuse its discretion by failing *ex mero motu* to prohibit voir dire questions to prospective jurors regard-

ing their sympathies toward an intoxicated person. We likewise find no abuse of discretion in the trial court's allowing the District Attorney—in closing argument, without objection—to gently remind the jurors of their responses to these questions.

[16] Defendant next contends that the trial court's sentencing instructions were erroneous and unconstitutional because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing. We find no error.

We resolved this issue contrary to defendant's position in *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), *overruled on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988). In *Kirkley*, the trial court instructed the jury that "the defendant has the burden of persuading the jury as to the existence of any mitigating circumstance and if all twelve jurors are unable to agree that a specific mitigating circumstance exists they must find that it does not exist." *Kirkley*, 308 N.C. at 217-18, 302 S.E. 2d at 156. Therefore, the jury could only find a mitigating circumstance if it unanimously agreed that it existed. The defendant argued that the court should have instructed that the jurors could only determine that a mitigating circumstance did *not* exist if they unanimously found that it did not exist. *Id.* at 218, 302 S.E. 2d at 157.

We held that in a capital case "the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation" and that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Id.* We stated:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during

the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.

In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, --- U.S. ---, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

Id. at 219, 302 S.E. 2d at 157.

We have declined to reexamine our *Kirkley* holding in several cases, including the following: *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

As a matter of state law, then, this issue is clearly settled contrary to defendant's position. Defendant contends, however, that the recent decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that we overrule *Kirkley* and its progeny. In *Mills*, the Supreme Court held that the trial court's instructions to the jury were constitutionally infirm because "reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.* at ---, 100 L.Ed. 2d at 400.

Mills is one of a long line of cases in which the United States Supreme Court has examined the constitutionality of state

capital-sentencing schemes. The Court has faced the tensions between two concerns relating to such schemes: the constitutional requirement of individualized sentencing, and the constitutional requirement that the death penalty not be inflicted arbitrarily and capriciously. In *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978), the court recognized that "[t]he signals from this Court have not . . . always been easy to decipher" and that it had "an obligation to reconcile previously differing views in order to provide [clear] guidance." *Lockett*, 438 U.S. at 602, 57 L.Ed. 2d at 988 (plurality opinion).

The plurality opinion in *Lockett* explained how, in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), a plurality of the Court had concluded that "discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment" because it was discriminatory, "wantonly" imposed and "afforded 'no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not.'" *Lockett*, 438 U.S. at 599, 57 L.Ed. 2d at 986 (quoting *Furman*, 408 U.S. at 257, 310, 313, 33 L.Ed. 2d at 359, 390, 392). In attempting to follow *Furman*, some states adopted mandatory death penalties for certain crimes, thus eliminating any jury discretion in sentencing. *Lockett*, 438 U.S. at 599-600, 57 L.Ed. 2d at 986-87.

In the wake of *Furman*, the Court examined death penalty statutes in five states. A plurality found the mandatory death sentence statutes in Louisiana and North Carolina unconstitutional. *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944 (1976). A plurality also found, however, that the Georgia, Texas, and Florida statutes, which were not mandatory and which provided certain safeguards to the defendant in the capital-sentencing process, were not constitutionally invalid. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976); *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929 (1976); *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913 (1976). In *Gregg*, the plurality wrote that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg*, 428 U.S. at 195, 49 L.Ed. 2d at 887. From these opinions, the plurality opinion in *Lockett* concluded that "sentencing procedures should not create 'a sub-

stantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.' " *Lockett*, 438 U.S. at 601, 57 L.Ed. 2d at 987 (quoting *Gregg*, 428 U.S. at 188, 49 L.Ed. 2d at 883).

> In the view of the three Justices, . . . *Furman* did not require that all sentencing discretion be eliminated, but only that it be "directed and limited," 428 U.S., at 189, 49 L.Ed. 2d 859, 96 S.Ct. 2909, so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a "meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not." *Id.*, at 188, 49 L.Ed. 2d 859, 96 S.Ct. 2909.

Lockett, 438 U.S. at 601, 57 L.Ed. 2d at 987-88.

The plurality opinion in *Lockett* acknowledged that mandatory death sentencing was unconstitutional. "[T]he sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Lockett*, 438 U.S. at 601, 57 L.Ed. 2d at 988 (quoting *Woodson v. North Carolina*, 428 U.S. at 304, 49 L.Ed. 2d at 961 (plurality opinion)). The opinion stated that "the sentencer . . . [may] not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604, 57 L.Ed. 2d at 990 (emphasis in original).

Ohio's death-penalty statute, which the Court examined in *Lockett*, mandated the imposition of the death penalty where a jury had found at least one aggravating circumstance unless, considering "the nature and circumstances of the offense and the history, character, and condition of the offender," the court determined that at least one of three specified mitigating circumstances had been established by a preponderance of the evidence. *Id.* at 607, 57 L.Ed. 2d at 991-92. The plurality opinion concluded that "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments" because it "preclude[d] consideration of relevant mitigating factors." *Id.* at 608, 57 L.Ed. 2d at 992. Therefore, the Court re-

versed the imposition of the death penalty and remanded for resentencing. *Id.* at 608-09, 57 L.Ed. 2d at 992.

In *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1 (1982), the Supreme Court applied the *Lockett* rule that "the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* at 110, 71 L.Ed. 2d at 8 (quoting *Lockett*, 438 U.S. at 604, 57 L.Ed. 2d at 990) (emphasis in original). The trial judge in *Eddings* had stated that, as a matter of law, he could not take into consideration that the defendant had come from a violent background. *Eddings*, 455 U.S. at 112-13, 71 L.Ed. 2d at 9-10. The Supreme Court held that "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Id.* at 114, 71 L.Ed. 2d at 11 (emphasis in original). The Court reversed the death sentence and remanded for resentencing. *Id.* at 117, 71 L.Ed. 2d at 12.

In *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384, the Supreme Court applied the *Lockett-Eddings* doctrine in holding that because the instructions to the jury on mitigating circumstances were potentially misleading, "[t]he possibility that the . . . jury conducted its task improperly . . . [was] great enough to require resentencing." *Id.* at ---, 100 L.Ed. 2d at 399. The verdict form in *Mills* had three sections:

Section I stated:

> Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT[.]

Id. at ---, 100 L.Ed. 2d at 400. Following this paragraph was a list of the submitted aggravating circumstances, each of which was followed by two blanks—one for a "yes" answer, the other for a "no" answer. Section I concluded:

> (If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no" do not complete Sections II and III.)

Id. at ---, 100 L.Ed. 2d at 400-01.

Section II stated:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "no" has not been proven BY A PREPONDERANCE OF THE EVIDENCE[.]

Id. at ---, 100 L.Ed 2d at 401. As in the first section, the proposed mitigating circumstances, numbered 1 through 7, were listed, each with blanks for "yes" and "no." Number 8 read, "Other mitigating circumstances exist, as set forth below." *Id.* at ---, 100 L.Ed. 2d at 401-02. Section II concluded:

> (If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," you do not complete Section III.)

Id. at ---, 100 L.Ed. 2d at 402.

Section III read:

> Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

Blanks designated "yes" and "no" followed. *Id.* at ---, 100 L.Ed. 2d at 403.

The fourth and final section read:

> DETERMINATION OF SENTENCE
>
> Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:
>
> 1. If all of the answers in Section I are marked "no" enter "Life Imprisonment."
>
> 2. If Section III was completed and was marked "yes" enter "Life Imprisonment."
>
> 3. If Section II was completed and all of the answers were marked "no" then enter "Death."

4. If Section III was completed and was marked "no" enter "Death."

Id. at ---, 100 L.Ed. 2d at 403.

In Section I, the jury answered "yes" to one of the aggravating circumstances and "no" to the rest. In Section II, it answered "no" to mitigating circumstances 1 through 7 and "none" to number 8 (the "catchall"). Having found no mitigating circumstances, the jury did not answer Section III. It returned a death sentence in response to the mandate of number three in the final section. *Id.* at ---, 100 L.Ed. 2d at 400-03.

This sentencing scheme mandated the death penalty if the jury unanimously found at least one aggravating circumstance and did not unanimously find any mitigating circumstances. Because the jury found one aggravating circumstance and no mitigating circumstances, it was required as a matter of law to impose the death penalty without completing Section III, which called for the weighing of aggravating and mitigating circumstances.

The defendant challenged his conviction and sentence, arguing that Maryland's capital-punishment statute was unconstitutionally mandatory as applied to him, because "even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death." *Id.* at ---, 100 L.Ed. 2d at 392 (emphasis in original). The Supreme Court granted certiorari "[b]ecause of the importance of [this] issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 393.

After examining the verdict form and instructions under which the jury had sentenced the defendant to death, the Court concluded that even if the jurors had reached Section III, "they were not free . . . to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked 'yes' in Section II." *Id.* at ---, 100 L.Ed. 2d at 397 (emphasis in original).

> [T]here is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in at-

> tempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. . . . The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk.

Id. at ---, 100 L.Ed. 2d at 400. Because of the risk that the jury was improperly precluded from considering certain *relevant* mitigating evidence, the Court held that the Maryland scheme violated the doctrine articulated in *Lockett* and *Eddings*. *See id.* at ---, 100 L.Ed. 2d at 400. Therefore, the Court vacated the judgment of the Court of Appeals, insofar as it sustained the death penalty, and remanded for resentencing. *Id.* at ---, 100 L.Ed. 2d at 400.

In *Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155 (1988), a case decided after *Mills*, the Supreme Court again examined Texas' capital-sentencing process. That process provided for the submission of two "Special Issues" to the jury. If the jury answered "yes" to both questions, the defendant would be sentenced to death. *Id.* at ---, 101 L.Ed. 2d at 162. The defendant in *Franklin* requested instructions that the jurors should take mitigating evidence into account in answering the Special Issues, so that they could answer "no" to either one or both of the Special Issues, even if they otherwise would have answered the Special Issues "yes." *Id.* at ---, 101 L.Ed. 2d at 162-63. The trial court instead instructed the jurors that they should reach their verdict based on all the evidence. *Id.* at ---, 101 L.Ed. 2d at 163. The defendant argued that the Special Issues precluded the jury from considering certain mitigating evidence. Even though the Texas capital-sentencing process does not mention mitigating evidence, *id.* at ---, 101 L.Ed. 2d at 177 (Stevens, J., dissenting), the plurality opinion held that the Texas procedure was not unconstitutional.

The plurality opinion stated that there are "two lines of cases . . . [which] are somewhat in 'tension' with each other"—the cases holding that the jury must not be precluded from considering all relevant evidence, and the cases holding that states must channel the exercise of jury discretion, *id.* at ---, 101 L.Ed. 2d at

171, and that the procedure in Texas "accommodates *both* of these concerns." *Id.* at ---, 101 L.Ed. 2d at 171 (emphasis in original). The plurality opinion concluded that "*Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of . . . mitigating factors." *Id.* at ---, 101 L.Ed. 2d at 169.

> [T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.

Id. at ---, 101 L.Ed. 2d at 170. States "must channel the [capital] sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.' " *Id.* at ---, 101 L.Ed. 2d at 170 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed. 2d 398, 406 (1980) (plurality opinion) (footnotes omitted)).

Thus, the Supreme Court has given individual scrutiny to several states' capital-sentencing procedures to determine whether they were non-mandatory and allowed for individualized sentencing, yet adequately channeled the discretion of the sentencer. The Court has upheld some procedures—*see Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155; *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859; *Jurek v. Texas*, 428 U.S. 262, 49 L.Ed. 2d 929; *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913—while declaring others invalid—*see Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384; *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1; *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973; *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974; *Woodson v. North Carolina*, 428 U.S. 280, 49 L.Ed. 2d 944. Therefore, in examining the aspect of our capital-sentencing process in question here, we must look at that aspect individually and in the context of the whole.

In the case now before us, the verdict form in the sentencing phase had four sections:

The first section, Issue One, listed the submitted aggravating circumstances and asked whether the jury unanimously found

from the evidence the existence of any of those circumstances. The jury unanimously found the two aggravating circumstances submitted.

The second section, Issue Two, listed the submitted mitigating circumstances and asked whether the jury unanimously found from the evidence the existence of any of those circumstances. Of the eight mitigating circumstances submitted, the jury answered "yes" to two and "no" to six, including the "catch-all" ("[a]ny other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value").

The third section read:

> ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three stated:

> *Issue Three:* Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> *Answer:*

The fourth section read:

> IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four stated:

> Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?
>
> *Answer:*

The jury answered "yes" to Issues Three and Four and returned a recommendation of the death penalty.

Our capital-sentencing procedure, as this case shows, differs in two significant ways from Maryland's procedure:

First, the instructions to the jury as to when it must impose the death penalty are different. Maryland's procedure required the jury to impose the death penalty if it "found" at least one aggravating circumstance and did not "find" any mitigating circumstances. It also required the jury to impose the death penalty if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances. Issue Three here requires the jury to weigh the "found" mitigating circumstances against the "found" aggravating circumstances. In contrast to the Maryland procedure, however, it does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. Rather, it requires the jury then to answer Issue Four. Issue Four ensures that a jury may return a recommendation of life imprisonment if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances. Maryland's capital-sentencing procedure, which the Supreme Court found constitutionally infirm in *Mills*, did not include a section equivalent to Issue Four here.

Second, in North Carolina evidence in effect becomes legally irrelevant to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor. "Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case." *State v. Kirkley*, 308 N.C. 196, 218, 302 S.E. 2d 144, 157 (1983). A requirement that the defendant must carry a certain evidentiary burden to prove the existence of a mitigating factor is a proper limitation of the jury's discretion. *See Patterson v. New York*, 432 U.S. 197, 201, 209, 53 L.Ed. 2d 281, 286-87, 291 (1977) (states normally have the power to regulate burdens of production and persuasion and "[i]f the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may assure itself that the fact has been established with reasonable certainty"). The instructions and verdict form in our capital-sentencing procedure serve to channel the jury's discretion by ensuring that, when

the jury makes its final sentencing determination, it will only consider evidence which we have, in effect, determined to be relevant. If all the jurors do not agree on the existence of a specific mitigating circumstance, then the defendant has failed to meet his or her burden of proof on that circumstance and the evidence regarding it is not legally relevant for sentencing purposes. Therefore, the instruction to the jury to weigh only the mitigating circumstances "found" by a unanimous vote was an instruction to consider only the *relevant* mitigating evidence in answering Issues Three and Four.

In *Mills*, the Maryland Court of Appeals had held that jurors could only mark "no" on a mitigating circumstance when they *unanimously* found that mitigating circumstance *not* to exist. *Mills v. State*, 310 Md. 33, 55, 527 A. 2d 3, 13 (1987). Where some, but not all, jurors agreed on the existence of a mitigating circumstance, the jury could not mark "no" to that circumstance; thus, unlike in North Carolina, the mitigating evidence introduced to support that mitigating circumstance remained legally relevant even though the jurors did not agree unanimously on the existence of the mitigating circumstance.

The fact that such evidence remained legally relevant apparently was significant in the Supreme Court's resolution of *Mills*. The Court noted that "[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally 'irrelevant' by one holdout vote." *Mills v. Maryland*, --- U.S. at --- n.7, 100 L.Ed. 2d at 394 n.7. The Court went on to state that the problem in *Mills* was that in answering Section III of the verdict form, the jurors "were not free . . . to consider *all relevant evidence* in mitigation as they balanced aggravating and mitigating circumstances." *Id.* at ---, 100 L.Ed. 2d at 397 (emphasis added). The instructions in *Mills* were potentially misleading and thus inadequate because they did not clearly permit the jury to consider all relevant evidence. Under North Carolina law, the jury is not prevented from considering relevant mitigating evidence at any time during sentencing.

Like the United States Supreme Court, *see Godfrey v. Georgia*, 446 U.S. at 428, 64 L.Ed. 2d at 406, we have emphasized the need for guided discretion in the capital-sentencing process. In *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, ---

U.S. ---, 98 L.Ed. 2d 406 (1987), the defendant argued that the trial court erroneously instructed the jury that it could only consider the "found" mitigating circumstances in weighing the mitigating and aggravating circumstances. He contended that the jury should have been able to consider circumstances not "found" by the jury and even circumstances which had not been written on the verdict form. *Id.* at 217, 358 S.E. 2d at 25-26. We stated that such a procedure would "sanction an invitation to caprice" in the sentencing phase of a capital trial. *Id.* at 217, 358 S.E. 2d at 26. We discussed the concern, often articulated by the United States Supreme Court, that the jury's discretion must be limited to prevent arbitrary and capricious infliction of the death penalty:

> "The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances." There is no reason to confound the jury's decision process with arbitrary, "inarticulable" factors that may be applied in mitigation of a sentence but not in aggravation of it. "[T]he jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the 'carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused.' "

Id. at 217-18, 358 S.E. 2d at 26 (citations omitted); *see also State v. Kirkley*, 308 N.C. at 219, 302 S.E. 2d at 157.

[17] Our capital-sentencing procedure allows for individualized sentencing. It allows the jury to find circumstances in mitigation, both submitted circumstances and any other circumstance the jury deems to have mitigating value. It allows the jury to consider all relevant evidence in deciding whether to recommend a sentence of death. Finally, it requires the jury—before recommending that the defendant be sentenced to death—to weigh the "found" aggravating and "found" mitigating circumstances and to decide whether the "found" aggravating circumstances, considered with the "found" mitigating circumstances, are sufficiently substantial to call for the death penalty.

In addition to allowing for individualized sentencing, our capital-sentencing procedure also guides the jury's discretion so as to guard against the arbitrary and capricious infliction of the death penalty. It requires the State to prove the existence of an

aggravating circumstance beyond a reasonable doubt. It requires the defendant to prove the existence of a mitigating circumstance by a preponderance of the evidence. It then allows the jury to consider only that evidence which is relevant, *i.e.*, the evidence which the jury has unanimously "found," in sentencing the defendant.

Our capital-sentencing procedure thus provides a proper balance between individualized sentencing and guided discretion and therefore, we believe, conforms with federal constitutional requirements.

The Supreme Court granted certiorari in *Mills* "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 393. The decision in *Mills* thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in *Mills*. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. *See State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1983), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in *Mills*, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Mills*. *See Jones v. Maryland*, 310 Md. 569, 530 A. 2d 743 (1987), *cert. granted and judgment vacated*, --- U.S. ---, 100 L.Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 94 L.Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); *see also Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 944, 58 L.Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: denial of certiorari). We do not suggest that the denial of certiorari in *Holden* and *Gardner* alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on *Jones* and its different treatment of *Holden* and *Gardner*, all in the immediate wake of *Mills*, as some indication that our capital-sentencing procedure differs sufficient-

ly from Maryland's that *Mills* does not control the question presented here.

In light of the foregoing precedent from the United States Supreme Court and from this Court, the differences between our capital-sentencing procedure and the Maryland procedure addressed by the Supreme Court in *Mills*, and the Supreme Court's treatment of *Jones*, *Holden*, and *Gardner* in the immediate wake of *Mills*, we are unable to conclude with any degree of certainty that *Mills* rendered our capital-sentencing procedure constitutionally infirm. We believe our clear, stable, considered procedure, established by *Kirkley* and adhered to in its progeny, is properly responsive to the requirement that capital-sentencing schemes provide for both individualized sentencing and guided sentencer discretion. We thus continue to adhere to our decisions in *Kirkley* and its progeny and hold that the instructions in question were without error.

Defendant raises the following "preservation" issues:

[18] (1) He contends that the trial court erred in denying his motion to require the State to disclose potential aggravating circumstances it intended to rely upon at sentencing. Such disclosure is not required. *State v. Holden*, 321 N.C. 125, 153-54, 362 S.E. 2d 513, 531 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988).

[19] (2) He contends that the trial court erred in placing the burden of proving the existence of mitigating circumstances on him rather than on the State. This was not error. *State v. Brown*, 320 N.C. 179, 216, 358 S.E. 2d 1, 25, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987).

[20] (3) He contends that the trial court erred in instructing the jury that it must recommend a death sentence if it answered issue four[1] affirmatively. This was not error. *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).

1. This issue was as follows: "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?"

[21] (4) He contends that the trial court erred in sentencing him to death because N.C.G.S. § 15A-2000(e)(3)[2] is unconstitutionally vague and overbroad, both facially and as applied. The argument is without merit. *State v. Brown*, 320 N.C. at 213-14, 358 S.E. 2d at 23-24.

(5) He contends that N.C.G.S. § 15A-2000 in its entirety is unconstitutional. The argument is without merit. *State v. Brown*, 315 N.C. 40, 60-61, 337 S.E. 2d 808, 823-24 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988).

Defendant has not persuaded us that we should depart from our prior holdings on these "preservation" issues, and we decline to do so.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Because we have found no error in the guilt and sentencing phases, we are required to review the record and determine: (1) whether the record supports the jury's findings of the aggravating circumstances 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 of death 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) (1983); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E. 2d 279, 315 (1987).

The jury found, as aggravating circumstances, that (1) defendant had been convicted previously of a felony involving the use of violence to the person, and (2) the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(3), (8) (1983). As to the first aggravating circumstance, the State presented uncontroverted documentary evidence establishing that defendant previously had

2. This statute establishes, as an aggravating circumstance which the jury may consider, the following: "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) (1983).

pled guilty to second degree murder and been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years. As to the second aggravating circumstance, the record contains plenary, uncontroverted evidence that the victim was, at the time of the shooting, a deputy sheriff engaged in the performance of his official duties. The record thus fully supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death.

We find nothing in the record which suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

[22] In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E. 2d 808, 829 (1985). We use the "pool" of similar cases announced in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). *Id.* However, "[w]e do not find it necessary to extrapolate or analyze *in our opinions* all, or any particular number, of the cases in our proportionality pool." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 316 (emphasis in original).

The crime here was committed against a law enforcement officer while he was engaged in the performance of his official duties. We have noted that this aggravating circumstance, found in N.C.G.S. § 15A-2000(e)(8), reflects the General Assembly's recognition of the "common concern" that "the collective conscience requires the most severe penalty for those who flout our system of law enforcement." *State v. 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.

State v. Hill, 311 N.C. 465, 488, 319 S.E. 2d 163, 177 (1984) (Mitchell, J., dissenting).

Defendant argues that *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163, where a majority of this Court found the death sentence disproportionate, is the case in the pool most comparable to this one. We disagree. The defendant in *Hill* shot and killed a police officer in a struggle that ensued when the officer tackled the defendant. A significant factor in this Court's holding that the death sentence was disproportionate was "the incredibly short amount of time involved." *State v. Hill*, 311 N.C. at 479, 319 S.E. 2d at 172. *See also State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), where an officer entered a store while a robbery was in progress, the defendant's response in shooting him was almost instantaneous, and the jury recommended a life sentence. Here, by contrast, the killing followed a considerable period during which law enforcement officers and a neighbor attempted to persuade defendant to stop the shooting, and during which defendant expressly said to the victim: "You leave or I'll kill you."

Further, unlike in the present case, there is no indication in *Hill* or *Abdullah* that the defendants in those cases had been convicted previously of a felony involving violence against the person. We thus conclude that those cases are not sufficiently comparable to the present case to suggest or require a holding that the death sentence here is disproportionate.

Rather, the more comparable case is *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). There, "the record clearly establishe[d] a course of conduct on the part of the defendant which amount[ed] to a wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities." *Id.* at 357, 279 S.E. 2d at 810. We concluded that under such circumstances the sentence of death was not disproportionate or excessive, considering both the crime and the defendant. *Id.* at 357-58, 279 S.E. 2d at 810.

Here, as in *Hutchins*, on the day of the murder defendant engaged in a course of conduct that showed a wanton disregard for the value of human life. His episodic, random shooting—de-

spite several warnings to stop it—threatened all who inhabited, or ventured into, the neighborhood. His ultimate violent act, which followed his own warning to the victim to "leave or I'll kill you," struck at the enforcement of the law by duly appointed authorities.

Thus, as in *Hutchins*, we conclude that nothing about the crime renders defendant's sentence of death disproportionate or excessive.

As to the defendant, the jury found—supported by competent, uncontroverted evidence—that he previously had been convicted of a felony involving the use of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1983). As noted, the record establishes that defendant had pled guilty to second degree murder and had been sentenced to imprisonment of not less than twenty-two nor more than twenty-eight years.[3] Defendant's prior offense thus involved the unlawful killing of another human being with malice, *see State v. Robbins*, 309 N.C. 771, 775, 309 S.E. 2d 188, 190 (1983), and was therefore among the most serious of the many felonies "involving the use or threat of violence to the person." N.C.G.S. § 15A-2000(e)(3) (1983).

In *State v. Brown*, we note that the aggravating circumstance provided for in N.C.G.S. § 15A-2000(e)(3) "reflect[s] upon the defendant's character as a recidivist." 320 N.C. at 224, 358 S.E. 2d at 30. The jury in *Brown* found only the "prior violent felony" aggravating circumstance, *id.* at 219, 358 S.E. 2d at 27, whereas the jury here found the additional aggravating circumstance that the offense was committed against a law enforcement officer while he was engaged in the performance of his duties. N.C.G.S. § 15A-2000(e)(8) (1983). Further, the prior violent felony in *Brown* was the discharge of a shotgun into an occupied building—*id.* at 232, 358 S.E. 2d at 34—a considerably less serious offense than second degree murder, the prior violent felony here. We concluded in *Brown* that we could not hold as a matter of law

3. We take judicial notice of our own records—*In re Trucking Co.*, 285 N.C. 552, 557, 206 S.E. 2d 172, 176 (1974); *In re Williamson*, 67 N.C. App. 184, 185, 312 S.E. 2d 239, 240 (1984)—and note that prior to entering his plea of guilty of second degree murder on this charge, defendant had been found guilty of first degree murder and sentenced to death. This Court, however, awarded a new trial for errors in the instructions. *See State v. McKoy*, 236 N.C. 121, 71 S.E. 2d 921 (1952).

that the death sentence was disproportionate. *Id.* at 231, 358 S.E. 2d at 34. *A fortiori*, the more serious nature of the total criminal conduct of the defendant here dictates the same conclusion.

We have carefully considered the circumstances of the offense and the character and propensities of the defendant as revealed by the record, briefs, transcript and arguments. We conclude that the facts of this case, combined with defendant's history, support the jury's decision to impose the ultimate penalty of death. We thus hold that the death sentence imposed is not disproportionate within the meaning and intent of N.C.G.S. § 15A-2000(d)(2). Upon this holding the death sentence is affirmed. "This Court has no discretion in determining whether a death sentence should be vacated. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703; *see Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 317.

No error.

Chief Justice EXUM dissenting.

I join in the dissenting opinions of Justice Martin and Justice Frye. I also dissent from the majority's position that *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), does not require us to overrule *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), *overruled in part on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988); and I write separately in support of my position that *Mills* does require us to overrule *Kirkley* and its progeny.

In *Kirkley* the question arose for the first time in this jurisdiction as to whether a jury in a capital sentencing proceeding must agree unanimously that a mitigating circumstance existed in order to consider that circumstance in the ultimate determination of whether the defendant should live or die. At the sentencing phase of Kirkley's trial the unanimity issue was not addressed in the trial court's initial jury instructions. After some deliberation the jury returned to the courtroom to ask specifically whether it must agree unanimously on each mitigating circumstance before it could continue to consider that circumstance in determining whether to impose death or life imprisonment. The trial court instructed the jury that it must unanimously agree on

each mitigating circumstance before it could continue to consider it in the ultimate balancing process. A majority of this Court in *Kirkley* held, contrary to the position of both the defendant and the state, that there was no error in the trial court's supplemental instructions on the unanimity question, saying, "Certainly consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." *Kirkley*, 308 N.C. at 218, 302 S.E. 2d at 157.

Dissenting on this issue in *Kirkley*, I adopted essentially what was then the state's position. The state in its brief in *Kirkley* said:

> *Lockett v. Ohio*, 438 U.S. 586 [57 L.Ed. 2d 973] (1978), holds that a statute that prevents the sentencer in all capital cases from giving independent weight to aspects in mitigation creates a risk that a death penalty will be imposed in spite of factors which call for a less severe penalty and thus is unconstitutional. It would seem manifestly improper, then, not to permit members of a jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance. It would also make any sentencing procedure unmanageable if each time a jury deadlocked on an issue a new sentencing hearing was required.
>
> It is the State's position that only those mitigating circumstances found unanimously to exist should be listed on the verdict sheet recommended in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 [72 L.Ed. 2d 155] (1982). *However, no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the State believes, could run afoul of Lockett v. Ohio, supra.*

Kirkley, 308 N.C. at 229, 302 S.E. 2d at 163 (emphasis supplied). I wrote in my *Kirkley* dissent:

> While the state's position on this question might pass constitutional muster, I think the better practice would be to instruct: (1) unanimity is not required in order to answer the

> question of the existence of a mitigating circumstance favorably to defendant; (2) such an issue should be answered unfavorably to defendant only if all jurors agreed to so answer it; (3) such an issue should be answered favorably to defendant if any juror would so answer it with an indication on the verdict form as to how many jurors so voted; and (4) in the final balancing process each juror would be free to consider only those mitigating circumstances which he or she were persuaded existed in the case.

Kirkley, 308 N.C. at 229-30, 302 S.E. 2d at 163. I still adhere to this position.

Despite the majority's valiant effort to explain *Mills* away, the *Mills* holding cannot be reconciled with our *Kirkley* holding on the unanimity question. Instead the *Mills* holding squarely sustains the position both the state and I took in *Kirkley* on this issue. Whatever escape from the *Mills* holding might be provided by differences in Maryland's and North Carolina's capital sentencing scheme or by the posture in which the *Mills* case reached the Supreme Court is effectively closed, it seems to me, by the rationale of the *Mills* decision as expressed in the opinion itself.

The majority correctly identifies the *Mills* holding: Jury instructions in a capital sentencing proceeding which create "a substantial probability that reasonable jurors . . . may well have thought that they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance" are constitutionally infirm under the Supreme Court's Eighth Amendment jurisprudence. *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 400. Our *Kirkley* holding is precisely to the contrary and should, therefore, yield.

The majority chooses instead to distinguish *Mills* on the basis of two circumstances urged upon this Court by the state as legally material differences.

The first difference suggested is that in Maryland a capital sentencing jury which finds at least one aggravating circumstance and fails to find any mitigating circumstances never engages in a balancing process and must return a sentence of death. In North Carolina even if one or more aggravating circumstances and no mitigating circumstances are found, the jury may nevertheless

elect not to impose the death penalty on the basis that the aggravating circumstances are themselves not sufficiently substantial to call for its imposition.

Relying on this difference in the two states' sentencing schemes as justification for continuing our *Kirkley* unanimity requirement ignores the rationale underlying the *Mills* holding as it is explained in the *Mills* opinion. It is true that the Supreme Court in *Mills* was concerned that a single holdout juror in Maryland on mitigating circumstances might force the imposition of the death penalty. The last substantive sentence of the *Mills* opinion is, "[t]he possibility that a single juror could block [consideration of mitigating evidence], and consequently require the jury to impose the death penalty, is one we dare not risk." *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 400. Indeed, in *Mills* the jury found the one aggravating circumstance submitted, found none of the several mitigating circumstances submitted and on that basis returned a sentence of death.

In Maryland, however, a jury finding one or more aggravating circumstances to exist and one or more mitigating circumstances to exist would then balance the conflicting sets of circumstances by determining whether the mitigating circumstances outweigh the aggravating. In this situation the Maryland sentencing scheme is indistinguishable in principle from North Carolina's.

In North Carolina when both mitigating and aggravating circumstances are found the jury must determine whether the mitigating circumstances are insufficient to outweigh the aggravating. If they are insufficient, then the aggravating circumstances must be considered with the mitigating circumstances and found to be sufficiently substantial to warrant imposition of the death penalty. In both balancing processes only those mitigating circumstances found to exist by all twelve jurors can be considered. Eleven jurors are prevented from considering mitigating circumstances they might wish to consider in these final balancing processes if the one remaining juror refuses to do so. This amounts to contradicting *Mills* by unconstitutionally precluding jurors in North Carolina from considering mitigating circumstances when they ultimately determine whether to impose the death penalty.

The *Mills* rationale as expressed in the opinion leads inescapably to the conclusion that its holding would apply to a Maryland case whether the jury found no mitigating circumstance or at least one but not all the mitigating circumstances submitted to it. Since in this situation Maryland's capital sentencing scheme is no different from North Carolina's, it must follow that the *Mills* holding applies equally to North Carolina's capital sentencing scheme.

The Eighth Amendment jurisprudence upon which *Mills* rests is that in a capital case the sentencing authority may not be precluded from considering any relevant mitigating circumstance which might be proffered by the defendant as reasonably justifying a sentence other than death. *Skipper v. South Carolina*, 476 U.S. 1, 4, 90 L.Ed. 2d 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L.Ed. 2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed. 2d 973 (1978). This jurisprudence is summarized at the outset of the substantive discussion in *Mills*. *Mills*, 486 U.S. at ---, 100 L.Ed. 2d at 393-94. Later in its opinion the Supreme Court posits a Maryland capital sentencing process under which the jury actually reaches the balancing stage, saying:

> Ordinarily, a Maryland jury reaches the balancing stage of the deliberation process any time it unanimously finds at least one mitigating circumstance, or, under the interpretation adopted by the Court of Appeals in this case, any time the jury does not unanimously reject all mitigating circumstances. Had the jurors that sentenced petitioner reached Section III, they would have found that even if they had read the verdict form as the Court of Appeals suggests they could have, and marked "yes" or "no" only on the basis of unanimity as to either, they were not free at this point to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances. Section III instructed the jury to weigh only those mitigating circumstances marked "yes" in Section II. Any mitigating circumstance not so marked, even if not unanimously rejected, could not be considered by any juror. A jury following the instructions set out in the verdict form could be "precluded from considering, *as a mitigating factor*, [an] aspect of a defendant's character or record [or] a circumstanc[e] of the offense that the defendant proffer[ed] as a basis for a sentence less than death,"

> *Skipper v. South Carolina*, 476 U.S. at 4, 90 L.Ed. 2d 1, 106 S.Ct. 1669, if even a single juror adhered to the view that such a factor should not be so considered.

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 397 (footnote omitted). Footnote 14 presses the point further:

> For example, some jurors in this case might have found that petitioner's age, 20, constituted a mitigating factor, i.e., youthfulness, under § 413(g)(5). Indeed, in his sentencing report the trial judge noted: "There was evidence from which the jury could have found the existence of Mitigating Circumstance No. 5 (youthful age)." App. 108. Other jurors, on the other hand, might have accepted the prosecutor's argument that petitioner was "not youthful in terms of the criminal justice system," id., at 79, because of his history of criminal activity. Under such circumstances, the lack of unanimity would have prevented the jury from marking that answer "yes." Regardless of whether the answer was marked "no" or left blank, the instructions in Section III would prevent those jurors who thought petitioner's youthfulness was relevant to the ultimate sentencing decision from giving that mitigating circumstance any weight.

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 397-98 n.14.

The majority next attempts to distinguish *Mills* on the basis of the posture in which that case reached the Supreme Court. The majority notes that the Maryland Court of Appeals in its *Mills* opinion and the State of Maryland before the United States Supreme Court both conceded that mitigating evidence continued to be legally relevant even if the jury does not unanimously find it to have mitigating value; but in North Carolina such evidence ceases to be legally relevant if rejected by even one juror.

This argument stands *Mills* and the Eighth Amendment jurisprudence upon which it rests on their respective heads. The jurisprudence so far developed by the Supreme Court in a series of cases to which I have already referred is that the Eighth and Fourteenth Amendments preclude a state from creating barriers to the consideration by a capital sentencer of all evidence which may reasonably be said to have mitigating value. It makes no dif-

ference what form these barriers take. The Supreme Court said unequivocally in *Mills*:

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett v. Ohio, supra; Hitchcock v. Dugger*, 481 U.S. ---, 95 L.Ed. 2d 347, 107 S.Ct. 1821 (1987); by the sentencing court, *Eddings v. Oklahoma, supra*; or by an evidentiary ruling, *Skipper v. South Carolina, supra. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance.* Whatever the cause, . . . the conclusion would necessarily be the same: "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing." *Eddings v. Oklahoma*, 455 U.S. at 117, n*, 71 L.Ed. 2d 1, 102 S.Ct. 869 (O'Connor, J., concurring).

Mills, 486 U.S. at ---, 100 L.Ed. 2d at 394 (emphasis supplied).

"[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only 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.' " *New Jersey v. T.L.O.*, 469 U.S. 325, 345, 83 L.Ed. 2d 720, 737 (1985), quoting Fed. R. Evid. 401. As noted by Thayer, "The law furnishes no test of relevancy." E. Thayer, *A Preliminary Treatise on Evidence at the Common Law* 265 (1898). The concept of logical relevancy employed in Rule 401 must be kept separate from issues of sufficiency of evidence for any purpose such as to satisfy a burden of production. M. Graham, *Handbook of Federal Evidence* § 401.1 (2d ed. 1986). This concept of relevancy is the same in the context of mitigating evidence in a capital sentencing proceeding as it is in other contexts. Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone

convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered. *Id.* at § 401.1 n.12.

To say, as the majority here does, that jury unanimity on a mitigating factor is necessary to make that factor legally relevant in the final balancing process seems not only to be a misuse of the concept of relevancy but also a classical case of circular reasoning with regard to the constitutional question presented. When the Supreme Court speaks in *Mills* of the constitutional necessity for permitting the sentencer in a capital case to "consider" all mitigating evidence in determining whether to impose or not to impose the death penalty, it clearly has reference to that stage of the process where the final sentencing decision is being made. It is at that stage where under *Mills* and its predecessors any juror must not be precluded from considering evidence that juror might reasonably believe to have mitigating value. It is not enough that the juror be permitted to "consider" the mitigating evidence at the point when the jury is trying to determine whether any particular mitigating circumstances exist. There is no question that all jurors were permitted to consider such evidence at that stage of the process in *Mills*.

Rather, the question presented in *Mills* is whether at the ultimate decision-making stage of a capital sentencing proceeding it is constitutionally permissible to preclude any juror from considering a mitigating circumstance that juror believes to exist because not all jurors agree on its existence. *Mills* answers that question "no." It also makes clear that the question must be answered "no" notwithstanding any procedural devices a state may employ to preclude the sentencer's consideration of mitigating factors at the ultimate decision-making stage. This means to me that North Carolina cannot preclude jurors from considering mitigating evidence at that stage by labeling the evidence legally irrelevant.

The majority relies in part on *Franklin v. Lynaugh*, --- U.S. ---, 101 L.Ed. 2d 155 (1988), for the proposition that it is permissible for states to structure, direct and focus the jury's consideration of mitigating evidence. Guiding and structuring the jury's consideration of mitigating evidence is one thing; precluding the jury's consideration of such evidence at the final decision-making

stage is quite another. *Lynaugh* permits the former; *Mills* prohibits the latter. Indeed, the Supreme Court concluded the instructions in *Lynaugh* were not constitutionally infirm "[b]ecause we do not believe that the jury instructions or the Texas Special Issues precluded jury consideration of any relevant mitigating circumstances in this case, or otherwise unconstitutionally limited the jury's discretion . . . ." *Lynaugh*, --- U.S. at ---, 101 L.Ed. 2d at 171.

Because the majority's reliance on the Supreme Court's denial of certiorari in two North Carolina cases in which the *Mills* issue was raised is sparing and properly carries with it the recognition that such denials mean nothing with regard to the Court's views on the merits of the case, I see little need to respond to this aspect of the majority's opinion. Suffice it to say that, according to the authorities cited by the majority, the Supreme Court's position on the issue of the unanimity requirement vis-a-vis mitigating circumstances in a capital sentencing procedure should be determined entirely from its holding and its analysis in *Mills* and not at all from its denials of applications for writs of certiorari in cases in which this issue might have been raised.

Justice FRYE joins in this dissenting opinion.

Justice FRYE dissenting.

Believing that the defendant has not received a fair and impartial trial, I dissent from the majority's decision in both the guilt-innocence and sentencing phases of the trial. First, I am convinced that under the totality of the circumstances, defendant's oral confession was not knowingly and voluntarily made and, for that reason, its admission in evidence against him was error. These circumstances are set out in some detail in the dissenting opinion of Justice Martin in which he concludes that the defendant is entitled to a new trial. I concur in that portion of his opinion.

I also conclude that the defendant is entitled to a new sentencing hearing as stated in the dissenting opinion of the Chief Justice for the reasons stated in his dissenting opinion.

I write separately because I disagree with the majority's treatment of two other issues which bear directly upon the guilt-

innocence phase of the trial and indirectly, if not directly, upon the jury's determination of whether the defendant should receive life imprisonment or the death penalty. My first difference with the majority relates to its treatment of the fact that both the trial court and the prosecutor informed the jury that the trial was subject to appellate review.

Defendant argued that the fact that both the trial court and the district attorney informed the jury that defendant's trial was subject to appellate review constitutes reversible error; that conveying that information to the jury fatally undermined the reliability of the jury's determination that defendant was guilty of murder in the first degree and the jury's conclusion that death was the appropriate punishment. The majority responds by reviewing this Court's decisions in *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975), and *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979), and the United States Supreme Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed. 2d 231 (1985), concluding that those cases

> stand for the proposition that statements by the trial court or prosecutor that tend to dilute the jury's sense of responsibility for its determinations by suggesting that its verdict will be reviewed, or that the punishment imposed will be withheld, are impermissible and prejudicial. *See* 75 Am. Jur. 2d *Trial* § 230 (1974) ('[c]omments . . . on the power of the court to suspend sentence or to set the jury's verdict aside, or statements that a higher court has the power to review the finding of the jury on the weight of the evidence, are calculated to induce the jury to disregard their responsibility, and are improper.').

The majority then proceeds to distinguish the above cases from the instant case. I find those cases controlling. In *White*, the prosecutor told the jury that "[if] any error is made in this court, [the Supreme] Court will say." *White*, 286 N.C. at 402, 211 S.E. 2d at 449. Here, the prosecutor argued, "[t]here is a right of appeal to any interpretation of laws and application of laws which are present in this case."

Further, in *White* the court stated to the jury that "the Supreme Court will review this case." *Id.* at 402, 211 S.E. 2d at 449. This Court concluded that by that "positive statement . . .

the jury was bound to have understood that the court assumed [that] their verdict would be guilty." *Id.* at 404, 211 S.E. 2d at 450-51. Here, the judge told the jurors that the court reporter

> will be taking down everything that's said or done during the trial so that everything is a matter of public record and then she can type up a transcript of a trial and they mail it down to the Supreme Court and the Supreme Court can review what we're doing up here in Stanly County.

The majority draws a distinction between the use of the words "will review" in *White* and "can review" in the instant case. The distinction, in context, is too fine. As this Court made clear in *White*, a jury in a capital case must weigh the evidence and find the facts on the assumption that whatever verdict they render will be the final disposition of the case. When the judge tells the jurors that the court reporter is taking everything down so that it is a matter of public record, that it will be mailed down to the Supreme Court so that the Supreme Court can review "what we're doing up here in Stanly County," reasonable jurors could easily believe, as stated by this Court, in *State v. Jones*, 296 N.C. 495, 500, 251 S.E. 2d 425, 428, "that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility." This belief is further encouraged when the court overrules defendant's objection to the prosecutor's argument that if convicted defendant can appeal on points of law. As Chief Justice Sharp intimated in *White*, jurors may not fully comprehend "the nature of the Supreme Court's review of a case upon appeal and . . . the difference between 'triers of the facts' and judges of the law." *White*, 286 N.C. at 404, 211 S.E. 2d at 450. Here, the trial judge both directly told the jury that its verdict was subject to appellate review and, subsequently, sanctioned the State's comments on that subject by overruling defendant's timely objection. Given those facts and the prior holdings of this Court, defendant's conviction and sentence of death should be vacated and this case remanded for a new trial.

I also disagree with the majority's treatment of defendant's contention that the trial court erred by allowing the prosecutor, during voir dire, to "stake out" the jurors by obtaining commitments from them to disregard defendant's intoxication in determining the existence of premeditation and deliberation and to

reject his voluntary intoxication defense. The purpose of voir dire examination of prospective jurors is to secure an impartial jury. *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). To assure that end, this Court has repeatedly held it improper for counsel to "stake out" jurors during voir dire by posing hypothetical questions designed to elicit in advance what a juror's decision will be under a certain state of evidence or upon a given state of facts. *See, e.g., State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986); *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985); *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1981); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *modified as to death penalty*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976).

The prosecutor asked the prospective jurors "if it is shown to you from the evidence and beyond a reasonable doubt that the defendant was intoxicated at the time of the alleged shooting, would this cause you in your opinion to have sympathy for him and allow that sympathy to affect your verdict?" The jurors assured the prosecutor that they would not let that fact influence their decision. Further, at the sentencing stage, the prosecutor stated "he was drinking liquor and I told you before you were chosen as a juror that if it is shown that he's intoxicated, were you going to have sympathy, sympathetic to his cause. As I recall, you said you wouldn't."

Allowing the prosecutor to seek and obtain commitments from the jurors was tantamount to asking them to ignore evidence of intoxication in reaching their verdict and in determining the appropriate sentence. The evidence of defendant's intoxication was overwhelming. Deputy Sheriff Lambert went to defendant's home in response to a report that defendant was drunk and firing a shotgun. Deputy Lambert testified that defendant would mumble but he could not understand him and that defendant, though standing, was "wobbly." The emergency room physician testified that defendant had a strong odor of alcohol, did not respond coherently to the doctor's questions, and, notwithstanding a laceration to his skull and a wound to his left buttocks, did not complain of any pain and was not given any medication for pain. Defendant had a blood alcohol level of .264 shortly after the shooting. Dr. Robert Rollins, clinical director of the Dorothea Dix forensic psychiatry unit, included among defendant's diagnoses: "episodic alcohol abuse," "alcohol intoxication, recovered," and

"organic delusional syndrome." In Dr. Rollins' professional opinion, defendant could not distinguish between right and wrong at the time of the offense and could not have formed the specific intent to kill the officer. In the opinion of Dr. Patricio Lara, another Dorothea Dix Hospital psychiatrist who also examined defendant, his intoxication, together with his limited intellectual functioning and personality disorder, resulted in an impairment of his ability, at the time of the offense, to conform his conduct with the requirements of the law.

Intoxication, even when voluntary, may constitute a valid defense to the charge of murder in the first degree. *See, e.g., State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983) (if defendant was intoxicated to a degree precluding premeditation and deliberation, he cannot be found guilty of murder in the first degree); *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978) (defendant cannot be convicted of murder in the first degree if intoxicated to a degree sufficient to preclude forming a specific intent to kill).

This Court has held that "[a] juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent." *State v. Leonard*, 296 N.C. 58, 62-63, 248 S.E. 2d 853, 855 (1978). Thus, permitting defendant to be tried for his life by a jury whose members had expressly committed themselves to disregard what proved to be substantial evidence that defendant was highly intoxicated at the time the fatal shot was fired infringed upon his fundamental right to be tried by an impartial jury.

As stated by the Supreme Court of Mississippi in *Stringer v. State*, 500 So. 2d 929 (1986):

> It is improper influence to put the jury in a 'box' by *voir dire* tactics which extract a promise, prior to trial, to ignore evidence favorable to the defendant. This promise or pledge prevents the jurors from considering all facts relevant to the verdict. The jurors are then called upon during closing arguments to fulfill that promise, and the effect—whether calculated or not—is to shame or coerce the jury into rejecting factors which would tend to mitigate against the death penalty.

Id., 500 So. 2d at 936-37.

For all of the reasons indicated herein, and for the reasons set forth in the dissenting opinion of Justice Martin, defendant should be given a new trial. Even if his conviction is upheld, he should be given a new sentencing hearing for the reasons stated in the dissenting opinion of the Chief Justice.

PROPORTIONALITY

Because I do not believe that defendant has received a fair trial free of prejudicial error, I would not reach the question of proportionality. However, since the majority reaches that question and finds that the death sentence is not disproportionate in this case, I write to express my disagreement with that conclusion also.

As the majority correctly states, in conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E. 2d 808, 829 (1985). There are four cases in the proportionality pool in which defendants killed law enforcement officers engaged in the performance of their official duties. Those cases are: *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985), *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981).

In *Payne*, defendant murdered a detective who had earlier arrested him on a drug charge. He handcuffed the detective's hands behind his back and pushed him into a river to drown. The jury returned a verdict of life imprisonment. In *Hill*, a policeman chased and tackled the defendant who was suspected of having committed a felony. During the ensuing struggle, defendant managed to get possession of the officer's pistol and shot and killed him. This Court found the death sentence disproportionate and sentenced defendant to life imprisonment. In *Abdullah*, defendant conspired with others to commit an armed robbery and shot the policeman several times during the course of the robbery, killing him. The jury returned a verdict of life imprisonment. In *Hutchins*, the defendant shot and killed two officers and then shot and killed a third officer who was attempting to arrest him. This Court upheld the sentence of death.

When considering the crime and the defendant and comparing this case with the crime and the defendants in the other four cases involving the killing of law enforcement officers, I find the instant case more like *Abdullah*, *Hill*, and *Payne* than *Hutchins*. Thus, I agree with defendant that to conclude that he deserves to die, when the defendants in *Abdullah*, *Payne*, and *Hill* were spared that ultimate penalty, would defeat the purpose of proportionality review mandated by the legislature, which, as this Court stated in *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983), "is to serve as a check against the capricious or random imposition of the death penalty." Thus, were I to reach proportionality, I would find the death sentence in the instant case disproportionate as a matter of law and sentence defendant to life imprisonment.

Chief Justice EXUM joins in this dissenting opinion.

Justice MARTIN dissenting in part.

I respectfully dissent from the holding of the majority that defendant's inculpatory statements were admissible; otherwise, I concur in the majority opinion, including specifically, the resolution of the issue arising under *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988).

With respect to the confession issue, the majority approves the admission of inculpatory statements by a sixty-five-year-old black man with an I.Q. of 74, blind in one eye, his other eye injured and bandaged so that he could not see, wounded and treated at the hospital, with a blood alcohol level of .264, afraid for his life, travelling in a van with officers for over two hours from Anson County to Raleigh, at times cold and thirsty, suffering from his wounds, and being, in the opinion of Dr. Rollins, incapable of appreciating the waiver of his constitutional rights. In this I cannot concur.

Perhaps by finecombing the record, as the majority has done, some evidence can be found which when isolated may support some of the trial court's findings of fact. The true test of the voluntariness of a confession, though, is found in the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). Once it is established that the procedural requirements of

Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), have been met, the determination of whether defendant's confession was knowingly and voluntarily made must be found from considering all of the circumstances of the case. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984).

What were the totality of the circumstances when defendant confessed?

THE ENVIRONMENT

First, it is to be noted that defendant was in a sheriff's van, being transported to Raleigh "for safekeeping" without the issuance of a judicial order authorizing the transfer. N.C.G.S. § 15A-521 (1983). Although an officer testified that "warrants" were served on defendant while in the van, no warrants appear in the record on appeal. The crime occurred and defendant was taken to Raleigh on 22 December 1984. The order of arrest in the record on appeal was served on defendant on 24 January 1985. So we have a defendant being unlawfully transported in a van through the black of night by hostile officers, alone, with no way to contact anyone outside the van as a witness or otherwise.

The trial court failed to consider the actions of the officers in removing defendant from the hospital and interrogating him in the isolated and coercive environment of a moving police van. Compelling a suspect to travel during interrogation, or interrogating a suspect during travel, is a factor which suggests involuntariness. *Clewis v. Texas*, 386 U.S. 707, 18 L.Ed. 2d 423 (1967). Here, the defendant was completely incommunicado and isolated from the police station or the jail. This was obviously done for the purpose of interrogating the defendant in an environment conducive to producing inculpatory statements. These are factors indicating involuntariness. This is particularly true when the defendant is susceptible to coercion. *Vernon v. Alabama*, 313 U.S. 547, 85 L.Ed. 1513 (1941) (per curiam); *White v. Texas*, 310 U.S. 530, 84 L.Ed. 1342 (1940). The officers were fully aware that the defendant had been badly wounded by gunfire shortly before the interrogation. They knew that defendant had been extremely intoxicated when he was brought to the hospital. They knew he was blind and in a severely weakened physical condition. Having this knowledge, the officers took the defendant from the hospital on a gurney, placed him into a police van containing three of-

ficers, and commenced the nighttime ride from Wadesboro to Raleigh. In so doing, the officers deliberately cut defendant off from the outside world, leaving him in a position of extreme vulnerability to their interrogation. It is difficult to conceive of a fact situation more conducive to overbearing a defendant's will than the one existing in this case.

THE DEFENDANT

The defendant at the time of this offense was sixty-five years of age. He was suffering from serious gunshot wounds sustained in the preceding hours. He was blind, mentally disordered, had a borderline intellect, and was under the influence of alcohol. He expressed to the officers that he was afraid for his life at the time they were interrogating him in the police van. Dr. Perry, an emergency room physician, testified that defendant was brought to the hospital by ambulance around 6:30 p.m. Dr. Perry treated him in the trauma facility for two serious gunshot wounds, one a laceration through the forehead down to the skull, the other a puncture wound to the buttocks. The head wound was about six centimeters long and very deep, the bullet passing through the entire thickness of the forehead down to the skull. The wound to the buttocks was a through-and-through injury, about ten to twelve centimeters in length. Defendant was semiconscious at the time of his arrival and unable to respond coherently to the doctor's attempts to communicate with him. Such wounds are normally very painful, but defendant did not indicate that he was suffering the normal degree of pain, which the doctor attributed to the degree of defendant's alcoholic intoxication, which was a blood alcohol level of .264. Dr. Perry treated defendant's wounds for some forty minutes, closing them with sutures. They were heavily bandaged, completely closing the defendant's good eye, he being blind in the other eye. During the treatment defendant was administered intravenous fluids for the purpose of elevating his blood pressure, according to Dr. Perry.

Dr. Rollins is an expert medical witness, a forensic psychiatrist, and employed by the state. He examined the defendant several times with respect to this incident. He testified that defendant had multiple personality disorders, including paranoid and delusional thinking, with impaired judgment and perception. In 1980 he had scored 89 on an I.Q. examination, but later, at the

time of this event, his I.Q. test score had deteriorated to 74, which placed defendant in the borderline range of intellectual functioning. Dr. Rollins further testified that defendant was substantially intoxicated at the time of the interrogation and that this condition would exacerbate defendant's mental disabilities. He expressly testified that defendant, because of his mental disorders and his physical condition at the time, was incapable of knowingly and voluntarily waiving his constitutional rights at the time that he was interrogated by the officers.

The trial judge failed to make any findings as to the defendant's mental condition and completely overlooked the deteriorating mental and psychotic condition of the defendant which had occurred over the past five years as evidenced by the decline in his I.Q. scores. The court's determination that defendant had an I.Q. at the time of the interrogation between 74 and 89 is unsupported by the evidence. The only relevant evidence indicates that at the time of the interrogation defendant's I.Q. was 74, having deteriorated from the 89 that he had scored some five years previously. Mental handicaps which make a defendant particularly susceptible to the influence of others are an important factor in weighing voluntariness. *Jurek v. Estelle*, 593 F. 2d 672 (5th Cir. 1979). Further, a defendant's physical condition is an important factor in determining whether a confession is voluntary. *Cooper v. Griffin*, 455 F. 2d 1142 (5th Cir. 1972). *See also State v. Dailey*, 351 S.E. 2d 431 (W. Va. 1986).

In *Colorado v. Connelly*, 479 U.S. ---, 93 L.Ed. 2d 473 (1986), the United States Supreme Court held that ordinarily a defendant's mental impairment, standing alone, is not a sufficient basis for ruling a confession involuntary. However, in this case, we have not only the defective mental condition of the defendant, but also the coercive environment in which the officers placed the defendant, together with his impaired physical condition. These factors considered together are sufficient to show involuntariness.

THE INTERROGATION

After placing the defendant in the police van and beginning the journey to Raleigh, the officers informed the defendant of his rights as they were leaving the Wadesboro city limits. To this the defendant responded: "I was tried for my life and I understand all this stuff. I was tried for my life back in 1951." Interestingly,

Miranda warnings were not required until 1966, fifteen years *after* defendant's earlier court experience. The officers testified that after being read his rights defendant said "[h]e did understand but he did not want to sign anything because he couldn't see." From this testimony, the trial court found that the defendant made an "express" statement that he did not want an attorney present. A fair reading of this testimony, however, only shows that the defendant responded that he understood his rights, but he did not want to sign anything because he could not see. There is no indication in this testimony that the defendant expressly waived the presence of counsel. He did not go the additional step and say: "I don't want a lawyer now." Of course, it is not essential that there be an express waiver by defendant. However, the court must presume that the defendant did not waive his rights. *State v. Connley*, 297 N.C. 584, 256 S.E. 2d 234, *cert. denied*, 444 U.S. 954, 62 L.Ed. 2d 327 (1979). The trial court's finding of an express waiver is unsupported by the evidence. Nowhere does the trial court find an implied waiver under all the circumstances of the case, and none can be so found. For this reason, I think the trial judge's order is fatally flawed.

The interrogation continued for some two hours, and during this time the officers obtained admissions from defendant that proved to be critical to the state's case. During the interrogation, the defendant stated, "I'm fearing for my life now." Although the officers testified that they assured defendant that he had nothing to fear, the defendant could not see the officers and had no way of knowing what they were doing in the van. He also had no way of knowing where they were taking him, even though one officer said he was being taken to Raleigh for safekeeping. Certainly, in view of the environment in which he was situated and his physical and mental condition, it is reasonable that the defendant was fearful for his life at the time that he was being interrogated. That fact alone is sufficient to refute any finding of voluntariness.

During the interrogation the defendant was suffering from his painful bullet wounds. There is no evidence that he had been given any sedatives or painkillers to alleviate his suffering. The record shows that defendant voiced numerous complaints during the interrogation and that he was experiencing physical discomfort.

At one point defendant told the officers that he was tired and wanted to stop the interrogation. He also complained at that time that he was cold, and the heat in the van was turned up and he was given a sheet to cover himself. After a short period, one of the officers asked defendant if he wanted to talk. Defendant stated that he did not want to talk to Officer Jackson. One of the other officers asked defendant if he would talk with him, and defendant agreed. This procedure by the officers violates the ruling of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). In *Edwards*, the Court held that when a suspect indicates his desire to stop the interrogation, the officers must terminate it and the interrogation cannot be resumed until initiated by the suspect. Here, the evidence clearly shows that defendant desired to terminate the interrogation. He said that he was tired and wanted to stop. The officers stopped for a short time and then, without any initiation of the interrogation by the defendant, the officers resumed the process of examining the defendant. For this reason, the confession was not admissible.

Thus, I find defendant's statement to be involuntary and the result of his being unlawfully placed in a coercive environment while severely handicapped, both mentally and physically, and interrogated in violation of *Edwards v. Arizona* while fearful for his life. Defendant is entitled to a new trial.

Chief Justice EXUM and Justice FRYE join in this dissenting opinion.

STATE OF NORTH CAROLINA v. ELTON OZELL McLAUGHLIN

No. 637A84

(Filed 7 September 1988)

1. Constitutional Law § 28— complicated case—denial of motion to have trial judge retain jurisdiction over all matters—no due process violation

The trial court did not err in a prosecution for three first degree murders by denying defendant's motion to have the trial judge retain jurisdiction over all matters pertaining to the trial on the grounds that this was a complicated case and that due process therefore required one judge to hear all pretrial mo-

tions and procedural matters and hear the case. Fifth Amendment to the U. S. Constitution, Art. I, § 19 of the North Carolina Constitution.

2. Constitutional Law § 31; Criminal Law § 5— motion for independent psychiatric exam properly denied—testimony from psychiatrist properly admitted

In a prosecution for three first degree murders, the report of a psychiatrist was properly introduced into evidence at a pretrial hearing to determine defendant's competency to stand trial even though defendant's motion for an independent psychiatric examination was denied where defendant failed to object to the report's introduction at the competency hearing; defendant made no ex parte threshold showing that his sanity at the time of the crime was likely to be a significant factor in his defense; the State-appointed psychiatrist testified that his examination of defendant lasted approximately two weeks, during which he could recall two long interviews with defendant; and the record contains no evidence that defendant was emotionally disturbed or unable to conform his conduct to the requirements of the law.

3. Constitutional Law § 31— denial of funds to hire private investigator—no error

The trial court did not err in a first degree murder prosecution by denying defendant's motion for funds to hire a private investigator where defendant made no clear showing that specific evidence was reasonably available and necessary for a proper defense, and the court advised defendant's two attorneys that they could return to the court if they encountered problems. N.C.G.S. § 7A-450(b) (1986).

4. Indictment and Warrant § 13.1; Constitutional Law § 30— denial of bill of particulars for aggravating factors—denial of list of State's witnesses—no error

Defendant in a first degree murder prosecution was not denied due process by the denial of his motion for a bill of particulars on the aggravating factors to be offered during the sentencing phase of his trial or because he was not provided with a list of the State's witnesses. N.C.G.S. § 15A-2000(e).

5. Constitutional Law § 30— murder—motion for discovery denied—no error

The trial court did not err in a prosecution for three first degree murders by the denial of defendant's motion for discovery of the names and addresses of all persons interviewed by the State with copies of their statements; the total list of persons interviewed in the entire investigation, with accounts of the interviews and the names of the interviewers; a detailed list of the criminal records of all State witnesses; and all written reports, documents or physical evidence in the possession of the State or the prosecution relative to defendant's case or its investigation. N.C.G.S. § 15A-903(d); N.C.G.S. § 15A-904(a).

6. Criminal Law § 91.1; Constitutional Law § 28— denial of motion to continue suppression hearing—no error

There was no error and defendant was not denied due process in a first degree murder prosecution from the trial court's denial of his motion to continue an evidence suppression hearing because defendant's two counsel needed more time to prepare. Defendant failed to argue a due process right in either his written or oral motion and failed to show prejudice.

7. Criminal Law § 75— murder—statements to law enforcement officers—given voluntarily

The trial court did not err by refusing to suppress defendant's statements to law enforcement officers on the grounds that they were not given voluntarily where the trial judge's order contained extensive findings showing that defendant had been fully advised of and waived his constitutional rights; he was fully coherent, did not appear to be under the influence of alcohol or drugs and showed no desire to stop talking or request an attorney; the interviewing officers made no threats against defendant, nor did they make any promises in return for his statements; and defendant failed to except to any of the trial judge's findings of fact.

8. Searches and Seizures § 29— search warrant—statutory requirements for application and for warrant—no error

There was no error in a murder prosecution where defendant alleged that a search warrant application for his home and automobile did not meet the requirements of N.C.G.S. § 15A-244 and that the warrant itself did not satisfy N.C.G.S. § 15A-246(2) where the trial court's order contains thorough findings of fact supporting its conclusion that the search warrant met the N.C.G.S. § 15A-244 standard and defendant failed to raise the issue of whether the warrant met statutory requirements at trial.

9. Jury § 6— individual voir dire—sequestration of jurors—denied—no error

There was no error in a murder prosecution from the trial court's refusal to require that the jurors be sequestered at night or from the denial of defendant's motion for individual voir dire of prospective jurors where the jury was selected from citizens of another county; the trial court frequently admonished the jury; defendant presented no evidence that the jury did anything other than follow the trial court's orders; and defendant's argument concerning individual voir dire was speculative at best.

10. Jury § 7.11; Constitutional Law § 63— death qualified jury—no error

The trial court did not err in a murder prosecution by death qualifying the jury.

11. Criminal Law § 91.4— murder trial—one week absence of one attorney—continuance denied—no error

The trial court did not err in a murder prosecution by denying defendant's motion for a continuance where defendant had two attorneys representing him for four months and one attorney was absent for one week to attend a sick relative.

12. Constitutional Law § 31— denial of jury selection expert—no error

The trial court in a murder prosecution did not err by denying defendant's motion for funds for a jury selection expert where defendant failed to show a particularized need for expert assistance.

13. Jury § 7.4— challenge to array—insufficient evidence of racial discrimination

The trial court correctly denied a murder defendant's challenge to the jury array where the trial court found that Duplin County's black population is

34.02% and that the prospective jurors were only 24% black, but defendant failed to show what portion of the 34% black population was actually eligible to serve as jurors and therefore no correlation can be made between the total black population and the percentage of blacks in the venire.

14. Constitutional Law § 60; Grand Jury § 3.3— selection of grand jury foreman—racial discrimination—not shown

Defendant in a first degree murder prosecution did not make out a prima facie showing of racial discrimination in the selection of grand jury foremen where defense counsel's assertions were made based on his personal observations as a resident of the neighboring county and his conversations with Bladen County residents, from which the jury was drawn.

15. Criminal Law §§ 42.4, 43.4, 60.1— murder—admission of photographs of victims, defendant's fingerprints and iron pipe—no error

The trial court in a first degree murder prosecution did not abuse its discretion by admitting into evidence photographs and slides of the victims, defendant's fingerprints, and the iron pipe with which two of the victims were attacked. The photographs and slides, while sometimes gruesome, were relevant, corroborated testimony, and aided the pathologists' explanations of their opinions of the victims' cause of death; the fingerprint lifted from a victim's car matched defendant's and was clearly relevant; and the iron pipe was relevant to both the State's and defendant's case.

16. Criminal Law § 87.1— prosecutor's questions of officer—not leading—no error

The trial court in a first degree murder prosecution did not err by permitting a detective to testify that defendant had told him that a pipe which he had used to strike the victims was in the closet of his house where there was no suggestion of a desired response in the prosecutor's questions and the Supreme Court could not agree that the evidence was without foundation.

17. Criminal Law §§ 77.3, 87.1, 90— murder—testimony by and concerning companion in crime—no error

The trial court did not err during a first degree murder prosecution during the testimony of defendant's companion in crime by allowing a "flurry" of leading questions where the transcript reveals that there was but a single leading question, asked by the court to clarify a response to the prosecutor's nonleading question; by allowing the State to impeach its own witness because N.C.G.S. § 8C-1, Rule 607 permits impeachment of a party's own witness and the questions about the witness's prior criminal activity appear to have been asked in order to clarify the witness's testimony; by permitting the conditional introduction of a no deal written statement from the district attorney to the witness where the ruling was that the arrangement could not be introduced unless defendant mentioned it in his jury argument and neither the court nor the jury saw the statement; or by allowing a detective to read statements the witness made to law enforcement officers allegedly in violation of N.C.G.S. § 15A-927 because § 15A-927 applies only where a joint trial occurs, and because defendant himself brought the statements to the jury's attention.

18. Homicide § 21.5— first degree murder—motion to dismiss—evidence sufficient

The trial court did not err in a prosecution for three murders by denying defendant's motion for a directed verdict as to two of the murders for failure to prove premeditation and deliberation where a State's witness testified that he and defendant had discussed the necessity of "taking care of" one of the victims, that defendant had shown the witness an iron pipe prior to the victims' deaths and had directed the witness to use it on one of the victims; when the other victim, a child, awoke in the car, defendant told the witness that they would have to get rid of the little girl because she could testify against them; and defendant hit the little girl on the head with the pipe and threw her from the car into the water.

19. Homicide § 25— three murders—simultaneous instructions—no error

The trial court did not err in a prosecution for three first degree murders by instructing the jury on all three murders simultaneously where the final mandate clearly separated the three cases and the transcript nowhere revealed even a hint of an instruction directing the jury to consider the three murders as a common plan or scheme.

20. Criminal Law § 114.1— murder—court's narrative of evidence—no error

The trial court did not err in its narration of the evidence in a first degree murder prosecution where, although the summary of defendant's evidence was shorter than that of the State, it nevertheless clarified the issues and eliminated extraneous matters.

21. Criminal Law § 113.1— murder—court's recapitulation of the evidence—no error

The trial court did not err in a prosecution for three first degree murders by refusing defendant's request for clarification of testimony in certain areas where the court recapitulated the evidence to the extent necessary to explain the application of the law to the evidence. N.C.G.S. § 15A-1232.

22. Homicide § 25— murder—instructions—no error

The trial court did not err in a first degree murder prosecution by refusing to instruct the jury on the time span between two attacks on the victim by defendant and a State's witness where the evidence amply demonstrated that the two men acted together in harmony to rid themselves of a potential witness against them for another murder.

23. Criminal Law § 111.1— murder—failure to instruct on placement of murder weapon on the clerk's desk—no error

The trial court in a murder prosecution did not err by refusing to give an instruction on the placement of an iron pipe, the murder weapon, on the clerk's desk immediately in front of the jury, to allow defendant to photograph the desk, or to grant defendant a mistrial where the pipe was relevant and admissible and had previously been viewed by the jury; the pipe was placed in a position only two feet away from other trial exhibits, including several rifles and shotguns introduced by defendant; and the trial court found as a fact that the jurors had walked past the guns as well as the iron pipe on their way in

and out of the courtroom and had looked at them throughout the trial, not just on the morning of the court's jury charge.

24. Criminal Law § 135.8— murder—aggravating factor—prior felony involving violence—properly submitted

The trial court did not err in a prosecution for first degree murder by submitting to the jury the aggravating factor of prior conviction of a felony involving use or threat of violence to the person where defendant admitted under oath that he had been convicted of involuntary manslaughter and stipulated that the killing involved the use of violence. N.C.G.S. § 15A-2000(e)(3).

25. Criminal Law § 135.8— murder—sentencing—aggravating factor of preventing lawful arrest—properly submitted

The trial court in a prosecution for three first degree murders properly submitted the aggravating factor in two of the cases that the murders were committed to prevent lawful arrest. N.C.G.S. § 15A-2000(e)(4).

26. Criminal Law § 135.8— murder—aggravating factor—pecuniary gain—properly submitted

The trial court did not err in a prosecution for three first degree murders by submitting the aggravating factor of pecuniary gain. N.C.G.S. § 15A-2000(e)(6).

27. Criminal Law § 135.8— murder—aggravating factor—especially heinous, atrocious or cruel—properly submitted

The trial court did not err in a prosecution for first degree murder by submitting the aggravating factor that the murder was especially heinous, atrocious or cruel where evidence was elicited which tended to show that defendant beat the victim with an iron pipe, stuffed her mouth with a rag to stop her screaming, straddled her body and grabbed her by the throat, dragged her into the bathroom, forced her head under the water in the half-filled tub, and held it there while she struggled desperately for her life. Moreover, defendant was not in any event prejudiced since the jury made no finding on this factor and defendant did not receive the death penalty for this murder. N.C.G.S. § 15A-2000(e)(9).

28. Criminal Law § 135.8— murder—aggravating factor—course of conduct—properly submitted

The trial court did not err in a first degree murder prosecution by submitting the aggravating factor of course of conduct. N.C.G.S. § 15A-2000(e)(11).

29. Criminal Law § 135.9— murder—mitigating factors—duress and parental obligations—not submitted—no error

The evidence in a prosecution for three first degree murders was insufficient to require submission to the jury of the statutory mitigating factor of duress or domination of another person based on defendant's drug use or the nonstatutory factor of parental obligations where nothing in the transcript revealed that defendant was an excessive user of drugs or alcohol which might have brought him under an accomplice's influence in committing the murders

and the only evidence of parental obligation was the testimony of defendant's mother that defendant's daughter lived with her and that defendant visited her and brought her gifts. N.C.G.S. § 15A-2000(f)(5) and (9).

30. Criminal Law § 135.7— murder—instructions on aggravating and mitigating factors

The trial court did not err in a prosecution for three first degree murders by including an instruction on the recommendation sheet that the jury should indicate death as the appropriate punishment if it should find that the aggravating factors outweighed the mitigating factors and were, when considered with the mitigating factors, sufficiently substantial to call for the death penalty.

31. Criminal Law § 135.7— murder—sentencing—issues on verdict sheet—no error

There was no error in a prosecution for first degree murder in the issues as submitted to the jury where there was compliance with *State v. McDougall*, 308 N.C. 1.

32. Jury § 9— murder trial—replacement of distraught juror—no abuse of discretion

The trial court did not abuse its discretion in a murder prosecution by removing a distraught juror between the guilt and sentencing phases where the juror was the only black female on the jury; she began crying uncontrollably on the morning the sentencing phase began; she told the judge she felt incapable of remaining on the jury but did not think the prospective sentencing phase was the cause of her condition; the court immediately excused the juror without asking her to go to another room and compose herself; the juror was replaced with the first alternate, a white male; and the replaced juror was returned to the jury room.

33. Criminal Law § 135.6— murder—sentencing phase—introduction of prior conviction for involuntary manslaughter—no error

The trial court did not err during the sentencing phase of a murder prosecution by admitting defendant's conviction for involuntary manslaughter. N.C.G.S. § 8C-1, Rule 403 (1986); N.C.G.S. § 15A-2000(e)(3).

34. Constitutional Law § 80— death penalty—constitutional

North Carolina's death penalty statute is constitutional. N.C.G.S. § 15A-2000.

35. Criminal Law § 111.1— murder—jury instructions—comment to press—no error

The trial court did not err in its jury instructions in the sentencing phase of a first degree murder prosecution by commenting that the news media would be allowed to look at a copy of the issues and punishment recommendation sheet.

36. Criminal Law §§ 113.9, 118.4— murder—denial of request to correct jury instructions—no error

The trial court did not err in the sentencing hearing for three first degree murders by denying defendant's requests to "correct" the jury instructions where the trial court did in fact give a suggested additional instruction in some instances; it had already given a proper instruction in others; and in some cases the trial court properly found no basis for defendant's dissatisfaction.

37. Criminal Law § 135.4— murder—sentencing—motions for life sentence and mistrial denied—no prejudice

There was no prejudice in the sentencing phase for three first degree murders from the denial of defendant's motions for a mistrial and a life sentence where defendant's motion for a life sentence came after the jury had deliberated for seven hours but the three murders together required the consideration of nine aggravating and eighteen mitigating factors, and defendant did not in fact move for a mistrial but for the imposition of life sentences in two of the cases, which was the result imposed by the jury in both cases.

38. Criminal Law § 113.7— murder—instruction on acting in concert—no prejudice

There was no prejudice in a prosecution for three first degree murders where the jury foreman asked the court during the sentencing phase for an explanation of acting in concert and the judge replied that he would be happy to explain the concept after the jury completed deliberations on defendant's punishment. The trial court had ample evidence before it to warrant the acting in concert instruction and the instruction on the concept was proper in all respects.

39. Criminal Law § 101.4— murder—jury deliberations—statement by juror in open court—no prejudice

There was no prejudice in a prosecution for three first degree murders where the transcript reveals that the jury had some difficulty completing the sentencing forms in two of the cases, the foreman was explaining the difficulty to the court when a juror asked permission to speak, and the juror then clarified the foreman's explanation. Even if this was error, there was no prejudice because defendant received a life sentence in both cases.

40. Criminal Law § 101.3— murder—jury deliberations—request to see an exhibit denied—no prejudice

There was no prejudice in a prosecution for three first degree murders from the court's misstatement of the law where the jury asked to see an exhibit and the court informed the jury that it could only view exhibits during the trial while sitting together in the jury box. The jury did not unequivocally demand to see the particular exhibit and defendant failed to object to the trial court's statement. N.C.G.S. § 15A-1233(b); N.C.G.S. § 15A-1446.

41. Criminal Law § 126— murder—sentencing—polling of jury

There was no error in a prosecution for three first degree murders where the jury originally returned a death sentence in all three cases but one juror recanted her decision in two of the cases and the court refused to allow de-

fendant to poll that juror again as to a decision in the third case, refused to allow defendant to repoll the entire jury, denied defendant's motion for further deliberation, and refused to allow the recanting juror's request to speak. The juror who recanted her decision in two of the cases was polled on the third case twice and neither a further polling nor an individual rationale for her decision to recant in the two cases was necessary. The jury had reached a unanimous verdict in its recommendation of the death penalty for the third murder and there was no reason for further deliberation; moreover, a trial court has no authority to change a jury's sentence recommendation.

42. Criminal Law §§ 101, 135.7— murder—trial court's dealing with jury—no error

There was no error in a prosecution for three first degree murders where the jury was not allowed to add comments to the punishment blanks in the verdict sheets; the trial court's individual conversation with the jury foreman when handing him the verdict sheets out of the presence of the other jurors was entirely innocuous; the court's statement to the jury that the trial would have to await the recovery of any sick juror before proceeding was not prejudicial since one juror had already been excused because of incapacitation and no other juror requested removal or showed any evidence of illness during deliberations; and the trial court properly instructed the jury that it had to fill in and answer all the aggravating factor blanks but could leave the mitigating factor blanks empty if it did not find the facts by preponderance of the evidence. N.C.G.S. § 15A-2000(b); N.C.G.S. § 15A-1446.

43. Criminal Law § 135.9— murder—requirement of unanimity of jury in finding mitigating circumstances—no error

There was no error in a first degree murder prosecution from the nature of the charge, the required verdict sheets, and the required considerations of elements and factors based on *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384.

44. Criminal Law § 159.1— murder—delay in preparing transcript—meaningful appellate review not precluded

Although the court reporter took eighteen months to prepare the transcript of a trial for three murders, and the transcript was not a model of reporting service, it was not so inaccurate as to prevent the Supreme Court's reviewing it for errors in defendant's trial.

45. Criminal Law § 135.10— murder—sentence of death—not disproportionate

A sentence of death was not disproportionate and was fully supported by defendant's violent history as well as his brutality and calculation in killing and disfiguring his victim and his total lack of remorse as shown by his further murders of the victim's wife and child.

Justice FRYE dissenting as to sentence.

Chief Justice EXUM joins in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from the imposition of a sentence of death and two life sentences, to

run consecutively, upon defendant's conviction of three separate charges of first-degree murder entered by *Hobgood, Hamilton H., J.*, at the 10 September 1984 special term of Superior Court, BLADEN County. Heard in the Supreme Court 8 February 1988 and 22 August 1988.

Lacy H. Thornburg, Attorney General, Elizabeth G. McCrodden, Associate Attorney General, Joan H. Byers, Special Deputy Attorney General, James J. Coman, Senior Deputy Attorney General, and William N. Farrell, Jr., Special Deputy Attorney General, for the State.

T. Craig Wright, Michael W. Willis, Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, Assistant Appellate Defender, for defendant-appellant.

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, and John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

MEYER, Justice.

These three cases arise from a contract murder which spawned two further murders committed in an effort to eliminate witnesses and evade justice.

James Elwell Worley was killed on 26 March 1984. Little more than a month later, on 29 April 1984, his wife, Shelia Denise Worley, and her daughter, Psoma Wine Baggett, were killed. The State's evidence tended to show the following events. Sometime before 26 March 1984 defendant approached an acquaintance, Eddie Carson Robinson (who testified for the State at defendant's trial), about an offer defendant had received from Shelia Denise Worley to "take care of her husband" for between $3,000 and $5,000. Defendant offered to split the money with Robinson if Robinson would help him by driving a car. Robinson agreed to the scheme.

According to Robinson, the men were obliged to abandon their first attempt on James Worley's life, but two nights later, equipped with a .22-caliber rifle, a piece of pipe and a container of gasoline, they returned in defendant's car to Worley's house and parked on the dirt road. As the men approached Worley's house on foot, Robinson carried the rifle and defendant carried the pipe.

They entered the house by the back door, went into a hallway and saw James Worley asleep in a bedroom. Defendant took the rifle from Robinson and in the presence of Worley's wife, Denise, shot Worley twice in the left chest from a distance of between two and three feet, killing him.

With Denise Worley's help, defendant and Robinson dressed Worley's corpse and placed it on the passenger seat of Worley's Volkswagen. With Robinson following in the Volkswagen, defendant drove away from the house in his own car. Eventually, both cars stopped on the side of the road. Robinson then poured the container of gasoline into the Volkswagen and onto Worley, and ignited it. At approximately 2:00 a.m. on 26 March 1984 the still burning Volkswagen was discovered. Although Worley's body was badly burned all over, it showed greater charring on the left side. Dr. Deborah L. Radische, a pathologist from the Office of the Chief Medical Examiner, testified that James Worley died from the gunshot wounds to his chest.

According to Robinson, after James Worley's death, defendant and Robinson were in contact, but the latter received no money for his part in the killing. The two men discussed the situation and the fact that, according to defendant, Denise Worley had been talking to the police. By Robinson's account, defendant was afraid that, because Denise Worley was a witness to the killing, she could put both men in the penitentiary.

On the afternoon of 29 April 1984, defendant and Robinson decided to kill Denise Worley that night. The men spent the afternoon at defendant's trailer, smoking marijuana and drinking a little wine. Denise Worley visited the trailer, had a discussion with defendant and left. She returned that night, with her two children, four-year-old Psoma Wine Baggett and an infant. When Denise Worley arrived, Robinson was in the back bedroom, but he moved to the bathroom on defendant's instructions, where he picked up the iron pipe which defendant had instructed him to use in the killing. After defendant had turned off the lights and was holding Denise Worley in a romantic pose, Robinson crept out of the bathroom and twice hit her over the head with the pipe. According to Robinson, Denise Worley fell backwards into the hallway, whereupon defendant straddled her, grabbed her by the throat and dragged her to the bathroom. Defendant placed

Denise Worley into the half-filled bathtub and held her head under water until she stopped struggling. The men then cleaned up the blood from the bathroom and hallway floors, removed Worley's body from the bathtub and placed it in the trunk of her car. They returned to the house to get the two children who were asleep and put them into Worley's car.

With Robinson driving Denise Worley's car and defendant driving his own, the two men drove to a field not far from a bridge at a place called White's Creek. As they opened the trunk of Worley's car, the four-year-old, Psoma Wine Baggett, awoke and got out of the car. Defendant told Robinson that they would have to get rid of the child because she could testify against them. When Psoma walked to the back of the car asking for her mother, defendant struck her twice with the iron pipe. Defendant then removed Denise Worley from the trunk of the car and put her in the passenger side. Psoma was put on the floor on the passenger side. As the child lay there, defendant gave the pipe to Robinson and told him to hit her. Robinson did so. Defendant drove his own car and Robinson drove Worley's car to the bridge. Robinson got out of Worley's car and let it roll down the embankment into the creek. Defendant then pulled Denise Worley halfway out of the car so that her head and torso were in the water. He threw Psoma several feet from the car into the water. As the men left the creek, Robinson could hear a crying sound. The infant was left in the car physically unharmed.

Dr. John Butts, forensic pathologist and then-Associate Chief Medical Examiner for North Carolina, who performed the autopsy on Denise Worley, testified that in his opinion, Denise Worley had died as a result of drowning as well as trauma to the head, but that she was still alive when she entered the water. Dr. Deborah L. Radische testified that in her opinion, Psoma Wine Baggett died from the trauma to her head as well as drowning and, like her mother, she was still alive when she entered the water.

Detective Phillip Little of the Bladen County Sheriff's Department testified that on 9 May 1984, Eddie C. Robinson gave him a statement, in which he admitted that he had driven Denise Worley's car but that his involvement began only after Denise's body had been placed in the trunk. On 10 May 1984, Robinson made a second statement, in which he described how he had hit

Denise Worley with the pipe and how defendant had held her head under water until she ceased struggling. Also on 10 May 1984, defendant himself made a statement to Detective Little. Defendant acknowledged that he had agreed to help Denise Worley by killing her husband and that he had gone to the Worley home where he had shot James Worley twice. He further stated that Denise Worley had died at defendant's trailer after she and defendant had argued and fought with the iron pipe. Although Robinson was not present during the argument, he had helped defendant to dispose of Denise Worley's body. Defendant stated that he had struck the first blow to Psoma Wine Baggett and Robinson had hit her twice more.

Defendant took the stand on his own behalf. He testified that although Denise Worley had approached him about killing her husband for money, he had refused the offer, but had arranged to meet her at Worley's home. When he entered the home by the back door with Robinson, defendant could see Denise Worley and could tell from her actions that something was wrong. He then saw James Worley moving in the bedroom, so he snatched the rifle from Robinson and shot Worley twice to protect himself, even though he saw no weapon on Worley. After dressing the corpse, Robinson drove Worley's Volkswagen and defendant drove his own car to the field where Robinson poured gasoline onto the Volkswagen and ignited it.

Defendant further testified that on the day Denise Worley was killed, she had visited defendant at his trailer and had become upset because she suspected defendant of having another woman there. She left the trailer, but later returned with her two children. She and defendant argued. Denise Worley pulled the iron pipe from the trunk of her car and hit defendant's arm with it, whereupon defendant became angry, took the pipe from Denise and hit her with it. Defendant took the pipe into his trailer, but Denise followed him and when she grasped defendant around the waist, he used the pipe to hit her again. While defendant treated his arm wound, Robinson took the pipe and hit Denise as she was rising from a chair. After she fell to the floor, Robinson hit her a second time. As Denise lay bleeding, defendant put a rag into her mouth to stop her screaming. Defendant and Robinson removed the children from Denise's car and put them in the trailer while they moved Denise to the trunk of her car. After cleaning up the

blood, the men put the children back into the passenger compartment of Denise's car. Defendant drove his own car, with Robinson following in Denise's car, to a field. Defendant testified that as the men were moving Denise's body from the trunk, Psoma awoke. Defendant was holding the pipe, but he was trying to protect Psoma from Robinson. The pipe slipped and fell, hitting the child. Defendant put the child and the pipe in the car, and when Psoma started screaming, Robinson hit her twice on the head with the pipe. Defendant and Robinson then drove the cars to the creek, where Denise's vehicle was rolled into the water.

On cross-examination of defendant, it was established that defendant had previously been convicted of involuntary manslaughter, possession of a controlled substance, driving under the influence, auto larceny and various motor vehicle law violations. Two witnesses testified to defendant's good character and reputation in the community.

The jury found defendant guilty of first-degree murder in all three cases. At the sentencing phase of the trial, defendant stipulated that he had previously been convicted of involuntary manslaughter and that the act involved the use of violence. Defendant then put on further evidence of his good character and reputation in the community, as well as his reputation for honesty. The State presented rebuttal evidence of defendant's bad reputation.

In the James Worley case, the jury found two aggravating factors and three mitigating factors. In the Denise Worley case, the jury found three aggravating factors and three mitigating factors. In the Psoma Baggett case, the jury found three aggravating factors and two mitigating factors. It then unanimously found beyond a reasonable doubt that the aggravating factors when considered with the mitigating factors were sufficiently substantial to call for the imposition of the death penalty in all three cases. However, when the verdicts were returned and the jury was polled, one juror recanted her vote as to the recommendation of the sentence of death in the cases of Denise Worley and Psoma Baggett. Therefore, pursuant to the jury's recommendation, the trial court sentenced defendant to death for the first-degree murder of James Worley and to two consecutive life sentences for the first-degree murders of Denise Worley and Psoma Baggett.

Defendant brings forward one hundred sixty-one assignments of error covering both the guilt-innocence and sentencing phases of his trial. Contrary to the North Carolina Rules of Appellate Procedure and acceptable practice, defendant does not group his exceptions under single assignments of error, but rather chooses to make a separate issue of each exception. N.C.R. App. P. 10(c) (1986). Though our task is complicated by this disregard for the rules, we will address defendant's one hundred sixty-one issues, in group form where appropriate.

I. PRETRIAL PHASE

Defendant first finds fault with the handling of sixteen pretrial matters. He contends specifically that the trial court erred in (1) denying his motion to retain jurisdiction, (2) overruling his objection to the introduction of the State's psychiatric report in the pretrial determination of defendant's competency to proceed, (3) denying his motion for funds to hire an investigator, (4) denying his motion for a bill of particulars of aggravating factors to be submitted at the sentencing phase, (5) denying his motion for a list of the State's witnesses, (6) denying certain items of defendant's *Brady* motion, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963), (7) refusing to continue the hearing of his motion to suppress, (8) refusing to suppress defendant's statements to law enforcement officers, (9) denying defendant's motion to suppress a search warrant and its fruits, (10) denying his motion for an independent psychiatric examination, (11) refusing to sequester the jurors at night, (12) denying defendant's motion for individual voir dire of prospective jurors, (13) denying his motion to continue the trial, (14) denying his motion to provide funds for a jury selection expert, (15) denying his motion to prohibit the death qualification of the jurors, and finally, (16) denying his challenge of the jury array. We address these pretrial matters *seriatim*, ultimately finding no error in any of them.

[1] On 31 May 1984, defendant filed a motion to have the trial judge retain jurisdiction over all matters pertaining to his trial. This motion was denied. Defendant now argues that because his was a complicated case, the due process requirements of the fifth amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution require that the same judge hear all pretrial motions and other procedural matters as

well as preside over the trial itself. Our research reveals no case which holds that a constitutional right exists to the retention by one judge of all matters pertaining to a trial, whether complicated or straightforward, and defendant cites us to none. This argument is without merit.

[2] On 19 May 1984 defendant filed a pretrial motion for a psychiatric evaluation of his sanity as well as his mental condition and capacity at the time of the crimes. This evaluation was performed by Dr. Patricio Lara of Dorothea Dix Hospital. Dr. Lara's report was introduced into evidence at a pretrial hearing to determine defendant's competency to stand trial. Defendant now argues that the report was erroneously admitted because his motion for an independent psychiatric examination was erroneously denied. He directs our attention to a later assignment of error, in which he contends that the court-ordered evaluation by Dr. Lara was totally inadequate because the psychiatrist saw him for no more than thirty minutes and because the report addressed only the question of defendant's competency to stand trial. Defendant's arguments are unpersuasive. We note initially that defendant failed to object to the report's introduction at the competency hearing. The limited use of the report to determine defendant's competency to stand trial is not error. *See Buchanan v. Kentucky*, 483 U.S. ---, 97 L.Ed. 2d 336 (1987). Defendant himself questioned Dr. Lara at trial on this issue. Moreover, although a constitutional right to provision, by the State, of a psychiatrist exists when a defendant has made an ex parte threshold showing that his sanity at the time of the crime is likely to be a significant factor in his defense, *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d 53 (1985), such defendant must show a particularized need for the psychiatrist. *State v. Gambrell*, 318 N.C. 249, 347 S.E. 2d 390 (1986); *State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986). His motion to the court contained no such showing; it seems to relate only to the establishment of mitigating circumstances, i.e., it made only a bare assertion that an independent evaluation was needed to address "questions which would tend to mitigate the alleged conduct of the Defendant, specifically the questions of whether the alleged crimes were committed while the Defendant was under the influence of any mental or emotional disturbance and whether the capacity of the Defendant to appreciate the criminality of his alleged conduct and to conform his conduct to the requirements of law was impaired."

Dr. Lara testified at trial that his examination of defendant lasted approximately two weeks, during which he could recall two "long interviews" with defendant. The record contains no evidence that defendant was emotionally disturbed or unable to conform his conduct to the requirements of law. Defendant failed to show a particularized need for a second independent psychiatric evaluation at the State's expense. These assignments of error are overruled.

[3] Defendant next contends that the trial court erred in initially denying his motion for funds with which to hire an investigator, thus denying him access to the "tools of defense." *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976). We disagree. Although the State must provide legal counsel and "other necessary expenses of representation" to indigent defendants, N.C.G.S. § 7A-450(b) (1986), the decision to provide an investigator pursuant to the statute rests within the trial court's discretion and will not be disturbed absent a showing of abuse of that discretion, *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). We noted in *Gardner* that "the appointment of private investigators should be made 'with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense,' since '[t]here is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence.'" *State v. Gardner*, 311 N.C. at 499, 319 S.E. 2d at 598 (quoting *State v. Tatum*, 291 N.C. 73, 82, 229 S.E. 2d 562, 568 (1976)). Defendant made no clear showing here. Nevertheless, the trial court advised defendant's two attorneys that if they encountered problems, they could return to the court and so advise it. They did not do so. Defendant has failed to demonstrate error. *See State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987).

[4] Defendant next contends that his motion for a bill of particulars on the aggravating factors to be offered during the sentencing phase of his trial was erroneously denied, so that he was deprived of due process of law. We have held that a defendant is not constitutionally entitled to an enumeration of aggravating factors to be used against him: statutory notice as contained in N.C.G.S. § 15A-2000(e) is sufficient. *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d

1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). Defendant goes on to argue that he was also denied due process of law because he was not provided with a list of the State's witnesses. We have held that a defendant is not entitled to such a list. *State v. Alston*, 307 N.C. 321, 335, 298 S.E. 2d 631, 641 (1983). This rule applies to capital cases. *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987). These assignments of error are overruled.

[5] Defendant's next assignment of error concerns his motion for discovery of certain information pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963). He argues that four items were unconstitutionally denied him. These included (1) the names and addresses of all persons interviewed by the State, with copies of their statements; (2) the total list of all persons interviewed in the entire investigation, with accounts of the interviews and the names of the interviewers; (3) a detailed list of the criminal records of all State witnesses; and (4) all written reports, documents or physical evidence in the possession of the State or the prosecution relative to defendant's case or its investigation. The State asserts that none of the items are subject to discovery, because they are either the "work product" of investigators or simply not discoverable under any relevant statute. We agree. In *State v. Alston*, 307 N.C. 321, 335-36, 298 S.E. 2d 631, 641, we held that the trial court did not have the authority to order the State to disclose to defendant either the names of the State's witnesses or the statements of all persons interrogated or interviewed during the investigation. N.C.G.S. § 15A-903(d), -904(a) (1986). Additionally, no statutory provision or constitutional principle requires the trial court to order the State to make available to a defendant all of its investigative files relating to his case or the names of all agents who participated in the investigation, N.C.G.S. § 15A-903(d) (1986), or to disclose the criminal records of the State's witnesses. *State v. Alston*, 307 N.C. at 336-38, 298 S.E. 2d at 643. Defendant's assignment of error in this regard is overruled.

[6] By his next assignment of error, defendant argues that the trial court erred in refusing to continue the hearing of his motion to suppress certain evidence. Defendant maintains that his two counsel needed more time to prepare for the hearing and that he was thereby denied due process of law. This argument is without merit. Defendant failed to argue a due process right in either his written or oral motion. Even had he not thus waived the constitu-

tional argument, *State v. Mitchell*, 276 N.C. 404, 172 S.E. 2d 527 (1970), he has utterly failed to show in what manner the trial court's refusal to continue the case prejudiced him. This assignment of error is overruled.

[7] Defendant next contends that the trial court erred in refusing to suppress the two statements defendant made to law enforcement officers on 9 and 10 May 1984. Specifically, he argues that his statements were not given voluntarily, considering the totality of the circumstances (for example, the interviewing officers were armed, defendant had not had much sleep, had worked a full shift and had indulged in alcohol and drug use some time prior to his arrest). We cannot agree with defendant's contention. The trial judge's order contains extensive findings of fact which show that at the time defendant made his two statements, he had been fully advised of and had waived his constitutional rights. He was coherent, appeared not to be under the influence of alcohol or drugs and showed no desire to stop talking or request an attorney. The interviewing officers made no threats against defendant, nor did they make him any promises in return for his statements. We note that defendant failed to except to any of the trial judge's findings of fact. When no exceptions are made to individual findings of fact, they are presumed to be supported by competent evidence. *State v. Allen*, 322 N.C. 176, 367 S.E. 2d 626 (1988); *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986). The findings here support the trial judge's conclusion that defendant voluntarily, knowingly and intelligently waived his constitutional rights.

[8] Defendant goes on to argue that the search warrant for his home and automobile did not satisfy the requirements of N.C.G.S. § 15A-244 (which lists the matters every search warrant application must contain) and that its fruits should therefore have been suppressed. We disagree. Defendant failed to except to any of these findings of fact. *See State v. Allen*, 322 N.C. 176, 367 S.E. 2d 626; *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450. Once again, the trial court's order contains thorough findings of fact supporting its conclusion that the search warrant met the N.C.G.S. § 15A-244 standard. Defendant also argues that the search warrant itself did not satisfy N.C.G.S. § 15A-246(2) because it did not contain the name of a specific officer or classification of officers to whom the warrant was addressed. Having failed to raise this is-

sue for the trial court's consideration, defendant may not raise it for the first time at the appellate level. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). Defendant's assignments of error concerning the search warrant and its fruits are overruled.

[9] Defendant next argues that he was prejudiced because the trial court did not require the jurors to be sequestered at night during his trial. He contends that the extensive newspaper and television publicity surrounding his trial mandated sequestration. We do not agree. Under N.C.G.S. § 15A-1236(b), the trial judge has discretion to order a jury's sequestration. In defendant's case, the jury was selected from citizens of another county. The trial court quite frequently admonished the jury against discussing the case or gaining information about it from outside sources. Defendant presented no evidence that the jury did anything other than follow the trial court's orders. He has failed to show prejudice. N.C.G.S. § 15A-1443(a) (1986). In addition, defendant argues that the trial court erred in denying his motion for voir dire of individual prospective jurors out of the presence of other jurors. He maintains that this denial made it impossible for him to question individual jurors about their knowledge of his case without educating the rest of the jury panel about it. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968); N.C.G.S. § 15A-1214(j) (1986). We conclude that defendant's argument is speculative at best. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979) (argument that collective voir dire makes all jurors aware of prejudicial and possibly incompetent evidence, thereby rendering selection of impartial jury impossible is mere speculation). *See also State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987). These assignments of error are rejected.

[10] Defendant next contends that the State should not have been permitted to "death qualify" the jury. Though defendant does not cite us to authority, we assume from his argument that he again buttresses his contention with *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776. Even so, defendant's argument is without merit. The United States Supreme Court has held that the United States Constitution does not prohibit states from "death qualifying" jurors in capital cases, since the procedure is "carefully designed to serve the State's concededly legitimate in-

terest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial." *Lockhart v. McCree*, 476 U.S. 162, 175-76, 90 L.Ed. 2d 137, 149 (1986). *See also Buchanan v. Kentucky*, 483 U.S. ---, 97 L.Ed. 2d 336 (1987). This Court has so held. *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986); *State v. King*, 316 N.C. 78, 340 S.E. 2d 71 (1986); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). We note that in defendant's case the State challenged eight potential jurors for cause because all expressed their inability to follow the court's instructions on imposition of the death penalty. At least one juror opposed to the death penalty remained on the jury because she indicated that she *could* follow the court's instructions. Several more were successfully challenged for cause because they thought that the death penalty should be automatic. Defendant's arguments as to "death qualifying" the jurors is rejected.

[11] On 16 August 1984 and 5 September 1984, defendant made a motion to continue his trial, which the trial court denied. Defendant now claims prejudice. Since defendant did not except to the findings of fact or conclusions of law in the trial court's order, they are not properly the basis of an assignment of error on appeal. N.C.R. App. P. 10(a). However, we conclude that the order of denial is supported by the conclusions of law which are in turn supported by the findings of fact. Defendant had two attorneys representing him for four months. A one-week absence by one attorney to attend to his sick relative is not a significant period in what amounts to eight man-months of trial preparation time. Defendant's claim of prejudice is without merit.

[12] Next, defendant argues that he was deprived of effective assistance of counsel, contrary to his sixth amendment rights, because the trial court refused to allocate him funds for a jury selection expert. As he did when arguing for an independent psychiatric examiner, defendant here failed to show a particularized need for expert assistance. Defendant's motion gave no reason why he needed such assistance. *State v. Artis*, 316 N.C. 507, 347 S.E. 2d 847 (1986) (denial of indigent defendant's request for jury selection expert upheld because no showing of particularized need). *See also State v. Hickey*, 317 N.C. 457, 342 S.E. 2d 646

(1986); *State v. Penley*, 318 N.C. 30, 347 S.E. 2d 783 (1986). This assignment of error is rejected.

[13] Defendant's final contention in the area of pretrial matters is that the trial court erred in denying his challenge to the jury array. Specifically, he argues that he made a prima facie showing that blacks had been excluded from the jury pool and that the burden of proof should then have shifted to the State to show that the jury selection process in Duplin County for defendant's trial was not discriminatory. *State v. Lowry*, 263 N.C. 536, 139 S.E. 2d 870 (1965). Defendant's argument is based on the trial court's finding that Duplin County's black population is 34.02% and that the prospective jurors were only 24% black. Defendant is black and so were his three victims. Since the State offered no competent evidence of nondiscrimination, defendant contends that the trial court should have ruled that the jury array was improper. We disagree.

A defendant has a constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. He does not, however, have a constitutional right to be indicted or tried by a jury of his own race or even to have a representative of his race on the petit jury. *State v. Brower*, 289 N.C. 644, 653, 224 S.E. 2d 551, 558 (1976), *motion for reconsideration denied*, 293 N.C. 259, 243 S.E. 2d 143 (1977). The burden is upon the defendant to show a prima facie case of racial discrimination. *Id.* In the case *sub judice*, defendant has failed to show that the jury selection procedure was not racially neutral or that there is a history of relatively few blacks serving on Duplin County juries. According to defendant's statistics, 34% of Duplin County's population is black. Of the 78 prospective jurors, only 24% were black. Defendant has failed to show, however, what portion of the county's 34% black population is actually eligible to serve as jurors. Therefore no correlation can be made between the total black population and the percentage of blacks in the venire. The record brought forward by defendant is insufficient to make out a prima facie case of racial discrimination. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (evidence insufficient where blacks approximately 11% underrepresented on venire from which petit jury drawn). *See also State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). Defendant's assignment of error is overruled.

[14] At this point, we turn to defendant's motion to amend the record on appeal, filed one week before oral argument on his case. We reserved our ruling on the motion until after the case was argued. The motion contains defendant's contention that his indictments stemmed from a grand jury in which the selection of the foreman was racially exclusive of blacks. We permitted defendant to address the issue at oral argument. Defendant's motion is based on *State v. Cofield*, 320 N.C. 297, 357 S.E. 2d 622 (1987), in which we held that where racial discrimination in the selection of the foreman of the grand jury which indicted the defendant can be demonstrated, the defendant's indictment will be vitiated and the judgment against him arrested. *Id.* at 304, 357 S.E. 2d at 626-27. A defendant can make out a prima facie case by showing either (1) that the selection procedure itself was not racially neutral, or (2) that for a substantial period in the past relatively few blacks have served in the position of foreman even though a substantial number have been selected to serve as members of grand juries. *Id.* at 308-09, 357 S.E. 2d at 629. Cofield met the second test by having the Superior Court Clerk testify as to the racial composition of the county as well as the number of blacks appointed as grand jury foremen during the Clerk's long tenure, which testimony was supported by the Clerk's records. Defendant McLaughlin made no such motion at trial and his counsel admitted on oral argument before this Court that no materials had been prepared on grand jury foremen appointments in Bladen County, but stated that he "believed" a *Cofield* situation to exist based on his personal observations as a resident of the neighboring county and his conversations with Bladen County residents. Counsel requested on behalf of defendant that the case be remanded to the trial court for determination as to whether a *Cofield* situation did in fact exist. We decline to remand based on such bare assertions of counsel's personal beliefs. Defendant's motion is denied.

II. GUILT-INNOCENCE PHASE

[15] Defendant first brings forward ten assignments of error relating to the admission into evidence of photographs and slides of the three victims, the expert opinion testimony as to the cause of death, defendant's fingerprints and the iron pipe with which Denise Worley and Psoma Baggett were attacked. Defendant makes one general argument that the evidence and testimony

about which he complains was inadmissible under Rule 403 of the North Carolina Rules of Evidence, which provides:

> Although relevant, evidence may 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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1986). Defendant complains that the prejudicial effect of the evidence and testimony outweighed their relevancy. We disagree.

We address these ten assignments of error as one group. We note initially that the exclusion of evidence under the Rule 403 weighing test is a matter within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). We have carefully scrutinized each of the items of evidence and transcript testimony which defendant argues should have been excluded. We find no error. The photographs and slides, while sometimes gruesome, were relevant, corroborated State witness Robinson's testimony, and aided the pathologists' explanations of their opinions on the victims' cause of death. "Photographs are usually competent to be used by a witness to explain or illustrate anything that is competent for him to describe in words." *State v. Watson*, 310 N.C. 384, 397, 312 S.E. 2d 448, 457 (1984). Gruesomeness alone does not render a photograph or slide incompetent. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979).

As to the several instances of allegedly prejudicial testimony, they were either relevant for corroboration purposes, or as clarification of an expert opinion as to cause or instrumentality of death. The fingerprint lifted from Denise Worley's car matched that of defendant on the fingerprint card—clearly relevant evidence. Finally, the iron pipe was relevant, not only to the State's case as the weapon used to hit Denise Worley and Psoma Baggett, but also to defendant's testimony that it slipped from his hand and hit Psoma accidentally. We conclude that defendant has failed to show that the trial court abused its discretion in allowing these items of evidence to be introduced and this testimony to be elicited.

[16] Defendant's next assignment of error relates to the statement he gave to Detective Little. At trial, the officer read defendant's statement and then answered questions put to him by the prosecutor. The transcript reveals the following:

> Q. All right, so now during the time that you took that statement, did you have occasion to ask Mr. McLaughlin about the pipe?
>
> A. Yes, sir.
>
> Q. And what, if anything, did he tell you about the pipe?
>
> MR. WILLIS: Objection.
>
> THE COURT: Overruled.
>
> A. Uh, McLaughlin told me that the pipe that he used to hit Denise and the child, Psoma, was in a closet near the front door of his mobile home.

The officer further testified that he went to defendant's home where he found the pipe. Defendant contends that by allowing the officer to rely on his memory of events and to testify to defendant's nonrecorded remarks, the trial court allowed the prosecutor to suggest the officer's answers to his questions. This information, argues defendant, was elicited without proper foundation. We are unable to discern any suggestion of a desired response in the prosecutor's questions, or to agree that they lacked sufficient foundation. The officer's testimony was to the effect that he used his recollection of what defendant had told him in order to search for and find the pipe. *See State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513. This assignment of error is without merit.

[17] Defendant's next four assignments of error concern his companion in crime, State witness Eddie Robinson. Defendant complains that he was prejudiced because the trial court allowed (1) the prosecutor to ask "a flurry" of leading questions of Robinson, (2) the State to impeach Robinson by questioning him about his prior criminal activity, (3) the conditional introduction into evidence of the "no deal" written statement from the district attorney to Robinson, and (4) Detective Little to read the statements Robinson made to law enforcement officers, allegedly in violation of N.C.G.S. § 15A-927. We disagree. First, our review of

the transcript reveals that defendant exaggerates—there was but a single leading question to which he excepted. It was asked not by the prosecutor, but by the trial court, and its purpose was to clarify a witness' response to the prosecutor's *non*leading question. Second, N.C.G.S. § 8C-1, Rule 607 permits impeachment of a party's own witness. The State questioned Robinson about his prior criminal activity only after defendant himself had elicited the testimony on cross-examination: the questions appear to have been asked in order to clarify Robinson's testimony on cross-examination. Third, the trial court ruled that the "no deal" arrangement between Robinson and the district attorney could not be introduced unless defendant mentioned it in his jury argument. Neither the court nor the jury saw the statement in question. Fourth, N.C.G.S. § 15A-927, relating to the statements of codefendants, does not apply in this case since, under the statute, restrictions are placed on the use of a codefendant's statement only where a joint trial occurs. N.C.G.S. § 15A-927(c)(1)(a), (1)(b) (1986). Robinson was not jointly tried with defendant. Moreover, here, the State could and did properly use Robinson's statements for corroboration purposes. One of the statements differed from Robinson's trial testimony. Since, however, defendant had cross-examined Robinson about this prior inconsistent statement, he cannot now claim prejudice when statements he himself had brought to the jury's attention were subsequently read to it by Detective Little. These four assignments of error are overruled.

[18] By his next assignment of error, defendant argues that his motion for a directed verdict in the cases of Denise Worley and Psoma Baggett should have been allowed because the State failed to prove premeditation and deliberation. Defendant here incorporates by reference more than one thousand pages of trial transcript to support his argument in addition to all applicable pages of the record. Defendant's argument fails.

The following definitions and principles of law apply. Premeditation means thought beforehand, for some length of time, however short. *State v. Hawkins*, 214 N.C. 326, 199 S.E. 284 (1938). Deliberation means the execution of an intent to kill in a cool state of blood, without legal provocation and in furtherance of a fixed design. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). In considering a motion to dismiss, the trial court must consider all the evidence in the light most favorable to the State. *State v.*

Earnhardt, 307 N.C. 62, 296 S.E. 2d 649 (1982). The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of all elements of the offense charged so that a rational trier of fact could find beyond a reasonable doubt that the defendant committed the crime. *State v. Thompson*, 306 N.C. 526, 294 S.E. 2d 314 (1982). Applying these definitions and principles to the case *sub judice*, we find ample evidence of defendant's premeditation and deliberation in the murders of Denise Worley and Psoma Baggett. Robinson testified that he and defendant had discussed the necessity of "taking care of" Denise. Prior to Denise's death, defendant had shown Robinson the iron pipe and had directed the latter to use it on Denise. When the child Psoma awoke in the car, defendant told Robinson that they would have to "get rid of the . . . little girl, because she could testify against [them]." Robinson testified that defendant hit Psoma on the head with the iron pipe and then threw her from the car into the water. We conclude from this evidence that the trial court properly denied defendant's motion to dismiss.

Defendant now makes one general statement to the effect that under N.C.G.S. § 8C-1, Rule 402, the trial court erroneously refused to allow him to introduce relevant evidence but allowed the State to introduce irrelevant evidence. In a further forty-five issues, scattered through his brief, defendant refers us back to this general statement, apparently arguing that his objections at trial were improperly overruled. The State answers each issue separately and in detail. We have carefully read the appropriate passages in the transcript. We are unable to conclude that the trial court erred in any of its evidentiary rulings. These assignments of error are rejected in toto.

[19] The next three issues defendant brings before us are to the effect that the trial court erred in denying defendant's motions (1) for dismissal of the charges against him at the end of all the evidence, (2) to set aside the three verdicts as against the greater weight of the evidence, and (3) for appropriate relief including a new trial. As to the first issue, defendant argues specifically that the court instructed the jury on all three murders simultaneously, thus presenting a view that the crimes were interrelated and part of a scheme or common plan. This, he asserts, led the jury to assume that if it found defendant guilty of one murder, then it would have to find him guilty of the other two. This assertion

commands no support from the transcript. Although the trial court instructed the jury on the murders simultaneously, the final mandate clearly separated the three cases. The transcript nowhere reveals even a hint of an instruction directing the jury to consider the three murders as a common plan or scheme. This assignment of error is overruled. As to the second and third issues, defendant refers us to his argument just made. It is similarly overruled.

[20] By his next assignment of error, defendant complains that the trial court presented a narrative of the evidence which failed to distinguish his contentions from those of the State. Defendant draws our attention to the contradictions in Robinson's testimony and his own, claiming that the trial court instructed the jury on a version of the facts which in places was inconsistent with both. We are unpersuaded. Under N.C.G.S. § 15A-1232 the trial court is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. This the trial court did. The transcript reveals that although the court's summary of defendant's evidence was shorter than that of the State, it nevertheless clarified the issues and eliminated extraneous matters. *State v. McClain*, 282 N.C. 396, 193 S.E. 2d 113 (1972); *State v. Jackson*, 228 N.C. 656, 46 S.E. 2d 858 (1948). We find no error in the narration of the evidence.

[21] Defendant next claims error by the trial court in refusing his request for clarification of testimony in three areas: (1) its refusal to instruct that Robinson admitted hitting both Denise Worley and Psoma Baggett and that he intended killing them; (2) its refusal to instruct on an evidentiary discrepancy concerning the location of Psoma's body in the creek; and (3) its refusal to instruct that the State's pathologist could not specify Denise Worley's cause of death. The State argues that (1) the trial court instructed that the evidence tended to show that Robinson hit Denise and Psoma; and nowhere does the record reveal an admission by Robinson of an intent to kill; (2) the discrepancy in the location of Psoma's body was for defense counsel to argue; and (3) the trial court's instructions reflected the pathologist's opinion that Denise Worley died of drowning and that the blows to her head would not have caused her death. We have carefully read the trial court's charge to the jury, and do not discern error. The trial court recapitulated the evidence to the extent necessary to

explain the application of the law to the evidence. *State v. McClain*, 282 N.C. 396, 193 S.E. 2d 113. These assignments of error are rejected.

[22] We now address an issue that defendant chooses to present in the portion of his brief relating to the penalty phase of his trial, but which properly relates to the guilt-innocence phase. Defendant argues that the evidence at trial showed that a "rather substantial" time elapsed between his and Robinson's attacks on Denise Worley with the iron pipe, sufficient to eliminate the acting in concert theory, and that the trial court erred in refusing to instruct the jury on this point. This argument fails under *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390, 395 (1979), where we stated that acting in concert means "to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." Defendant's evidence was that after striking Denise Worley with the iron pipe as she attempted to hug him, he went to the bathroom to clean the arm wounds he had earlier sustained, told Robinson what had happened and then watched as Robinson hit Denise. This evidence amply demonstrates that the two men acted together in harmony pursuant to their agreed plan to rid themselves of a potential witness against them for the murder of James Worley. The trial court did not err in refusing to instruct the jury on the time span between the attacks on Denise Worley.

[23] Defendant's next three assignments of error relate to the iron pipe used to attack both Denise Worley and Psoma Baggett, which was placed on the clerk's desk immediately in front of the jury. The trial court refused to give an instruction on the placement or to allow defendant to photograph the desk. It also denied his motion for a mistrial. Defendant now asserts that the district attorney placed the pipe in that position only for the purpose of inflaming the jury, so that defendant suffered prejudice. We are unpersuaded. The pipe was both relevant and admissible and had previously been viewed by the jury. *See State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980). The question therefore becomes whether the trial court abused its discretion in refusing to declare a mistrial. We conclude that it did not. The trial court has the discretionary power to order a mistrial, but such an order must be based upon an occurrence that renders a fair and impartial trial impossible. *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243

(1954). The record shows that the iron pipe was placed in a position only two feet away from other trial exhibits, including several rifles and shotguns introduced by defendant. The trial court found as a fact that the jurors had walked past the guns as well as the iron pipe on their way in and out of the courtroom and had looked at them throughout the trial. We cannot conclude that the sight of the iron pipe, though separated from other exhibits on the morning of the trial court's jury charge, had such an inflammatory effect upon the jury that defendant suffered prejudice thereby. The trial court correctly refused to give an instruction on the pipe's placement, to allow defendant to photograph the clerk's desk or to declare a mistrial.

Finally, defendant complains about what he describes as the trial court's "unnecessary comments" during both phases of his trial. He gives us thirty-eight examples. None of these examples persuade us to defendant's view. The trial court's control of the trial was entirely proper. Defendant's assignment of error is rejected.

III. SENTENCING PHASE

[24] Defendant first directs our attention to several aggravating factors which he argues were erroneously submitted to the jury at the sentencing phase of his trial for the three murders. First, he argues that submission of the aggravating factor of a prior felony was inappropriate under N.C.G.S. § 15A-2000(e)(3). This is entirely without merit. The statute allows the jury to consider as an aggravating factor for sentencing purposes the fact that a defendant has been previously convicted of a felony involving the use or threat of violence to the person. *Id.* Defendant here admitted under oath that he had been convicted of involuntary manslaughter and stipulated that the killing involved the use of violence. This aggravating factor was properly submitted to the jury.

[25] Second, defendant argues that the aggravating factor of commission of the murder to prevent lawful arrest, N.C.G.S. § 15A-2000(e)(4), should not have been submitted in the cases of Denise Worley and Psoma Baggett. He contends that the evidence he presented tended to show that these two deaths were unrelated to the avoidance or prevention of arrest for the murder of James Worley. We conclude that the evidence was sufficient

for the submission of this factor. The State's witness, Robinson, testified that he and defendant schemed to kill Denise Worley to prevent her from exposing their involvement in James Worley's death. The evidence presented makes it clear that they then killed Psoma Baggett to prevent her from identifying them as the men who had murdered her mother, Denise Worley. This aggravating factor was properly submitted to the jury. *See, e.g., State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985).

[26] Third, defendant argues that the aggravating factor of murder for pecuniary gain, N.C.G.S. § 15A-2000(e)(6), should not have been submitted in the cases of Denise Worley and Psoma Baggett. This is a meritless argument, since the factor was only submitted to the jury in the case of the murder of James Worley. As to this murder, the factor was properly submitted on the basis of Robinson's testimony that Denise Worley had offered to pay defendant money to murder her husband.

[27] Fourth, defendant argues that the aggravating factor that the murder of Denise Worley was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9), was improperly submitted to the jury. We do not agree. Evidence was elicited which tended to show that defendant beat Denise with the iron pipe, stuffed her mouth with a rag to stop her screaming, straddled her body, grabbed her by the throat and dragged her into the bathroom. There he forced her head under the water in the half-filled tub and held it there while she struggled desperately for her life. In any event, defendant was not prejudiced by the submission of this factor since the jury made no finding on it and defendant did not receive the death penalty for the murder of Denise Worley.

[28] Finally, defendant argues that the aggravating factor of a course of conduct, N.C.G.S. § 15A-2000(e)(11), for the murders of Denise Worley and Psoma Baggett should not have been submitted for the jury's consideration. Defendant is mistaken. Such a submission under the evidence in the two cases was entirely proper. *See State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983).

[29] Next, defendant contends that his motions to have two mitigating factors submitted to the jury were improperly denied. The motions asked for the submission of the statutory mitigating factor that defendant acted under duress or under the domination of another person because the evidence showed defendant to be a daily and habitual user of alcohol and drugs, N.C.G.S. § 15A-2000(f)(5), and the nonstatutory mitigating factor of defendant's parental obligations because the evidence showed that he contributed to the support of his two minor children, *see* N.C.G.S. § 15A-2000(f)(9). We conclude that the trial court properly denied defendant's motions. Nothing in the transcript reveals that defendant was an excessive user of drugs or alcohol which might have brought him under Robinson's influence in committing the murders. The only evidence as to defendant's parental obligation came from defendant's mother, who testified that defendant's daughter lived with her and that defendant visited her and brought her gifts. The evidence on both these mitigating factors was simply insufficient to require their submission to the jury.

[30] Defendant's next assignment of error concerns the issues and recommendation sheet in the case of the murder of James Worley. Defendant asserts that the trial court's instruction on the sheet, which directed the jury to indicate death as the appropriate punishment if it should find that the aggravating factors outweighed the mitigating factors and were, when considered with the mitigating factors, sufficiently substantial to call for the death penalty, was in effect a removal of that determination from the jury's province. We have repeatedly upheld the validity of such an instruction. *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279 (1987); *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L.Ed. 2d 342 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203. This assignment of error is overruled.

[31] Defendant also argues in a separate assignment of error that the verdict sheet in the case of James Worley was so complicated that it necessarily resulted in confusion amongst the jurors and prejudice to him. We have scrutinized the issues in this case as they were submitted to the jury. We find them in

compliance with our directive in *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983), that the order and form of the issues to be submitted to the jury should be substantially as follows:

(1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

(2) Do you find from the evidence the existence of one or more of the following mitigating circumstances?

(3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found?

(4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

Id. at 32-33, 301 S.E. 2d at 327. This assignment of error is rejected.

[32] Defendant now brings to our attention several assignments of error relating to the removal of a juror between the guilt-innocence and sentencing phases of the trial. The record reveals that on the morning the sentencing phase began, female juror Simmons was crying uncontrollably. She told the trial court that she felt incapable of remaining on the jury, but explained that she did not think that the prospective sentencing phase was the cause of her condition. Defendant complains that the trial court immediately excused juror Simmons, without asking her to go to another room and make an effort to compose herself. Juror Simmons was the only black female who sat as a juror at the guilt-innocence phase of defendant's trial. The trial court replaced her with the first alternate juror, a white male. Defendant argues that juror Simmons should have been allowed an opportunity to recover her equanimity.

The decision to replace a juror with an alternate juror is within the trial court's discretion. *State v. Stanley*, 227 N.C. 650, 657, 44 S.E. 2d 196, 200 (1947); *State v. Nelson*, 298 N.C. 573, 260

S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980).

> The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and the defendant may receive a fair trial. This discretionary power to regulate the composition of the jury continues beyond empanelment. It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error.

State v. Nelson, 298 N.C. at 593, 260 S.E. 2d at 644 (citations omitted). *See also* N.C.G.S. § 15A-1215 (1986). Here, the trial court described juror Simmons as distraught and highly emotional. She could speak only with difficulty. She informed the trial court that she could not control herself. We fail to find an abuse of the trial court's discretion where the record so clearly demonstrates that an immediate replacement was necessary. Having excused and replaced juror Simmons, however, the trial court sent her to the jury room. Defendant maintains that this action violated N.C.G.S. § 15A-1236(c) because juror Simmons was no longer a juror and should not have been in further contact with the other jury members. He moved for a mistrial, and the trial court denied his motion. Defendant now argues that juror Simmons might have communicated her feelings about the three cases to her former colleagues. He also argues the possibility that a juror who is excused after the guilt-innocence phase might have voted for life imprisonment while the alternate juror who did not determine guilt-innocence might vote for the death penalty. Defendant contends that such is the case here. Both these arguments are mere speculation. The record shows that when the trial judge ordered juror Simmons to be returned to the jury room, he admonished her not to speak to the other jurors "about it."[1] We will not assume that juror Simmons ignored the trial court's admonition. Neither will we assume that the alternate juror, who replaced juror Simmons and who was present throughout the guilt-innocence phase, either automatically voted for the death penalty or

1. "It" presumably refers to the case.

failed to follow the trial court's instructions. The trial court properly denied defendant's motion for a mistrial.

[33] Defendant, in two separate arguments, next argues that his prior conviction for involuntary manslaughter should not have been introduced, N.C.G.S. § 8C-1, Rule 403 (1986), because its probative value was outweighed by its prejudicial effect. These arguments are totally without merit. Defendant admitted the conviction and stipulated to it. The evidence of the conviction is clearly admissible in the sentencing phase of defendant's trial as an appropriate method of establishing the N.C.G.S. § 15A-2000(e)(3) aggravating factor. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). These assignments of error are overruled.

[34] Next, defendant argues that North Carolina's death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional under both the state and federal constitutions. We have consistently and repeatedly held that this state's capital sentencing scheme is constitutional, *see, e.g., State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), and that N.C.G.S. § 15A-2000 is constitutional, *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197; *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L.Ed. 2d 1181 (1980). We decline to depart from these decisions.

Next, defendant finds fault with the trial court's supervision of his counsel's jury arguments. We have closely scrutinized the transcript pages to which defendant draws our attention. Having read in context the phrases to which defendant excepts, we find no error.

[35] Defendant now assigns error to several aspects of the trial court's charge to the jury at the sentencing phase of his trial. This he does with fifteen individually numbered issues clumped together and one numbered separately and out of sequence. First, he contends that the trial court committed reversible error by expressing an opinion in commenting directly to the news media in beginning its jury charge. This comment, he argues, could only have had the effect of demonstrating to the jury that its actions were subject to close public scrutiny, thereby prejudicing defend-

ant's chances of receiving a fair determination in sentencing. This argument is meritless. In referring to the issues and punishment recommendation sheet, the trial court spoke as follows:

> I note that there are several members of the news media present and they will have an opportunity not to get a copy but to look at a copy that I have if they need to. It is mainly to give them a little more comprehension about what they are trying to write about.

This was not an opinion; rather, it was a neutral statement and could have had no effect whatsoever upon the jury's sentencing decision.

[36] Second, defendant contends that the trial court's "numerous" denials of his requests to "correct" the jury instructions constitute prejudicial error. We do not agree. We have studied the pertinent passages in the transcript. In some instances, the trial court did in fact give a suggested additional instruction; in others, it had already given a proper instruction on the particular point about which defendant now complains; and in yet others, the trial court properly found no basis for defendant's dissatisfaction. These assignments of error are rejected.

[37] By his next assignment of error and a later, repetitive assignment, defendant contends that the trial court erred in denying his motion to impose a life sentence after the jury had deliberated for seven hours. He argues that the time period was sufficient to indicate that the jury was unable to reach a unanimous decision as to the death penalty and that the trial court should have declared a mistrial and imposed a life sentence pursuant to N.C.G.S. § 15A-2000(b). We are unable to agree with defendant's argument. In *State v. Johnson*, 298 N.C. 355, 370, 259 S.E. 2d 752, 762 (1979), we held that what constitutes a reasonable time for jury deliberation in the sentencing phase of a capital trial is a matter within the trial court's discretion. We have noted also that some cases may involve varying numbers of aggravating and mitigating factors which the jury must consider. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). In *Kirkley*, we held that a deliberation period of seven and one half hours was reasonable where there were two separate cases, each with one aggravating factor and fourteen mitigating factors. Defendant's jury

was considering three separate cases. The murder of James Worley required consideration of two aggravating and six mitigating factors; the murder of Denise Worley, four aggravating and six mitigating factors; and the murder of Psoma Baggett, three aggravating and six mitigating factors. Under these circumstances, we cannot say that the trial court abused its discretion in refusing to declare a mistrial and impose a life sentence. Defendant goes on to contend in a later section of his brief that in addition to the lengthy deliberation, the jury's obvious confusion and lack of unanimity with regard to certain issues were sufficient to warrant a mistrial. This argument is without merit. The transcript reveals that defendant had at that point of the trial made a motion, not for a mistrial, but for imposition of life sentences by the trial court in the cases of Denise Worley and Psoma Baggett. Since the jury imposed life sentences in both cases, defendant has suffered no prejudice.

[38] Defendant presents another ground upon which he asserts that his motion for mistrial should have been granted. After the jury had completed its task in the guilt-innocence phase and had begun deliberating in the sentencing phase of defendant's trial, the foreman asked the trial court several questions about the acting in concert theory. The foreman stated that he did not know what acting in concert meant and asked for an explanation. The trial judge replied that he would be happy to explain the concept after the jury had completed deliberation on defendant's punishment. Defendant contends that the foreman's remark demonstrates that he had applied a legal theory that he did not understand in determining defendant's guilt or innocence. The State, on the other hand, contends that the foreman's questions about acting in concert related to a concern about imposing the death sentence on defendant under circumstances where his cohort Robinson may have been the principal actor. Since the jury decided that defendant should receive life imprisonment rather than the death penalty for the murders of Denise Worley and Psoma Baggett, the State argues that any confusion on the foreman's part inured to defendant's benefit rather than to his detriment. Although the transcript is not clear on this point, we agree that defendant was not prejudiced. The trial court had ample evidence before it to warrant the acting in concert instruction to the

jury and its instruction on the concept was proper in all respects. We therefore overrule this assignment of error.

[39] In a further assignment of error, defendant contends that the trial court erred in allowing an unidentified juror who was not the foreman to express an opinion in open court during the sentencing phase about the confusion she perceived to exist in the sentencing forms. The transcript reveals that the jury experienced some difficulty in completing the forms in the cases of Denise Worley and Psoma Baggett. The foreman was explaining the jury's difficulty to the trial court when the female juror asked permission to speak. The trial court allowed her to do so, and she then simply clarified the foreman's explanation of the jury's confusion. She did not speak again. Even if we found this to be error, and we do not, defendant received life sentences in both these cases and thus cannot demonstrate prejudice here.

[40] Defendant's next argument is that the trial court erred in refusing to accede to the jury's request to see an exhibit. The trial court informed the jury that it could only view exhibits during the trial while sitting together in the jury box. Defendant asserts that this answer violated N.C.G.S. § 15A-1233(b). We agree that the trial court misstated the law, but we do not find prejudice to defendant. The transcript shows that the jury did not unequivocally demand to see the particular exhibit. Moreover, defendant failed to object to the trial court's statement, and this assignment of error has been waived. N.C.G.S. § 15A-1446 (1986).

[41] We now address defendant's several complaints about the jury poll, all of which are similar and should have been grouped together in the brief. After deliberation, the jury originally returned with a recommendation to impose the death sentence in all three cases. A jury poll was taken, at which time one of the jurors, Ms. Mobley, recanted her decision to recommend death in the cases of Denise Worley and Psoma Baggett. Defendant's basic contention is that he should have been permitted to poll juror Mobley again as to her decision in favor of the death penalty in the James Worley case. He also argues that since juror Mobley's recantation in the Denise Worley and Psoma Baggett cases demonstrated dissension and confusion among the jurors, defendant should have been permitted to repoll the twelve, to "see if they, in fact, disagreed with the decision . . . as stated by the

foreman." In this regard, he maintains that his motion for further jury deliberation was erroneously denied by the trial judge. Finally, he asserts that juror Mobley was erroneously denied her request to speak after she had recanted on the two death sentences. N.C.G.S. § 15A-1238 (1986). We find no merit in any of these complaints.

The transcript reveals that juror Mobley was polled twice in regard to her death sentence decision in the James Worley case, once during the normal course of polling after the jury's death sentence recommendation in all three cases and again after she had recanted in the Denise Worley and Psoma Baggett cases. When asked whether she wanted to reconsider the death sentence in the James Worley case, juror Mobley replied that she stood by her original decision in that instance. We do not believe that further polling of juror Mobley or an individual explanation of the rationale for her decision to recant in the Denise Worley and Psoma Baggett cases was necessary. The jury had reached a unanimous verdict in its recommendation of the death penalty for the James Worley murder and in polling, juror Mobley twice reconfirmed her vote. There was no reason for the jury to deliberate further in the James Worley case. Moreover, a trial court has no authority to change a jury's sentence recommendation. *State v. Jackson*, 309 N.C. 26, 45, n.3, 305 S.E. 2d 703, 716, n.3 (1983).

Defendant now brings forward seven assignments of error concerning the trial court's denials of his motion to dismiss, motion for mistrial, motion for judgment notwithstanding the verdict and motion for appropriate relief. In these assignments, defendant refers the Court to arguments made earlier in his brief. As we have already addressed these issues, we decline to readdress them here.

Defendant next draws the Court's attention to several aspects of the trial court's charge to the jury during the guilt-innocence phase of defendant's trial that he contends were erroneous. He also complains about "incomprehensible verdict sheets" and the "totally unmanageable nature of the proceedings." These contentions are inexplicably out of sequence, are virtually identical to defendant's prior contentions on the same subject and have been previously addressed.

Four instances of the trial court's dealing with the jury now come under criticism from defendant. Specifically, he argues that the court erred in its (1) instructions to the jury about sentencing alternatives, (2) delivery of the penalty phase verdict sheets to the jury foreman out of his colleagues' presence, (3) admonitions to the jurors not to become ill, and (4) instructions to the jury about its consideration of mitigating factors.

[42] First, defendant contends that the jury should have been allowed to add comments if it wished in the punishment blanks on the verdict sheet. This contention is without merit. Under N.C.G.S. § 15A-2000(b), the jury is required to consider aggravating factors and mitigating circumstances and then to determine "whether the defendant should be sentenced to death or imprisonment in the State's prison for life." These are the only alternatives allowed the jury. Other comments or notations are irrelevant. Second, defendant argues that the trial court impermissibly conversed individually with the jury foreman when handing the verdict sheets to him out of the presence of the other jurors. We have reviewed the trial court's comments; they are entirely innocuous and convey nothing about the evidence or the court's personal opinion of the trial. We note that defendant failed to object at the time. *See* N.C.G.S. § 15A-1446 (1986). Defendant's argument is without foundation in fact. Third, defendant contends that the trial court erred in its statement to the jury that the trial would have to await the recovery of any sick juror before proceeding. Once again, we find no merit in defendant's argument. One juror had already been excused because of incapacitation. The trial court's remarks appear in the nature of a warning to the twelve that they should not feign sickness to avoid their duty of recommending defendant's punishment. Since no other juror requested removal or showed any evidence of illness during deliberations, defendant has failed to show prejudice of any kind. Finally, defendant contends that the trial court instructed the jury that it did not have to consider every mitigating factor in making its recommendation as to his punishment. This argument is meritless. The transcript shows that the trial court was responding to the jury foreman's questions about completing the blanks on the punishment recommendation sheet pertaining to aggravating and mitigating factors. The court properly instructed the jury that it had to fill in and answer all the aggravating fac-

tor blanks, but could leave the mitigating factor blanks empty if it did not find the factors by a preponderance of the evidence. These four assignments of error are overruled.

[43] Defendant goes on to argue, however, that his convictions and sentences should be set aside due to the "fatally defective nature of the charge, [the] required verdict sheets, [and the] required considerations of elements and factors." This opinion was originally filed on 2 June 1988. Subsequently, the United States Supreme Court filed its decision in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), which addressed the requirement of unanimity of the jury in finding mitigating circumstances in the sentencing phase of a capital trial. This Court, in conference, determined to treat the above-referenced argument as having raised the *Mills* issue and concluded that there should be additional briefing and argument in this case and all other cases presently before the Court with respect to the issues raised by *Mills*. This opinion was withdrawn on 13 June 1988, and supplemental briefing on the applicability of *Mills* was ordered on the same date. Oral argument was ordered on 28 July 1988 and was heard on 22 August 1988. For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we reject defendant's argument based upon the holding of *Mills*.

[44] Finally, defendant argues for reversal of his convictions and sentence or, alternatively, for a new trial, because the court reporter took eighteen months to prepare the transcript of his trial and because, in his view, its condition is such that it precludes meaningful appellate review. Defendant mistakenly relies upon *State v. Sanders*, 312 N.C. 318, 321 S.E. 2d 836 (1984) (per curiam), which involved a transcript so incomplete and inaccurate that one could not distinguish between transcript error and reliable trial testimony reporting. Although the transcript in the case *sub judice* cannot be described as a model of reporting service, it is not so inaccurate as to prevent this Court from reviewing it for errors in defendant's trial. Defendant's assignment of error in this regard is overruled.

Having found no error in the guilt-innocence or sentencing phases of defendant's trial, we now undertake our solemn statu-

tory duty of reviewing defendant's convictions and sentence of death for proportionality. N.C.G.S. § 15A-2000(d)(1) (1986).

IV. PROPORTIONALITY REVIEW

[45] In conducting the review, the Court uses as a pool of cases for comparison purposes all cases which were tried as capital cases after 1 June 1977 where the jury recommended death or life or where life was imposed due to an inability on the jury's part to agree on a sentence, and which were found to be without error on direct appeal. *State v. Williams*, 308 N.C. 47, 79, 301 S.E. 2d 335, 355. In making the comparison, the Court does not simply engage in rebalancing the aggravating and mitigating factors; rather, it is obligated to scour the entire record for all the circumstances of the case *sub judice* and the manner in which defendant committed the crime, as well as defendant's character, background, and physical and mental condition. *State v. Lawson*, 310 N.C. 632, 648, 314 S.E. 2d 493, 503, *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985).

We have compared both defendant and the crime to the roughly similar cases in the proportionality pool and to those cases found disproportionate to date. We conclude that defendant's death sentence is proportionate.

Defendant received the death sentence for the murder of James Worley. The jury found the two aggravating circumstances submitted to it beyond a reasonable doubt: (1) defendant had previously been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3), and (2) the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6). Of the mitigating circumstances submitted to it, the jury found three by a preponderance of the evidence: (1) defendant aided in the apprehension of another capital felon (the State's witness, Eddie Robinson), N.C.G.S. § 15A-2000(f)(8), (2) defendant has a low mentality with an IQ of 72, and (3) defendant had been employed at Cape Craft Pine for fourteen years and there he had been a good, dependable worker, well thought of by his supervisor and his fellow workers. The jury refused to find that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, and it failed to answer whether defendant had been a person of good character and reputation in the community.

The proportionality pool presently contains one other contract killing case, *State v. Lowery*, 318 N.C. 54, 347 S.E. 2d 729 (1986). In *Lowery*, James Small, the victim's husband, hired Lowery and another man named Johnson (subsequently the State's witness) to murder Mrs. Small. Lowery and Johnson strangled her to death. Lowery and James Small were tried jointly and the jury recommended death for Small but life for Lowery. The record on appeal in *Lowery* reveals that the jury found that the murder was especially heinous, atrocious or cruel and that it was committed for pecuniary gain. In mitigation, however, the jury found that Lowery's capacity to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6), and that other nonstatutory mitigating circumstances existed. In contrast to the *Lowery* case, defendant in the case *sub judice* did not make a N.C.G.S. § 15A-2000(f)(6) showing. Moreover, the presence here of the aggravating circumstance N.C.G.S. § 15A-2000(e)(3), a prior felony involving the use of violence to the person, differentiates defendant's case from *Lowery*. Also, unlike Lowery, defendant had already killed once when he killed James Worley. N.C.G.S. § 15A-2000(e)(3) reflects upon defendant's character as a repeat offender. "N.C.G.S. § 15A-2000(e)(3) in particular tends to demonstrate that the crime committed was part of a long term course of violent conduct." *State v. Brown*, 320 N.C. 179, 224, 358 S.E. 2d 1, 30 (1987). Lowery killed one person. Defendant killed four persons—three of them within a two-month period.

To date, this Court has vacated the death sentence as disproportionate in six cases: *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, State v. Vandiver*, 321 N.C. 570, 384 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); and *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). None of these cases involved a contract killing. In *Bondurant, Hill, Jackson* and *Stokes*, we noted that the State had failed to show that the defendants there had coldly calculated or planned the commission of the murders over a period of time. Such is not the case here. Here, the State's evidence showed that defendant carefully planned James Worley's murder and schemed about how best to accomplish it. In none of the cases found disproportionate had the

defendant killed another person prior to the murder for which he received the death penalty. Here, defendant had killed once before the James Worley murder and he killed again, twice, after it to cover his involvement. In *Stokes* and *Young*, the defendants were relatively young. In *Bondurant*, the defendant tried to help his victim and exhibited great remorse. In *Stokes*, *Bondurant*, *Hill* and *Jackson*, the defendants were drunk or mentally impaired at the time of the crimes. Here, none of these mitigating factors existed. We are unable to conclude that defendant's murder of James Worley "does not rise to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Jackson*, 309 N.C. at 46, 305 S.E. 2d at 717.

Defendant compares his case with *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181; *State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703, because in common with defendant's case, they all involved the pecuniary gain aggravating circumstance, N.C.G.S. § 15A-2000(e)(6). Unlike Young, Whisenant and Jackson, however, defendant was a contract killer, not an armed robber. Defendant murdered James Worley, a man against whom he had no personal grudge, at the instigation of Worley's wife, for monetary consideration. The calculating nature of this contract killing is illustrated by defendant's preparations—selecting the weapon and readying the gasoline—and by his actions after the murder—dressing the corpse and then burning it in the car to suggest accidental death. This was a cold-blooded contract murder, not comparable to the armed robbery felony-murders in *Young*, *Whisenant* and *Jackson*. We hold that defendant's violent history as well as his brutality and calculation in the killing and disfiguring of his victim's body and his total lack of remorse for the murder as demonstrated by his further murders of James Worley's wife and her small child fully support the jury's recommendation of death in this case.

We have addressed all of defendant's assignments of error and have scoured the record and transcript of his trial in all three cases. We conclude that defendant received a fair trial and a sentencing hearing free from prejudicial error before an impartial judge and jury. The convictions are supported by the evidence. The sentence of death is also supported by the evidence and is not disproportionate.

No error.

Justice FRYE dissenting as to sentence.

For the reasons expressed in the Chief Justice's dissenting opinion in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), which I joined, I believe the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that defendant be given a new sentencing hearing. Accordingly, I dissent from that portion of the Court's opinion which rejects defendant's argument based upon the holding of *Mills*. I concur in the remainder of the Court's opinion.

Chief Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. TIMOTHY ALBERT HARRIS

No. 51A88

(Filed 7 September 1988)

1. **Homicide § 12.1— murder—indictment—short form—sufficient**

An indictment for first degree murder which was in compliance with the short form authorized by N.C.G.S. § 15-144 was sufficient.

2. **Homicide § 12.1; Indictment and Warrant § 13— murder—premeditation and deliberation or felony murder—election not required**

The trial court did not err in a murder prosecution by failing to require the State to elect either the theory of premeditation and deliberation or the theory of felony murder.

3. **Criminal Law § 15.1— murder—change of venue for pretrial publicity denied—no error**

The trial court did not err in a murder and armed robbery prosecution by denying defendant's motion for a change of venue based on pretrial publicity where the articles complained of were factual and devoid of any prejudicial speculations or characterizations; and the record does not disclose that defendant exhausted his peremptory challenges or that any juror had prior knowledge of the case.

4. Bills of Discovery § 6; Constitutional Law § 30— statement of defendant to jailer—substance provided before trial—identity of witness and circumstances not revealed—no error

The trial court did not err in a prosecution for murder and armed robbery by refusing to require the State to reveal the name of a witness, to provide a copy of the witness's written statement to defendant prior to trial or to provide a description of the facts and circumstances surrounding the statements where a jailer gave a statement to an investigator recounting a conversation with defendant, the State provided defendant with the substance of his own remarks without identifying the witness or providing a written copy of the statement, and the State made the written statement available to defendant at trial. N.C.G.S. § 15A-903(a)(2); N.C.G.S. § 15A-903(f)(1); N.C.G.S. § 15A-904(a).

5. Jury § 9— acquaintance of juror with witness—discovered after trial began—juror not removed

The trial court did not abuse its discretion in a prosecution for murder and armed robbery by denying defendant's motion to withdraw a juror who was acquainted with a witness where the witness's name was not revealed during jury selection, the acquaintanceship was not apparent until the two were observed greeting one another at the courthouse, both the court and the defense attorney questioned the juror about his relationship with the State's witness, and the juror stated unequivocally that the acquaintance would not affect his ability to remain fair and impartial.

6. Criminal Law § 135.7— murder—preliminary instructions on bifurcated trial—no error

There was no prejudice in a murder prosecution where the court gave a preliminary pattern jury instruction that "however, prior to that time the only concern of the trial jury is to determine whether the defendant is guilty of the crime charged or of any lesser included offenses about which it is instructed." The purpose of the instruction was clearly to limit the jury during the first phase of the trial to consideration of issues bearing upon the guilt or innocence of the accused without concern as to sentencing issues and, at defendant's urging, the trial judge remedied the situation with a curative instruction.

7. Criminal Law § 62— reference to polygraph test—mistrial denied—no error

The trial court did not err in a prosecution for murder and armed robbery by failing to declare a mistrial after a State's witness testified that he had asked both defendant and an accomplice who testified for the State to take a polygraph test where the witness's statement was neutral on its face in that it did not reveal responses to the request to take the test or whether the test was given and the judge took appropriate action to prevent any improper inference by allowing defendant's cross-examination of the witness to address that concern and by giving a cautionary instruction. Moreover, although defendant argues that the court erred by prohibiting evidence of a voice stress test after the door had been opened to lie detector evidence, the trial court in fact indicated that it would permit such evidence and defendant made no attempt to elicit the evidence.

8. Criminal Law § 43.4— murder—photograph of victim—properly admitted

The trial court did not err in a prosecution for armed robbery and murder by admitting a color photograph of the victim's remains where the victim was found two and one-half weeks after the murder and the upper body had apparently been ravaged by animals. An investigator identified the photograph as a fair and accurate representation of the victim's body as it appeared at the crime scene and it therefore was admissible to illustrate the location and position of the body when found as well as to corroborate details of other testimony; furthermore, there was no issue of inflammatory repetition because the State introduced only one photograph of the body.

9. Criminal Law § 86.4— murder—fight during competency evaluation—introduction not prejudicial

There was no prejudice in a prosecution for armed robbery and murder where the court allowed the prosecutor to cross-examine defendant about a fight in which he was involved at Dorothea Dix Hospital during his competency evaluation. Although the evidence was not relevant to the issue of credibility, and the State made no attempt to present an alternative argument for admissibility under N.C.G.S. § 8C-1, Rule 404(b), there was no prejudice because the testimony revealed that the brief altercation was not a fist fight and that defendant had merely pushed another patient down as a means of defending himself when the man attacked him. N.C.G.S. § 8C-1, Rule 608(b); N.C.G.S. § 15A-1443(a).

10. Homicide § 21.5— first degree murder—evidence sufficient

The trial court did not err in a prosecution for armed robbery and first degree murder by denying defendant's motion to dismiss the charge of premeditated and deliberate murder where the evidence, viewed in the light most favorable to the State, showed a statement of violent intent by defendant well in advance of the murderous deeds; a distinct lack of provocation on the part of the victim; and a brutal killing involving multiple skull injuries, many of which were inflicted after the victim had already been felled and incapacitated.

11. Criminal Law § 117.4— murder—special instruction on motive of accomplice denied—no error

The trial court did not err in a prosecution for armed robbery and murder by denying defendant's request for a special instruction on the motive of an accomplice who testified for the State where the trial judge gave defendant wide latitude to develop his theory that the accomplice was motivated by economic deprivation to commit the murder and admonished the jury to examine the accomplice's testimony with the greatest of care and caution in light of the evidence that he was an accomplice and of his plea agreement with the State; moreover, the trial judge charged the jury upon the alternate theory that defendant and the accomplice were acting in concert and an instruction as to the accomplice's motive would have been harmful to defendant rather than helpful.

12. Criminal Law § 113.7— murder—instruction on aiding and abetting not given—no error

The trial court did not err in a prosecution for armed robbery and murder by refusing defendant's request for an instruction on aiding and abetting where defendant was not charged with aiding and abetting nor did the evidence support such a theory.

13. Criminal Law § 138.14— robbery—sentencing—single aggravating factor outweighing two mitigating factors

The trial court did not err when sentencing defendant for robbery with a dangerous weapon by determining that the single aggravating factor of prior convictions outweighed the two mitigating factors of physical condition and aiding in the apprehension of another felon. N.C.G.S. § 15A-1340.4(a)(1)o; N.C.G.S. § 15A-1340.4(a)(2)d and h.

APPEAL by defendant from judgments sentencing him to consecutive terms of life imprisonment for conviction of murder in the first degree and forty years for conviction of robbery with a dangerous weapon, said judgments imposed by *Tillery, J.*, at the 14 September 1987 session of Superior Court, CRAVEN County. Heard in the Supreme Court 12 May 1988.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the state.

Rudolph A. Ashton, III and Jerry D. Redfern for defendant.

MARTIN, Justice.

Defendant brings forth twelve assignments of error with respect to his trial. For the reasons stated below, we hold that defendant received a fair trial free from prejudicial error.

The state's evidence tended to show the following:

On the evening of 5 April 1987 defendant and his housemate Eddie Neil patronized Jerry's Lounge, a bar on Old Cherry Point Highway near New Bern. Defendant and Neil soon became acquainted with another patron—the victim, Ernest Hardy. The men conversed while defendant and Hardy took turns buying rounds of drinks. Throughout the evening, Hardy watched the clock, stating that he had "a meeting down the road." Sometime after midnight defendant indicated that he was going to give Hardy a ride but would return to the bar shortly. Defendant, Neil, and Hardy then left. Half an hour later, defendant and Neil re-

turned. Defendant responded to inquiries as to Hardy's whereabouts by explaining that he had "taken him down the road to the Exxon." He further stated that Hardy had asked him to wait a few minutes and had gotten into a black Cadillac with two black men. Defendant said he got nervous and left. Defendant appeared calm during this explanation, although he expressed some concern as to whether he had done the right thing in leaving Hardy alone with the men. During defendant's explanations, Neil nodded in agreement but did not contribute anything.

On 8 April Hardy's sister filed a missing person's report with the Craven County Sheriff's Department. On 9 April Investigator David Arthur interviewed defendant and Neil about the case. Defendant told the story of Hardy's "meeting" at the Exxon while Neil quietly concurred. On 10 April defendant talked with Investigator Bob Brown, reiterating the story.

On 24 April Investigator Arthur met with Neil at Neil's request. Neil stated that defendant had killed Hardy and was planning to leave the jurisdiction. Neil then led police officers to a gravel lot two and one-half miles east of New Bern, diagonally across Highway 70 from the fairgrounds.

Ernest Hardy's remains were found in the surrounding wooded area, sixty-nine feet from the edge of the gravel lot. The land sloped so the body could not easily be seen from the lot. The body lay face up. It was substantially decomposed and partially skeletonized where the flesh had been consumed by scavengers. The fly on the victim's pants was open and his right pocket turned inside out. The victim's lower jawbone rested some twenty-five yards away from the body. Three human teeth, the victim's blood-stained baseball cap, and a wooden club with a metal end and the trade name "Tire Billy" printed on it were found on the site. An autopsy performed by Dr. Darlene Thorn, forensic pathologist, revealed several significant skull injuries. Dr. Thorn noted multiple fractures inflicted by at least five major blows with a blunt instrument. There was a large hole in the left forehead area where a portion of the skull was missing. The cause of death was blunt trauma injury to the brain and skull.

Both defendant and Neil were arrested and charged, respectively, with murder in the first degree and accessory after the fact. Upon arrest defendant repeated the story about the mysteri-

ous black men in spite of Investigator's Arthur's indication that Neil had implicated him.

On 27 April Investigator Arthur responded to a message from the county jail that defendant wanted to talk to him. Defendant stated that he wanted to "get straight and tell the truth," then blamed Neil for the murder. Investigator Arthur later confronted Neil with defendant's accusations. Neil made another statement which included previously undisclosed information about his own role in the killing. Neil was then charged with murder and robbery. Before trial Neil pled guilty to murder in the second degree and robbery with a dangerous weapon.

At trial the state relied primarily on the eyewitness testimony of Neil, who testified pursuant to a plea agreement. According to Neil, on 5 April he and defendant drank and smoked marijuana throughout the day. They went to Jerry's Lounge at about 7:30 to continue drinking. Ernest Hardy came in and started flashing his money around in the bar. Later that evening defendant agreed to give Hardy a ride home, but when Hardy was out of earshot, defendant privately told Neil that he was going to "knock Ernest Hardy in the head."

After the three men had driven five or ten miles down Highway 70, defendant said he had to use the bathroom. He pulled off the road into a vacant lot across from the fairgrounds. Hardy got out and walked around to the back of the car while Neil remained inside. Defendant reached into the backseat along the floorboard where he kept a club, then walked to where Hardy was standing. Neil heard a loud thump. He looked back and saw Hardy fall to the ground. When he got out to investigate he saw defendant standing over the fallen Hardy, beating him in the head with the club.

Defendant bludgeoned Hardy several times. He then stopped and dropped the club, whereupon Neil picked it up. Defendant told Neil to hit Hardy so Neil clubbed him three times. They rolled Hardy over and defendant took his wallet, diamond ring, and gold necklace while Neil took his knife and belt. They then dragged Hardy into the woods and placed him on some rocks. Defendant observed that Hardy was still breathing and struck Hardy's face two or three times with a rock. At defendant's sug-

gestion Neil also hit Hardy with a rock. Defendant warned Neil that he would kill him if he told anyone about the incident.

On the way back to the bar, defendant instructed Neil to state, if questioned, that Hardy had gotten in a car at the Exxon station with two big black men. Defendant said he was going to get his paycheck and go to Texas so he could "get out of town before they caught up with what had happened."

The state also presented the testimony of jailer James Sauls. On 29 April Sauls had a conversation with defendant at the Craven County Jail which prompted him to contact Investigator Arthur. During a discussion concerning the effect of defendant's incarceration upon his family, Sauls encouraged defendant to rely on the Bible. Defendant responded that twice he got away from the Bible and each time ended up in jail. He stated "I was out smoking that dope and I knocked a man in the head and here I am again."

Defendant presented evidence tending to show that Eddie Neil, while incarcerated in Craven County Jail, threatened another inmate by stating "I done killed one [person] and it means nothing to me if I have to kill you." Defendant also testified on his own behalf and denied bludgeoning the victim. He stated that he had gotten an insurance check the first week of April from which he had $300 left over. Neil, on the other hand, was out of work and rarely had money for drinks. On the night in question defendant bought drinks for Neil and when Hardy came in they alternated buying rounds for the people in the bar. They left about 12:30 a.m. in order to share some marijuana and cocaine that Hardy had. Neil said he had to use the bathroom so they pulled off the road and everyone got out of the car. When defendant finished urinating and turned around towards the car, he saw Neil get the club out of the car and hit Hardy in the back of the head. When Hardy fell down Neil beat him several times, then ordered defendant to help drag the body. Defendant helped because he was afraid Neil would turn on him if he refused. Neil noticed that Hardy was still alive and said he needed to kill him because he had seen his face at the bar. Neil picked up a rock and hit Hardy repeatedly in the face and chest right over the heart. Again defendant did not intervene for fear that he would also be killed. Hardy was still breathing when they left. Neil made up the

story about the black men and told defendant to back him up or his life would be in danger.

Defendant also testified that he grew up in a family of ten children and completed the eleventh grade in school. He has held a variety of jobs in three states and at the time of the offense was employed as a carpenter at Hatteras Yachts. He has previously been convicted of armed robbery, tampering with a vehicle, abandonment of children, and two counts of driving while intoxicated. Once he caught his wife "running out" on him and shot a pistol three times into the roof of their home. He used to shoot cocaine but at the time of the offense was not shooting or using the drug heavily, although he was dealing it and taking a portion of the cocaine as profit. On the night in question he drank heavily and used both cocaine and marijuana.

The jury convicted defendant of murder in the first degree based upon theories of premeditation and deliberation and felony murder. Defendant was also convicted of robbery with a dangerous weapon. Pursuant to N.C.G.S. § 15A-2000(a)(1), a sentencing hearing was held to determine defendant's punishment for the murder conviction.

The state presented no evidence in the sentencing phase. Defendant put on several character witnesses whose testimony tended to show that he has an easygoing personality, has been a model inmate at Craven County Jail, and has been a loving brother and son. A psychological evaluation from Dorothea Dix Hospital indicated that he has an IQ of 84 and his intoxicated condition at the time of the crime "most probably restricted his ability to conform his actions within limits established by the law by determining a tendency for impulsive behavior with limited ability to control his emotions and conduct."

The jury found as aggravating circumstances that the murder was committed for the purpose of avoiding arrest, N.C.G.S. § 15A-2000(e)(4), and that the murder was committed while the defendant was engaged in the commission of a robbery with a dangerous weapon, N.C.G.S. § 15A-2000(e)(5). The jury found as statutory mitigating circumstances 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), and that defendant aided in the apprehension of

another capital felon, N.C.G.S. § 15A-2000(f)(8). The jury also found the catchall circumstance of N.C.G.S. § 15A-2000(e)(9) and the nonstatutory circumstance that defendant was gainfully employed and a person of good reputation at his place of employment. Having determined that the mitigating circumstances were not insufficient to outweigh the aggravating circumstances, the jury recommended a sentence of life imprisonment. The trial judge then imposed a sentence of forty years' imprisonment for robbery with a dangerous weapon, to be served at the expiration of the life sentence. Defendant appealed the murder conviction pursuant to N.C.G.S. § 7A-27(a). His motion to bypass the Court of Appeals on the appeal of the robbery conviction was granted 1 February 1988.

[1] Defendant first contends that the indictment for murder in the first degree was fatally defective. The indictment, in compliance with the short form authorized by N.C.G.S. § 15-144, charged the following:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously and of malice aforethought did kill and murder Ernest Raymond Hardy.

Except for the name of the victim, this indictment is identical to that approved by this Court in *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985). Defendant argues that the short form is deficient under N.C.G.S. § 15A-924(a)(5) and article I, section 23 of the North Carolina Constitution in that it (1) fails to allege premeditation and deliberation and (2) fails to allege the elements of felony murder. These contentions are identical to the arguments we rejected in *Avery*. Defendant has presented no compelling reason to reconsider *Avery* and we therefore decline to do so.

[2] Defendant next contends that the trial court erred in failing to require the state to elect either the theory of premeditation and deliberation or the theory of felony murder. Again this is an issue which we have repeatedly resolved contrary to defendant's position, most recently in *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, --- L.Ed. 2d --- (13 June 1988). We find no basis to reconsider our previous decisions and this assignment of error is overruled.

[3] Defendant next contends that the trial court erred in denying his motion for a change of venue based on pretrial publicity in Craven County. Defendant based his motion upon the following eight articles published in The [New Bern] Sun-Journal: *Reward offered in case of missing man*, Apr. 16, 1987; *Family concerned for missing man*, Apr. 22, 1987; *Missing Craven man's body found*, Apr. 25, 1987; *Second man charged in murder*, Apr. 28, 1987; *Lawyers appointed in murder case*, Apr. 30, 1987; *Grand jury indicts 2 for murder, robbery*, May 12, 1987; *Maysville man admits murder role*, Jul. 28, 1987; and *Murder trial opens*, Sept. 11, 1987.

A motion for change of venue is addressed to the sound discretion of the trial judge and his decision will not be disturbed on appeal unless the defendant demonstrates an abuse of discretion. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976). The burden is on the moving party to show that due to pretrial publicity there is a reasonable likelihood that he will not receive a fair trial. *State v. Abbott*, 320 N.C. 475, 358 S.E. 2d 365 (1987). Factual, noninflammatory accounts regarding the commission of a crime and the pretrial proceedings are ordinarily not sufficient grounds for granting the motion. *Id.; State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). Moreover, where a defendant does not show that he exhausted his peremptory challenges or that jurors had prior knowledge of the case, he fails to carry the burden of establishing prejudice. *State v. Johnson*, 317 N.C. 343, 346 S.E. 2d 596 (1986); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982).

Having reviewed the articles complained of, we find each to be factual and devoid of any prejudicial speculations or characterizations. Nor does the record disclose that defendant exhausted his peremptory challenges or that any juror had prior knowledge of the case. Under the circumstances the trial judge did not abuse his discretion in denying defendant's motion.

[4] Defendant next contends that the trial court erred in refusing to require the state to reveal the name of witness James Sauls and to provide a copy of Sauls' written statement to defendant prior to trial.

Sauls, a civilian jailer at Craven County Jail, gave a statement to Investigator Arthur recounting a conversation with defendant during which defendant said, "I was out smoking that dope and I knocked a man in the head." Arthur reduced Sauls'

recollection of this conversation to writing. In the pretrial discovery phase, the state provided defendant with the substance of his own remarks to Sauls without identifying Sauls or providing a copy of the written statement. Defendant argues that he was entitled to this information. Our examination of the pertinent statutory provisions demonstrates that the state fully complied with discovery requirements.

First, we note that the state had no duty to divulge Sauls' name to defendant before trial. The legislature has expressly refused to adopt a requirement that the state furnish the accused with the names of its witnesses. *See* N.C.G.S. § 15A-903 official commentary (1983). We have long held that defendants are not entitled to such a list. *E.g., State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

Nor was the state obliged to provide defendant with a copy of Sauls' complete statement to Investigator Arthur. N.C.G.S. § 15A-903(a)(2) requires the state to divulge "the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made." The state complied with this subsection by disclosing that portion of Sauls' statement which recited defendant's own words from the jailhouse conversation. Defendant was not entitled to a description of the facts and circumstances surrounding these statements. *State v. Bruce*, 315 N.C. 273, 337 S.E. 2d 510 (1985).

Nor was he entitled to a pretrial copy of Sauls' written statement. N.C.G.S. § 15A-903(f)(1) provides that "no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection *until that witness has testified on direct examination* in the trial of the case." (Emphasis added.)

Similarly, under N.C.G.S. § 15A-904(a), the state is not required to furnish defendant *before trial* any statement made by a witness of the state to anyone acting on behalf of the state. If the statement in question is material and favorable to the defendant, the state is required to disclose it to the defense *at trial*. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). Here the state made Sauls' written statement available to defendant at trial in accordance with these statutory provisions.

[5] In a companion argument, defendant contends that the trial court erred in denying his motion to withdraw juror Carter, who was personally acquainted with James Sauls. Because Sauls' name was not revealed during jury selection, Carter's acquaintance with him was not apparent until counsel observed the two greeting one another at the courthouse. Upon defendant's motion, the trial court conducted a voir dire examination of juror Carter during which the following colloquy occurred:

> THE COURT: Mr. Carter, are you acquainted with Mr. Sauls who was testifying in this case?
>
> JUROR CARTER: I am acquainted with him. You see, when he retired out of the service, he moved into our neighborhood, yes.
>
> THE COURT: Would the fact that you know him and have known him over some period of time, in the event that he testifies in this case, make it more difficult for you to be fair and impartial?
>
> MR. CARTER: No, sir.

Counsel for defendant continued the inquiry:

> Q. Did you see him around here last week while you were here at all?
>
> A. I think I saw him one time yes, one time last week.
>
> Q. Do you recall speaking to him at that time?
>
> A. Just, yes "hi, how you been doing?" Not no conversation whatsoever.
>
> Q. And you are convinced the fact that you know him you can put all of that aside, is that what you are saying?
>
> A. Yes, I mean.

After a jury has been impaneled, further challenge of a juror is a matter within the sound discretion of the trial judge. *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977). Here both the court and the defense attorney questioned juror Carter about his relationship with the state's witness. Carter stated unequivocally that the acquaintance would not affect his ability to remain fair and

impartial. Under the circumstances we find no abuse of discretion in the trial judge's denial of defendant's motion to withdraw juror Carter. *See State v. McLamb*, 313 N.C. 572, 330 S.E. 2d 476 (1985); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562.

[6] Defendant next contends that the preliminary pattern jury instruction given was erroneous. The instruction in question, N.C.P.I.—Crim. 106.10, explains the bifurcated nature of first degree murder trials, noting that in the event of a conviction a separate sentencing proceeding with separate instructions will convene. In pertinent part the instruction reads: "However, prior to that time the only concern of the trial jury is to determine whether the defendant is guilty of the crime charged or of any lesser included offenses about which it is instructed." Defendant complains that this instruction failed to mention the alternative of a "not guilty" verdict, thereby creating the erroneous impression that conviction of the crime charged or conviction of a lesser included offense were the only options in the guilt phase of his trial.

We find this assignment of error to be meritless. Clearly, the purpose of the instruction is to limit the jury during the first phase of the trial to consideration of issues bearing upon the guilt or innocence of the accused, without concern as to sentencing issues. We perceive very little possibility of jury confusion. Moreover, at defendant's urging, the trial judge further instructed as follows: "I would charge you to remember . . . that there are three possible ways that this first phase of this trial may be resolved. That is, you may find the Defendant guilty as charged or you may find him guilty of some lesser included offense, or you may find him not guilty." Thus, in the unlikely event that confusion had resulted from the preliminary instruction, the trial judge remedied the situation with the curative instruction.

[7] Defendant next argues that the trial court erred in failing to declare a mistrial after Investigator Arthur testified that he had asked both defendant and Eddie Neil to take a polygraph test.

In *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), this Court disapproved the use of polygraph test results at trial even when the parties stipulate to their admissibility. The trial judge, wary of running afoul of that decision, cautioned the parties before trial to avoid references to polygraph tests. Nonetheless,

on direct examination of Investigator Arthur the following transpired:

> Q. Did you have any further conversation with [defendant] or Neil that night?
>
> A. Yes, sir. I asked both of them if they would agree to take a—polygraph test.
>
> MR. ASHTON: Objection.
>
> COURT: Sustained.

Whether a motion for mistrial should be granted is a matter addressed to the sound discretion of the trial judge. A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). Under the facts of this case we find no abuse of the trial judge's discretion in denying defendant's motion.

The witness' statement that "I asked both of them if they would agree to take a—polygraph test" is neutral on its face. The testimony does not reveal the responses of defendant or Neil to the request or whether the test was ever given at all. Furthermore, defendant's bald assertion that "[t]he statement clearly could have left jurors with the idea that Neil must have taken the test and passed and [defendant] must have taken the test and failed, or refused the test, and that is why Neil was turning State's evidence and [defendant] was on trial for his life" is unsupported. The record reveals that the able trial judge took appropriate action to prevent any such inference by allowing defendant's cross-examination of Investigator Arthur to address that concern:

> Q. Now, prior to your meeting with Eddie Neil that morning, had you ever asked [defendant] to take a polygraph?
>
> A. Yes, sir.
>
> Q. Isn't it true that he indicated his willingness to do that?
>
> A. Yes, sir.
>
> Q. But you never set up that test, did you?
>
> A. No, sir.

MR. ASHTON: Your Honor, would it be appropriate to ask [for] a cautionary instruction about that?

THE COURT: All right. Members of the jury, at this point the Court would instruct you that the Supreme Court of North Carolina has ruled that polygraph evidence is not reliable enough to be offered in courts of law in the State of North Carolina, even by the agreement of counsel, so I would caution you not to attach any significance to that. Is that sufficient?

MR. ASHTON: Yes, sir, thank you, Your Honor.

Because any possible prejudice was removed by the cross-examination and cautionary instruction, defendant has not shown that the impropriety in the present case was so egregious as to affect the jury's ability to render an impartial verdict.

Defendant alternatively argues that Arthur's improper testimony "opened the door" to lie detector evidence and the trial court therefore erred in prohibiting the defense from introducing evidence that defendant willingly took and passed a voice stress analysis test. The record demonstrates that the trial judge did in fact indicate that he would permit defendant to elicit such evidence. However, defendant apparently chose to question Arthur about the polygraph test only and made no attempt to elicit evidence about the voice stress analysis test. He may not now be heard to complain about his own trial strategy. These assignments of error are overruled.

[8] Defendant next assigns error to the admission over objection of a color photograph of the victim's remains. The photograph in question depicts the victim's decomposed body as it appeared when discovered on 24 April, some two and one-half weeks after the murder. While the victim's lower body appears intact, the upper body has apparently been ravaged by animals to such an extent that the skull, neck, and arms have been substantially stripped of flesh, the torso has been partially consumed, and the right hand has been completely gnawed off. The lower jawbone is missing from the skull. While we agree that the photo is grisly and unpleasant, we find no error in its admission into evidence.

As a general rule, the fact that a photograph is gory and may tend to arouse prejudice does not render it inadmissible, so long

as it is otherwise relevant and material. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), *overruled on other grounds, State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975). Thus, in a homicide case, photographs showing the condition of the body and its location when found are competent in spite of their portrayal of a gruesome spectacle. *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982). This holds true even where the photographs depict remains in an advanced state of decomposition, *see State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984), and where the cause of death is uncontroverted, *see Elkerson.*

However, the admission of an excessive number of photographs, depicting substantially the same scene, may be prejudicial error where the additional photographs add nothing of probative value but tend solely to inflame the jury. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979) (of five photographs depicting the victim's body in an advanced state of decomposition and partially dismembered by animals, only one had probative value; others were deemed repetitive and immaterial); *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (three photographs of victim at funeral home with projecting probes indicating the points of entry and exit of the bullet were inflammatory and had no probative value). Such evidence should be excluded when its prejudicial effect outweighs its probative force. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

Here Investigator Michael Rice identified the photograph in question as a fair and accurate representation of the victim's body as it appeared at the crime scene. The photograph was therefore admissible, in spite of its gruesomeness, to illustrate the location and position of the body when found. It was also probative in that it tended to corroborate certain details of the testimony of defendant and Neil. For example, the photograph shows that the victim's pants are unzipped, one pocket turned out, and his belt missing, facts consistent with accounts of the attack and subsequent robbery. Because the state introduced only one photograph of the victim's body,[1] no issue of inflammatory repetition arises. This assignment of error is overruled.

1. The state also introduced a photograph of the victim's jawbone lying in the grass. Defendant did not object to its admission into evidence.

[9] Defendant next contends that the trial court erred in allowing the prosecutor to cross-examine defendant about a fight in which he was involved at Dorothea Dix Hospital during his competency evaluation. The state insists that the questioning was permissible under the North Carolina Rules of Evidence as a means of impeaching defendant's credibility. We disagree.

Rule 608(b) governs the impeachment of a witness' credibility through extrinsic evidence of specific instances of his conduct. The rule provides as follows:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

As we noted in *State v. Morgan*, 315 N.C. 626, 634, 340 S.E. 2d 84, 89 (1986):

> Rule 608(b) represents a drastic departure from the former traditional North Carolina practice which allowed a defendant to be cross-examined for impeachment purposes regarding *any* prior act of misconduct not resulting in conviction so long as the prosecutor had a good-faith basis for the questions.

Now, under the rule, "the only character trait relevant to the issue of credibility is veracity or the lack of it. The focus, then, is upon whether the conduct sought to be inquired into is of the type which is indicative of the actor's character for truthfulness or untruthfulness." *Id.* at 634-35, 340 S.E. 2d at 90.

The state's assertion that questions about the fight were addressed to the issue of defendant's credibility is disingenuous at best. Clearly "extrinsic instances of assaultive behavior, standing alone, are not in any way probative of the witness' character for truthfulness or untruthfulness." *Id.* at 635, 340 S.E. 2d at 90.

We reject the credibility theory advanced by the state and hold that it was error to admit the extrinsic conduct evidence. We note that the state made no attempt to present an alternative argument for admissibility under Rule 404(b). We therefore express no opinion as to whether the evidence was elicited solely to prove a propensity for violence or aggressive behavior, in violation of Rule 404(a), or was elicited for a legitimate purpose under the exceptions of Rule 404(b).

Although we have determined that the cross-examination was error, we find this error to be a harmless one under the facts of this case. Defendant's testimony revealed that the brief altercation at Dix was not a fist fight. He had merely pushed another patient down as a means of defending himself when the man attacked him. Defendant did not remain hostile and was not disciplined or "locked down" by the hospital staff. This testimony, portraying defendant as the victim rather than the aggressor in the incident, tended to cast him in a favorable light. Under the circumstances there was no reasonable possibility that a different result would have been reached at trial absent the error in question. N.C.G.S. § 15A-1443(a) (1983).

[10] Defendant next assigns error to the trial court's denial of his motion to dismiss the charge of premeditated and deliberate murder. We note at the outset that the denial of defendant's motion to dismiss at the close of the state's evidence is not properly at issue on this appeal. Defendant chose to offer evidence after his motion was denied and thereby waived appellate review of the trial judge's decision. *State v. Griffin*, 319 N.C. 429, 355 S.E. 2d 474 (1987); N.C.G.S. § 15-173 (1983); N.C.R. App. P. 10(b)(3). We need only address defendant's motion to dismiss at the close of all the evidence.

In considering a motion to dismiss in a criminal matter, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). The evidence must be examined in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Any contradictions or discrepancies in the evidence are for the jury to resolve and do

not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Murder in the first degree is the intentional and unlawful killing of a human being with malice, premeditation, and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); N.C.G.S. § 14-17 (1986). Premeditation means that the defendant formed the specific intent to kill for some length of time, however short, before the actual killing. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). No particular length of time is required for the mental processes of premeditation and deliberation; it is sufficient that the processes occur prior to, and not simultaneously with, the killing. *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

Premeditation and deliberation ordinarily must be proved by circumstantial rather than direct evidence. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986). Some of the circumstances which may support an inference of premeditation and deliberation are: a lack of provocation on the part of the victim; the conduct and statements of the defendant before and after the killing; threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the victim; ill-will or previous difficulty between the parties; the dealing of lethal blows after the victim has been felled and rendered helpless; the brutality of the killing; and the nature and number of the victim's wounds. *Id.*

Applying these familiar principles to the case at hand, we find ample evidence of premeditation and deliberation in the circumstances surrounding the death of Ernest Hardy. According to the testimony of Eddie Neil, prior to the victim's entry of defendant's vehicle defendant stated that he planned to "knock Ernest Hardy in the head." Defendant soon thereafter concocted a pretext which allowed him to stop the car in a deserted area and lure the unsuspecting victim out of the car. While the victim was urinating with his back turned, defendant grabbed a club from the car and crept up behind him. He knocked the victim down with a single blow to the head, then struck several more blows as

the victim lay helpless on the ground. Later, when he noticed that the victim was still breathing, defendant struck the victim's head and face several times with a large rock. Viewed in the light most favorable to the state, this evidence shows a statement of violent intent by defendant well in advance of the murderous deeds, a distinct lack of provocation on the part of the victim, and a brutal killing involving multiple skull injuries, many of which were inflicted after the victim had already been felled and incapacitated. Accordingly, we hold that there was sufficient evidence of premeditation and deliberation to take the case to the jury and to support the conviction on that theory.

[11] Defendant next contends that the trial court erred in denying his request for a special instruction on motive. Defendant does not dispute the propriety of the charge with respect to his *own* motive; rather he argues that the jury should have also been instructed that it could give equal consideration to *Eddie Neil's* motive. Defendant cites no authority for his position.

Here the trial judge gave defendant wide latitude to develop his theory that Neil was motivated by economic deprivation to commit the murder. Furthermore, the judge admonished the jury to examine Neil's testimony "with the greatest care and caution" in light of evidence that he was an accomplice and in light of his plea agreement with the state. The jury was well apprised of Neil's interest in the outcome of the case. Moreover, because the trial judge charged the jury upon the alternative theory that defendant and Neil were acting together in concert in committing the murder, an instruction as to Neil's motive to kill the victim would have been harmful to defendant rather than helpful.

[12] Defendant next contends that the trial court erred in refusing his request for an instruction substantially in compliance with the pattern jury instruction on aiding and abetting. This assignment of error is frivolous. Defendant was not charged with aiding and abetting, nor does any of the evidence support such a theory. The state's evidence tended to show that defendant was a principal in the murder, while defendant's evidence tended to show that he was at most an accessory after the fact. Therefore, defendant was not entitled to an instruction on the principles of aiding and abetting. *See State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert. denied*, 418 U.S. 905, 41 L.Ed. 2d 1153 (1974).

[13] Finally, defendant challenges the forty-year sentence imposed under the Fair Sentencing Act for robbery with a dangerous weapon. He argues that the trial judge abused his discretion in determining that the single aggravating factor of prior convictions, N.C.G.S. § 15A-1340.4(a)(1)o, outweighed the two mitigating factors of physical condition, N.C.G.S. § 15A-1340.4(a)(2)d, and aiding in the apprehension of another felon, N.C.G.S. § 15A-1340.4(a)(2)h.

As we observed in *State v. Melton*, 307 N.C. 370, 380, 298 S.E. 2d 673, 680 (1983):

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. The court may very properly emphasize one factor more than another in a particular case. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

We discern neither defiance of logic nor abuse of discretion in according the prior-conviction factor greater weight in light of the evidence supporting the finding. The judge acted well within the bounds of reason in determining that this aggravating factor outweighed the mitigating factors.

In defendant's conviction and sentences we find

No error.

AARON ARONOV v. SECRETARY OF REVENUE, DEPARTMENT OF REVENUE, STATE OF NORTH CAROLINA

No. 336PA87

(Filed 7 September 1988)

1. Taxation § 28.3— nonresident taxpayer—reduction of carryover losses by non-North Carolina income—due process

The Secretary of Revenue's interpretation of N.C.G.S. § 105-147(9)(d)(2) to require a nonresident taxpayer to reduce his North Carolina carryover losses

by his non-North Carolina income does not have the effect of imposing a tax on the non-North Carolina income in violation of the due process clause of the U. S. Constitution or the law of the land clause of the N. C. Constitution.

2. **Taxation § 28.3— nonresident taxpayer—reduction of carryover losses by non-North Carolina income—legislative authority**

The Secretary of Revenue's interpretation of N.C.G.S. § 105-147(9)(d)(2) to require a nonresident individual taxpayer to reduce his North Carolina carryover losses by his non-North Carolina income did not exceed legislative authority or contravene the general purpose clause of N.C.G.S. § 135-134, since the statute applies with equal force to a nonresident individual as it does to a foreign corporation or interstate business.

Justice MARTIN dissenting.

APPEAL by the Secretary of Revenue from a unanimous decision of the Court of Appeals, 85 N.C. App. 677, 355 S.E. 2d 854 (1987), affirming the Order reversing Final Administrative Decision No. 212 of the Tax Review Board, entered by *Bailey, J.*, at the 27 May 1986 Civil Non-Jury Session of Superior Court, WAKE County. Heard in the Supreme Court 15 October 1987.

Law offices of Kenneth G. Anderson, by Kenneth G. Anderson and James P. Stevens, and Hunter, Wharton & Howell, by John V. Hunter, III, for plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by Newton G. Pritchett, Jr., Assistant Attorney General, for appellants Secretary of Revenue, Department of Revenue, and State of North Carolina.

MEYER, Justice.

This case presents an issue of first impression. We decide whether the Secretary of Revenue's requirement that a nonresident taxpayer reduce his distributive share of his North Carolina partnership's net operating loss each year by his non-North Carolina income has the effect of imposing a tax on that income in violation of constitutional and legislative authority. The Court of Appeals resolved the issue in favor of the taxpayer. We reverse.

During the years 1975 through 1978, Aaron Aronov (hereinafter "the taxpayer") was a nonresident of North Carolina, domiciled and residing in Montgomery, Alabama, but doing business in North Carolina as a limited partner in Freedom Drive Mall, Ltd., a limited partnership which operated a shopping center in Char-

lotte, North Carolina. For each of the taxable years 1975, 1976 and 1977, the partnership realized net operating losses of $195,438.62, $309,789.78 and $450,279.10 respectively. The taxpayer's distributive share of the partnership losses was $52,768.43 in 1975, $83,643.24 in 1976 and $121,575.36 in 1977. The taxpayer derived substantial income from sources outside North Carolina for those years, however, in the amounts of $118,056, $283,758 and $488,908 respectively.

The shopping center venture was unsuccessful and the lender, First Chicago Realty Corporation, sought to acquire the property under a deed in lieu of foreclosure. On 1 March 1978, the partnership sold its interest in the shopping center to Freedom Mall Associates, Inc., an agent of the lender, for the consideration of $100.00 and cancellation of the partnership's indebtedness, which had been secured by a deed of trust on the property to the lender.

During the taxable year 1978, the partnership realized a total income of $984,098.20, which included the gain from the cancellation of the debt upon sale of the shopping center. After deducting interest and other expenses, the partnership realized a net income of $955,507.50, as reflected in its 1978 tax return. The taxpayer's distributive share of the net taxable income for that year was $257,987.03.

The taxpayer reported $257,987 as his distributive share on his 1978 North Carolina individual income tax return. As a deduction from this income, he claimed a carryover loss of $257,987, representing his accumulated distributive shares of the partnership's net operating losses for the years 1975, 1976 and 1977. As a result, the taxpayer's 1978 return reflected adjusted gross income of $0.00 and no tax due.

The Department of Revenue disallowed the taxpayer's claimed deduction on the grounds that under N.C.G.S. § 105-147(9)(d)(2) the taxpayer had not shown that he had sustained net economic losses in 1975, 1976 and 1977, because his income from all sources in those years, including any income not taxable under North Carolina's individual income tax laws, exceeded his distributive share of the partnership's net operating losses in 1975, 1976 and 1977. By Notice of Income Tax Adjustment, the Department proposed an assessment for 1978 of $17,839.09 plus interest, based

on the taxpayer's North Carolina net taxable income. The taxpayer requested a hearing before the Department of Revenue. At the hearing, he contended that the income he had reported from the sale of the shopping center was only a "technical" gain, and that requiring him to reduce his distributive share of the partnership's loss each year by his non-North Carolina income had the effect of imposing a tax on that income in violation of both legislative and constitutional authority. On 4 August 1981, the Secretary of Revenue (hereinafter "Secretary") entered a Final Decision which sustained the assessment for 1978 in its entirety.

The taxpayer appealed the Final Decision to the Tax Review Board, which initially remanded the matter to the Secretary based on a decision of the United States Court of Appeals for the Fifth Circuit not pertinent to the question presented here because of an intervening reversal by the United States Supreme Court. *Commissioner of Revenue v. Tufts*, 461 U.S. 300, 75 L.Ed. 2d 86, *reh'g denied*, 463 U.S. 1215, 77 L.Ed. 2d 1401 (1983). On rehearing before the Assistant Secretary of Revenue, the taxpayer renewed his contentions as above. On 21 June 1984, the Assistant Secretary entered a Final Decision sustaining the assessment in its entirety. The matter was subsequently reviewed by the Tax Review Board. On 31 January 1985, the Board entered Administrative Decision No. 212, which affirmed the Assistant Secretary of Revenue's Final Decision in all respects.

The taxpayer then petitioned for review in Superior Court. The trial court, sitting without a jury, reversed Administrative Decision No. 212 and its underlying assessment, concluding that (1) it violated the due process and commerce clauses of the United States Constitution as well as the law of the land clause of the North Carolina Constitution, (2) it exceeded statutory authority and was legally erroneous, and (3) it was arbitrary and capricious.

The Secretary appealed. The Court of Appeals affirmed the judgment of the trial court on the grounds that (1) the Secretary's construction of N.C.G.S. § 105-147(9)(d)(2) to allow use of the nonresident taxpayer's non-North Carolina income to reduce his carryover losses in North Carolina was an indirect attempt to tax income not taxable by this state in violation of both federal due process and North Carolina's law of the land clause; and (2) the Secretary's interpretation of N.C.G.S. § 105-147(9)(d)(2) exceeded

statutory authority as espoused in the general purpose clause of N.C.G.S. § 105-134. The Court of Appeals declined to reach the question of whether the Secretary's interpretation violated the federal commerce clause. The Secretary appealed to this Court on the basis of substantial questions arising under the Constitutions of the United States and of North Carolina.

I.

[1] We first address the question of whether the Secretary's interpretation of N.C.G.S. § 105-147(9)(d)(2) violates the federal due process clause or the law of the land clause of the state constitution. The Court of Appeals determined that the Secretary's interpretation of the statute resulted in "a sophisticated scheme which taxes, belatedly, the nonresident taxpayer's non-North Carolina income." *Aronov v. Sec. of Rev.*, 85 N.C. App. 677, 682, 355 S.E. 2d 854, 857.

N.C.G.S. § 105-147(9)(d)(2) provides as follows:

> The net economic loss for any year shall mean the amount by which allowable deductions for the year other than personal exemptions, non-business deductions and prior year losses shall exceed *income from all sources in the year including any income not taxable under this Division.*

N.C.G.S. § 105-147(9)(d)(2) (1985) (emphasis added). The Secretary has interpreted the emphasized language to require that

> [i]f a nonresident with income taxable to North Carolina and also with income not taxable to North Carolina has a loss on the North Carolina income, he must reduce the loss by the income not taxable to North Carolina under this division before he may carry the loss over to the ensuing year.

N.C. Admin. Code tit. 17, r. 6B.2604 (February 1976).

Because the term "law of the land" in article I, section 20 of the North Carolina Constitution is synonymous with the term "due process of law" in the fourteenth amendment to the United States Constitution, *see, e.g., Transportation Co. v. Currie, Comr. of Revenue*, 248 N.C. 560, 104 S.E. 2d 403 (1958), *aff'd*, 359 U.S. 28, 3 L.Ed. 2d 625 (1959), we are aided in our review by two cases from the United States Supreme Court. *Frick v. Pennsylvania*, 268 U.S. 473, 69 L.Ed. 1058 (1925); *Maxwell v. Bugbee*, 250 U.S.

525, 63 L.Ed. 1124 (1919). A close reading of these decisions leads us to conclude that the Court of Appeals' determination is erroneous because it is based upon a misunderstanding of the distinction between them.

The law is well settled that states have the power to tax nonresidents on income derived from sources within the state. *Shaffer v. Carter*, 252 U.S. 37, 64 L.Ed. 445 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 64 L.Ed. 460 (1920). Indeed, where jurisdiction to tax exists, states enjoy broad authority to determine the method and extent of taxation. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 85 L.Ed. 267 (1940). Moreover, when a state levies taxes within its authority, property not in itself taxable by the state may be used as a measure of the tax imposed. *Maxwell v. Bugbee*, 250 U.S. 525, 63 L.Ed. 1124. At issue in *Maxwell* was a New Jersey statute which allegedly taxed the transfer of property, whether in or out of state, of resident and nonresident decedents. The amount of tax depended on the ratio of the New Jersey property to the entire estate wherever situated, but the tax was levied only upon property actually located within New Jersey. Maxwell contended that the effect of including the property beyond the jurisdiction of New Jersey in measuring the tax levied in New Jersey amounted to a deprivation of property without due process of law. The Supreme Court concluded:

> [T]he *subject matter* here regulated is a *privilege* to succeed to property which is within the jurisdiction of the State. When the State levies taxes within its authority, property not in itself taxable by the State may be used as a *measure* of the tax imposed. . . . In the present case, the State imposes a *privilege tax*, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. . . . It is in no just sense a tax upon the foreign property.

Id. at 539, 63 L.Ed. at 1131 (emphasis added).

In contrast, in *Frick v. Pennsylvania*, 268 U.S. 473, 69 L.Ed. 1058, upon which the Court of Appeals relied, the Supreme Court held that the state had no constitutional power to levy an inheritance tax based upon real and personal property wherever located. By including the value of tangible personal property

located outside the state in the Pennsylvania decedent's gross estate for the purpose of applying an inheritance tax on the whole estate, the Pennsylvania statute "in so far as it attempt[ed] to tax the transfer of tangible personalty having an actual situs in other States, contravene[d] the due process of law clause of the Fourteenth Amendment and [was] invalid." *Id.* at 496, 69 L.Ed. at 1065. The Supreme Court distinguished this holding from *Maxwell* on the basis that *Maxwell* did not involve an attempt to tax local property on the value of the whole; rather, the only bearing the property outside the state had on the tax was on the *rate* of tax imposed on property inside the state. *Id.*

The essential distinction between *Maxwell* and *Frick*, then, is that in the latter case, the *subject* of the tax was personal property located in other states and therefore not within Pennsylvania's jurisdiction, but in the former, the *subject* of the tax was within New Jersey's jurisdiction. In *Maxwell*, the nontaxable property was used only as a *measure* of the tax imposed on the property located in New Jersey. We believe that the facts in the case before us are comparable to *Maxwell* rather than to *Frick*. Here, contrary to the Court of Appeals' analysis, the taxpayer's Alabama income has not been used to determine whether he had income subject to taxation in North Carolina. Both parties agree that the state has jurisdiction over the *subject* of the tax, the approximately $257,987 of income earned in North Carolina in 1978 from the taxpayer's distributive share of the shopping mall sale. The remaining computation is the *measure* of the tax, which is arrived at by using the taxpayer's Alabama income in 1975, 1976 and 1977 to reduce the deduction which he would otherwise have been granted for a net economic loss carryover from $257,987 to $0.00.

Deductions are privileges, not rights. They are benefits which the state gratuitously confers. *See Maxwell v. Bugbee*, 250 U.S. 525, 63 L.Ed. 1124; *Rubber Co. v. Shaw, Comr. of Revenue*, 244 N.C. 170, 92 S.E. 2d 799 (1956); *Ward v. Clayton, Com'r of Revenue*, 5 N.C. App. 53, 167 S.E. 2d 808 (1969), *aff'd*, 276 N.C. 411, 172 S.E. 2d 531 (1970). The state has the concomitant power to limit those benefits. When the state levies taxes within its jurisdiction, income not in itself taxable by that state may therefore be used as a measure of the tax imposed without violating the due process clause of the fourteenth amendment. *Max-*

well v. Bugbee, 250 U.S. 525, 63 L.Ed. 1124; *see also Great Atlantic and Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 81 L.Ed. 1193 (1937).

This Court has itself considered the issue in the context of inheritance taxes. *Rigby v. Clayton, Comr. of Revenue*, 274 N.C. 465, 164 S.E. 2d 7 (1968). There we held that the levy of an inheritance tax upon the transfer of property within North Carolina at a rate which considered the decedent's estate wherever situated did not violate the federal due process clause or the state law of the land clause. We adopted the Court of Appeals' reasoning that *Frick* sustained the validity of *Maxwell* by "recognizing the difference between an attempt to tax succession to property within the State in an amount computed on the value of the entire estate wherever located . . . and a statute which merely uses the value of the entire estate wherever located to determine the *rate* of tax to be applied." *Rigby v. Clayton, Comr. of Revenue*, 2 N.C. App. 57, 63, 162 S.E. 2d 682, 685 (1968). In the case *sub judice*, we continue to recognize the distinction between *Frick* and *Maxwell*. Here the taxpayer's Alabama income is merely used to determine the amount of his properly taxable North Carolina income, which in turn determines the rate of the tax to be applied to that amount. We conclude that the requirement that the taxpayer reduce his North Carolina carryover losses by his non-North Carolina income does not result in "a sophisticated scheme" which "belatedly" taxes the non-North Carolina income.

We hold that the Secretary's interpretation of N.C.G.S. § 105-147(9)(d)(2) does not violate either the due process clause of the United States Constitution or the law of the land clause of the North Carolina Constitution.

II.

[2] We now consider whether the Secretary's interpretation of N.C.G.S. § 105-147(9)(d)(2) exceeds legislative authority. *See* N.C.R. App. P. 16(a) (1988). We conclude that it does not.

With respect to a person who is a nonresident of North Carolina, N.C.G.S. § 105-136 imposes a progressive rate of tax

> upon the net income derived from North Carolina sources of every nonresident individual which is attributable to the ownership of any interest in real or tangible personal proper-

> ty in this State or which is from a business, trade, profession, or occupation carried on in this State.

N.C.G.S. § 105-136 (1985). "Net income" is defined as a taxpayer's gross income less the deductions allowed by law. N.C.G.S. § 105-140 (1985). Both the Secretary and the taxpayer agree that the taxpayer had a North Carolina taxable gross income of approximately $257,987 in 1978. The question to be answered, therefore, is whether the Secretary's requirement in N.C. Admin. Code tit. 17, r. 6B.2604 that the taxpayer reduce his North Carolina carryover losses by his non-North Carolina income exceeds legislative authority.

In answering this question we are mindful of several basic rules of statutory construction in the tax area. Deductions, such as that authorized in N.C.G.S. § 105-147(9)(d)(2), are in the nature of exemptions: they are privileges, not rights, and are allowed as a matter of legislative grace. *Ward v. Clayton*, 5 N.C. App. 53, 167 S.E. 2d 808 (1969), *aff'd*, 276 N.C. 411, 172 S.E. 2d 531 (1970). When a statute provides for an exemption from taxation, any ambiguities therein are resolved in favor of taxation. *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E. 2d 199 (1974). "The underlying premise when interpreting taxing statutes is: 'Taxation is the rule; exemption the exception.'" *Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 611, 231 S.E. 2d 656, 658 (1977) (quoting *Odd Fellows v. Swain*, 217 N.C. 632, 637, 9 S.E. 2d 365, 368 (1940)). A statute providing exemption from taxation is strictly construed against the taxpayer and in favor of the State. *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E. 2d 297 (1976). In all tax cases, the construction placed upon the statute by the Secretary (then the Commissioner) of Revenue, although not binding, will be given due consideration by a reviewing court. *Campbell v. Currie, Commissioner of Revenue*, 251 N.C. 329, 111 S.E. 2d 319 (1959).

We also find guidance in analogous case law. In *Dayton Rubber Co. v. Shaw, Comr. of Revenue*, 244 N.C. 170, 92 S.E. 2d 799 (1956), we addressed this issue with respect to corporations. There the Commissioner reduced the carryover loss of a foreign corporation doing business in North Carolina by royalty income that the corporation received which was not taxable in this state. In upholding the inclusion of nontaxable income in arriving at an

allowable deduction for carryover purposes as required by N.C.G.S. § 105-147(6)(d) (now similarly codified as N.C.G.S. § 105-147(9)(d)(2) and (d)(3)), we stated:

> It is also conceded by the defendant that the royalty income of the plaintiff in 1949 and 1950 was from non-unitary business operations having no relation or connection with the plaintiff's manufacturing activities in North Carolina. Thus, it is clear that no part of it could be taxed as income in North Carolina. *However, including this nontaxable income, in arriving at an allowable deduction for carryover purposes to be deducted from taxable income in a succeeding year, is, in our opinion, required by G.S. 105-147(6)(d), and we so hold.*
>
> Our Legislature was under no constitutional or other legal compulsion to allow any carryover to be deducted from taxable income in a future year. It enacted the carryover provisions purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income.

Dayton Rubber Co. v. Shaw, Comr. of Revenue, 244 N.C. at 174, 92 S.E. 2d at 802 (emphasis added). Nothing in the former statute limited its application to resident individuals and foreign and domestic corporations. Moreover, the second paragraph of the statute provided:

> [T]he net economic loss for any year shall mean the amount by which allowable deductions for the year other than contributions, personal exemptions, prior year losses, taxes on property held for personal use, and interest on debts incurred for personal rather than business purposes shall *exceed income from all sources in the year including any income not taxable under this article.*

N.C.G.S. § 105-147(6)(d) (1961) (emphasis added). The differences between this former statute and N.C.G.S. § 105-147(9)(d)(2) and (d)(3) are formal, not substantive. Similarly, nothing in the present statute limits its application to resident individuals. Neither do we find anything in the language of *Dayton Rubber Co.* which confines its rationale and holding to the unitary method of apportionment, foreign corporations or interstate businesses as the taxpayer contends.

In *Manufacturing Co. v. Clayton, Acting Comr. of Revenue*, 265 N.C. 165, 143 S.E. 2d 113 (1965), this Court held that where a corporation realizes a gain from the liquidation of wholly owned subsidiaries, that gain, even though not taxable income under N.C.G.S. § 105-144(c), constitutes income "from all sources including income not taxable" under N.C.G.S. § 105-147(9)(d)(2) which must be deducted from any loss carryover from a previous year. And in *Dayco Corp. v. Clayton, Comr. of Revenue*, 269 N.C. 490, 153 S.E. 2d 28 (1967), this Court held that dividends received by a foreign corporation from its stock in nonsubsidiary corporations and capital gains received from the sale of stock in the same nonsubsidiary corporations must be deducted from the claimed carryover loss, because even though the income is derived from out of state transactions and is therefore not taxable by North Carolina, it nevertheless falls into the category of "income not taxable under this article" under N.C.G.S. § 105-147(9)(d)(2). Since "taxable income" means income on which North Carolina levies a tax pursuant to the Revenue Act, all *other* income is "income not taxable under this [Division]." *Dayco Corp. v. Clayton, Comr. of Revenue*, 269 N.C. at 498, 153 S.E. 2d at 33. With respect to corporations, income "not taxable" under the North Carolina Revenue Act consists of income exempt from taxation and income allocated to other states which is therefore not taxable by North Carolina. *Id.* at 496, 153 S.E. 2d at 32.

These cases, together with the rules of statutory construction referred to above, persuade us that the Secretary has correctly interpreted N.C.G.S. § 105-147(9)(d)(2) in N.C. Admin. Code tit. 17, r. 6B.2604. Nothing in the statute limits its application to resident individuals or to foreign corporations or interstate businesses. Further, nothing in the language of this Court's prior cases in the area leads us to hold otherwise. We conclude, therefore, that with respect to nonresident individuals, income from sources outside North Carolina is the equivalent of corporate income allocated to other states and is "income not taxable under this Division," which must be included in arriving at an allowable carryover deduction in an ensuing year. N.C.G.S. § 105-147(9)(d)(2) (1985); *Dayco Corp. v. Clayton, Comr. of Revenue*, 269 N.C. 490, 153 S.E. 2d 28.

The Court of Appeals determined that the Secretary's interpretation of the carryover loss provision exceeded statutory

authority as espoused in the statute's general purpose clause, which provides as follows:

> The general purpose of this Division is to impose a tax for the use of the State government upon the net income in excess of the exemptions herein allowed collectible annually:
>
> . . . .
>
> (2) Of every nonresident individual deriving income from North Carolina sources attributable to the ownership of any interest in real or tangible personal property in this State or deriving income from a business, trade, profession, or occupation carried on in this State.

N.C.G.S. § 105-134 (1985). We disagree. A virtually identical general purpose section was in effect from 1939 through 1967, but the Secretary's interpretation of the loss carryover provision was never held to contravene it. Since we have concluded that N.C. G.S. § 105-147(9)(d)(2) applies with equal force to a nonresident individual as it does to a foreign corporation or interstate business, the Secretary's interpretation of this subsection *a fortiori* does not contravene the general purpose clause.

We hold that the Secretary's interpretation of N.C.G.S. § 105-147(9)(d)(2), as evidenced by title 17, rule 6B.2604 of the North Carolina Administrative Code, does not exceed legislative authority.

In view of our disposition of this case, we do not address the other issues presented. Because we hold that the Secretary's interpretation of N.C.G.S. § 105-147(9)(d)(2) does not violate either constitutional or legislative authority, the opinion of the Court of Appeals is necessarily reversed. The case is remanded to the Court of Appeals for remand to the Superior Court, Wake County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MARTIN dissenting.

I respectfully dissent. Using the taxpayer's Alabama income to offset carryover losses is in effect a taxation of that income by

the state of North Carolina, in contravention of the taxpayer's constitutional rights.

The majority correctly identifies the two United States Supreme Court cases pertinent to the constitutional issue but goes astray in applying them to the facts of this case. In *Maxwell v. Bugbee*, 250 U.S. 525, 63 L.Ed. 1124 (1919), the taxpayer challenged on due process grounds an inheritance statute which set the tax rate for the transfer of in-state property by determining the ratio of that property to the decedent's entire estate, wherever situated. The Supreme Court upheld the statute, holding that "property not in itself taxable by the State may be used as a measure of the tax imposed." *Id.* at 539, 63 L.Ed. at 1131.

Six years later, in *Frick v. Pennsylvania*, 268 U.S. 473, 69 L.Ed. 1058 (1925), the Court was confronted with an inheritance statute which included the value of the decedent's out-of-state property in calculating the value of the gross estate to be taxed. The Court struck down the statute as violative of the due process clause of the fourteenth amendment, noting that " 'it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins.' " *Id.* at 491, 69 L.Ed. at 1063 (quoting *United States v. Bennett*, 232 U.S. 299, 306, 58 L.Ed. 612, 616 (1914)).

The *Frick* Court distinguished *Maxwell* on the grounds that in *Maxwell* the inclusion of out-of-state property affected only the rate of the tax. This Court has itself recognized this distinction in *Rigby v. Clayton, Comr. of Revenue*, 274 N.C. 465, 164 S.E. 2d 7 (1968). There we noted that "the 'Due process' provisions of the Federal or State Constitution are not violated by the use of value of the entire estate, wherever located, to determine the *rate* of the tax to be applied." *Id.* at 469, 164 S.E. 2d at 10.

It is to be remembered that *Maxwell*, like *Rigby*, was not concerned with a tax on property, but with the determination of the tax *rate* to be applied upon the *transmission* of property from the dead to the living. The tax in *Maxwell* and *Rigby* was a tax on the privilege to succeed to property. *Rigby*, 274 N.C. 465, 164 S.E. 2d 7. In the case before us we are involved with determining the *amount* of income subject to the statutorily established tax rate. Likewise, in *Frick* the United States Supreme Court was

concerned with determining the amount or value of the property to be taxed.

The majority also recognizes this distinction but inexplicably mischaracterizes the present case as more analogous to *Maxwell* than to *Frick*. It is clear to me that the state is not using the Alabama income to determine the rate at which the North Carolina income will be taxed. The rates for individual income tax, ranging from two percent to seven percent, have already been set by statute. *See* N.C.G.S. § 105-136 (1985). Here the state seeks instead to use the Alabama income to increase the *amount* or *value* of North Carolina income to be taxed by eliminating a legitimate loss deduction. This is a far cry from the situation in *Maxwell*, where the value of nontaxable out-of-state property solely affected the rate of tax while the value of in-state property to be taxed remained the same. Let us reverse the facts. Could the taxpayer use his Alabama *losses* to reduce his taxable North Carolina income? Obviously, the answer is no. Likewise, the state cannot use Aronov's Alabama gains to increase the amount of his taxable North Carolina income.

All parties agree that Alabama income is not taxable in North Carolina. A state may not tax value earned outside its borders. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 73 L.Ed. 2d 787 (1982). Yet, under the majority's view, the taxpayer's liability is the same as it would have been had his Alabama income in 1975, 1976, and 1977 been North Carolina income. The majority's opinion is thus "the equivalent of saying that it was admissible to measure the tax by a standard *which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution.*" *Frick* at 494-95, 69 L.Ed. at 1064 (emphasis added). Such an approach is untenable because, as in *Frick*, "[i]t would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail." *Id.* at 495, 69 L.Ed. 2d at 1064-65. An attempted taxation must fail "where the State exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction *in such a way as to really amount to taxing that which is beyond its authority.*" *Maxwell* at 539-40, 63 L.Ed. at 1131 (emphasis added).

The majority opinion now relies upon both *Frick* and *Maxwell*. In accord with *Maxwell* it states that "the taxpayer's Alabama income has not been used to determine whether he had income subject to taxation in North Carolina," arguing that the Alabama income was only used to determine the rate or increase of the tax to be applied. Later, the majority holds: "Here the taxpayer's Alabama income is merely used to determine the amount of his properly taxable North Carolina income . . . ." Thus the majority first holds that the Alabama income was only used to determine the rate of the tax, but finally admits that it was used to determine the amount of income to be subject to taxation under the statutory rate schedule.

By allowing the Alabama income to be used to determine the amount of the taxpayer's taxable income, the majority opinion violates the constitutional mandates of *Frick*. The majority engages in the utmost sophistry in upholding a tax premised solely upon the existence of constitutionally protected out-of-state income.

Although deductions are a privilege, where the state allows them it must apply them in a constitutional manner. It cannot arbitrarily remove them as to individual taxpayers without running afoul of constitutional due process guarantees. The majority opinion is constitutionally flawed. "The power of taxation shall be exercised in a just and equitable manner . . . ." N.C. Const. art. V, § 2(1). I agree with the reasoning in Judge Becton's well-drawn opinion below and vote to affirm the Court of Appeals.

BETTY FORTUNE, INDIVIDUALLY AND DALE FORTUNE, A MINOR BY HIS GUARDIAN AD LITEM, BETTY FORTUNE v. FIRST UNION NATIONAL BANK, A CORPORATION AND AS EXECUTOR AND TRUSTEE OF THE ROBERT L. FORTUNE ESTATE AND TRUST

No. 552PA87

(Filed 7 September 1988)

1. Trusts § 11— discretionary trust—action by beneficiary against executor or trustee for mismanagement

A trust beneficiary may sue an executor or trustee for damages if the executor or trustee has mismanaged the property he holds in a fiduciary capacity even though the executor or trustee is under no duty to pay money immediately and unconditionally to the beneficiary.

2. Trusts § 11— discretionary trust—beneficiary's action against executor-trustee for mismanagement—proof of damages with sufficient certainty

Damages to the beneficiary of a family trust (testator's son) from mismanagement of the trust assets by defendant executor-trustee could be proved with sufficient certainty to permit the jury to reach a reasonable conclusion where the testator's will created a marital deduction trust with his wife as sole beneficiary and a family trust giving the trustee the absolute discretion to determine whether, and to what extent, to distribute trust income or corpus to the beneficiaries; at the wife's death, the corpus of the family trust was to go to the son or to his surviving issue; there was evidence that at least $290,000 could have been put in the family trust and substantially more in the marital deduction trust but that the assets were depleted by defendant and each trust was funded with only one dollar; the jury could reasonably find that if the trustee, in its discretion, determined to invade the principal of either trust for the benefit of the wife, it would first invade the marital deduction trust; the jury would be able to determine what would have been the need of the wife to have a part of the income from the family trust by taking into account her income from the marital deduction trust as well as other resources she may have; the jury could thus determine what the income to the son from the family trust would have been or what would have been accumulated for his eventual benefit; and the value of the son's remainder interest in the trust could be calculated by the use of the mortuary tables in N.C.G.S. § 8-46 with the help of an expert witness if necessary.

3. Appeal and Error § 62.2— new trial on damage issue only

A new trial will be awarded on the damage issue only in this action by a trust beneficiary against an executor-trustee for breach of fiduciary duty where the damage issue was not properly presented to the jury because of a mistake as to the beneficiary's interest in the trust, the negligence issue was distinct from the damage issue, and the error in assessing damages did not affect the entire verdict.

Justice MEYER dissenting.

Chief Justice EXUM and Justice WHICHARD join in this dissenting opinion.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 87 N.C. App. 1, 359 S.E. 2d 801 (1987), modifying a judgment of the superior court. Heard in the Supreme Court 10 May 1988.

This is an action against the executor and trustee under the will of Robert L. Fortune for breach of fiduciary duties. The plaintiff Betty Fortune brought the action individually and as guardian ad litem of her son Dale Fortune. Prior to the trial the court granted a motion for summary judgment against Betty Fortune on all her claims except her claim for an accounting. The individual claim of Betty Fortune is not involved in this appeal. There

was evidence at trial which showed Robert L. Fortune created two trusts by his will. One was a marital deduction trust with his wife Betty Fortune as sole beneficiary. The other trust was denominated a family trust which provided the trustee in its "absolute discretion" could accumulate all or any part of trust income or distribute it to the testator's wife Betty Fortune or his son Dale Fortune. The trustee also in its "uncontrolled discretion," had the power to use the principal of the trust for either beneficiary as it "shall deem needful or desirable for the beneficiary's comfortable support and maintenance and education and for the medical, surgical, hospital, or other institutional care of such beneficiary." At the death of Betty Fortune the corpus of the trust was to go to Dale Fortune if he survived his mother. If Dale Fortune did not survive his mother the corpus of the trust was to be delivered to the surviving issue of Dale Fortune.

There was evidence that the defendant was negligent in the manner in which it managed the estate. The assets were depleted and each trust was funded with one dollar only. The court granted the defendant's motion to dismiss the claim for punitive damages and denied the motion to dismiss the claim based on negligence. The jury found that Dale Fortune had been damaged in the amount of $413,744.76 by the negligence of the defendant. The court entered a judgment for this amount in favor of Dale Fortune. The Court of Appeals found no error in the trial of the case but held that the damages to Dale Fortune were too speculative to be proved. The Court of Appeals ordered that the judgment of the superior court be amended to award the damages to the trust. The Court of Appeals held that the plaintiff had not properly brought forward his assignment of error to the dismissal of his claim for punitive damages.

This Court allowed the defendant's petition for discretionary review on 12 February 1988.

McLeod, Senter & Winesette, P.A., by Joe McLeod, for plaintiff appellees.

J. Frank Huskins, Francis C. Clark, Staff Attorney for First Union National Bank, and Maupin, Taylor, Ellis & Adams, P.A., by R. Stephen Camp and M. Elizabeth Davenport, for defendant appellant.

WEBB, Justice.

The defendant argues that the Court of Appeals erred in two respects. It contends first that the Court of Appeals was correct in holding Dale Fortune could not prove any damage but was in error in ordering the damages to be awarded to the trust. The defendant also argues that there was insufficient evidence to support the amount of damages awarded.

[1] We do not pass on the defendant's argument that the damages may not be transferred to the trust because we hold that in this case Dale Fortune is entitled to bring the action in his individual capacity. Restatement (Second) of Trusts, § 198(1) (1979) says:

> If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.

The defendant, relying on this section of the Restatement, contends that a beneficiary may not maintain an action for a breach of duty to the trust unless the trustee is under a duty to pay money immediately and unconditionally to the beneficiary. Illustration d. of Section 198 says that the beneficiary's remedy in such a case is a suit in equity to compel the trustee to restore the money. Our Court of Appeals in *Ingle v. Allen*, 69 N.C. App. 192, 317 S.E. 2d 1 (1984), allowed an action for damages by a beneficiary of a trust against the executors and trustees under a will. Such actions have been allowed in other jurisdictions. *See Work v. County National Bank and Trust Co. of Santa Barbara*, 4 Cal. 2d 532, 51 P. 2d 90 (1935); *Hoppe v. Hoppe*, 370 So. 2d 374 (Fla. Dist. Ct. App. 1978); *First City Nat. Bank v. Haynes*, 614 S.W. 2d 605 (Tex. Civ. App. 1981); 76 Am. Jur. 2d *Trusts*, § 645 at 854 (1975). We see no reason why a beneficiary may not sue an executor or trustee for damages if the executor or trustee has mismanaged the property he holds in a fiduciary capacity. We believe that a beneficiary who has been damaged by the negligence of a fiduciary should have this remedy in addition to any other remedy he may have. We hold that such a claim may be maintained.

As we read the Court of Appeals' opinion, it does not hold that a claim for money damages may not be maintained by a bene-

ficiary against a fiduciary. It holds that in this case Dale Fortune's interest in the trust, because it is a discretionary interest, is too speculative to be measured. For this reason, the Court of Appeals felt damages could not be proved with reasonable certainty. In proving damages, "absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion." *Service Co. v. Sales Co.*, 259 N.C. 400, 417, 131 S.E. 2d 9, 22 (1963); *Tillis v. Cotton Mills*, 251 N.C. 359, 365, 111 S.E. 2d 606, 612 (1959); *Thrower v. Dairy Products*, 249 N.C. 109, 112, 105 S.E. 2d 428, 431 (1958). Damages may be recovered if a plaintiff proves the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit. Restatement (Second) of Torts, § 912 (1977).

[2] We hold that in this case Dale Fortune's damages may be proved with sufficient certainty that a jury may determine them. The value of the assets which would have been placed in the two trusts may be determined by the value of Robert Fortune's estate. There was evidence that at least $290,000 could have been put in the family trust and substantially more in the marital deduction trust. It is in this light that we must look at the discretionary power of the trustee to pay all the income and principal of the family trust to Betty Fortune. If the two trusts had been fully funded, Betty Fortune would have had the marital deduction trust of several hundred thousand dollars from which she would have received the income and been entitled to have the trustee invade the principal for her if necessary. The jury could reasonably find that if the trustee, in its discretion, determined to invade the principal of either trust for the benefit of Betty Fortune, it would invade first the marital deduction trust. In such a case the possibility of invading the corpus of the family trust would be remote. A jury should be able to determine what would have been the need of Betty Fortune to have a part of the income from the family trust, taking into account her income from the marital deduction trust as well as other resources she may have. A jury could thus determine with reasonable certainty what the income to Dale Fortune from the family trust would be or what would have been accumulated for his eventual benefit. The value of Dale Fortune's remainder interest in the trust may be calculated by

use of the mortuary tables in N.C.G.S. § 8-46 with the help of an expert witness if necessary. We hold that under the circumstances of this case the evidence may be made specific enough to allow the jury to reach a reasonable conclusion.

[3] We agree with the defendant that the damage issue was not properly presented to the jury. The evidence as to Dale Fortune's interest in the trust and the charge of the court on this feature of the case was premised on the theory that Dale Fortune had a one-half interest in the family trust. This is not correct. Dale Fortune's interest in the trust must be calculated by what the jury could reasonably believe he would receive from the trust, taking into account that he had a remainder interest and that he may have received a part, all, or none of the income and corpus as the circumstances may have developed.

We hold there must be a new trial because of error in submitting the damage issue. It is within the discretion of this Court whether to grant a new trial on one issue. A new trial as to damages only should be ordered if the damage issue is separate and distinct from the other issues and the new trial can be had without danger of complication with other matters in the case. It must be clear that the error in assessing damages did not affect the entire verdict. If it appears the damages awarded were from a compromise verdict, a new trial on damages alone should not be ordered. *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (1977); *Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974). In this case it does not appear that there was a compromise verdict. The plaintiff was awarded substantially that for which he asked. We do not believe the error in assessing damages affected the entire verdict. The negligence issue in this case was distinct from the damage issue. We hold that this is a proper case for remand for a trial on the damage issue only.

In its assignment of error as to the evidence to support the award of damages, the defendant does not contend there was no evidence to support the award, but that the evidence was not sufficient to support an award of the size which was granted. Because we have ordered a new trial for damages, we do not consider this argument. The evidence will be different at a new trial.

The appellee has asked us to consider in our discretion the question of punitive damages which the Court of Appeals held had not been brought forward for review. This we decline to do.

We reverse the Court of Appeals and remand for a further remand for proceedings consistent with this opinion.

Reversed and remanded.

Justice MEYER dissenting.

The Court of Appeals, having properly concluded that the minor plaintiff, Dale Fortune, could not recover individually based on the trial court's erroneous determination that he was a joint life tenant in the trusts, allowed the *amount* of the jury verdict in his favor to stand. In its obvious attempt to reach what it considered a just result, that court advanced a different theory for a cause of action on behalf of the trusts, found that the trusts had suffered the damages in the same amount of $413,744.76 that the jury had awarded to Dale Fortune, and directed that judgment be entered in favor of the trusts. Because this case was neither argued nor defended on the basis of liability or damages to the trusts but only to Dale Fortune individually, the Court of Appeals acted beyond the scope of its authority in transferring the jury award to the trusts. Pursuant to the division of jurisdiction among the courts of this state, the Court of Appeals is intended to be a court of review and has no jurisdiction to determine facts not conceded or conclusively established at the trial court level. "[T]he Court of Appeals *[has] jurisdiction to review* upon appeal decisions of the several courts of the General Court of Justice . . . *upon matters of law or legal inference* . . . ." N.C.G.S. § 7A-26 (1967) (emphasis added). *See Putnam v. Lincoln Safe Deposit Co.*, 191 N.Y. 166, 83 N.E. 789 (1908). When a case is governed on appeal by a theory different from the one presented at trial, the parties have not been afforded notice on which to present or defend their interests. A reviewing court must decide a case on appeal under the same theory presented at trial. *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 297-302, 271 S.E. 2d 385, 388-90 (1980); *State v. Brooks*, 275 N.C. 175, 179, 166 S.E. 2d 70, 72 (1969); *In re Drainage*, 257 N.C. 337, 343, 125 S.E. 2d 908, 912 (1962).

Plaintiff Dale Fortune's interest in the estate is limited to the provisions of the residuary trust created by the will of Robert L. Fortune and constitutes a mere expectancy. The residuary trust provides that, during the life of plaintiff's mother, the trustee in its "absolute discretion" can accumulate all or any part of the income of the trust or distribute all or any part of it to plaintiff's mother, to plaintiff, or to any issue of plaintiff if he should die before his mother. The trustee is also given the power to distribute the principal of the trust in the same discretionary manner. At the termination of the trust, its assets are to be distributed to Dale Fortune *if then living*, otherwise to his surviving issue or, if none, to the heirs of Robert L. Fortune under the provisions of chapter 29 of the North Carolina General Statutes (the North Carolina Intestate Succession Act).

The issues submitted to the jury were erroneous. They allowed a recovery, not to the trust, but to Dale Fortune individually. Pursuant to the trial court's instructions, a jury awarded damages of $413,744.76 directly to him. By awarding Dale Fortune damages now, before he is entitled to receive the trust assets, assuming he ever will be so entitled, the court ignored the terms of the trusts created by Mr. Fortune's will. This it may not do. A court's limited power to modify the terms of a trust may not be exercised for the purpose of destroying the terms of the trust or defeating the purpose of the donor. *Penick v. Bank*, 218 N.C. 686, 12 S.E. 2d 253 (1940). I disagree in the strongest possible way with the majority's conclusion that plaintiff was entitled to sue and recover his individual damages caused by defendant's breach of fiduciary duty, and I therefore dissent.

Dale Fortune has no "right" to the income or to the principal while his mother lives—he has only a mere expectancy. A beneficiary may not maintain an action at law to recover individually for a breach of duty to the trust unless "the trustee is under a duty to pay money immediately and unconditionally to the beneficiary." Restatement (Second) of Trusts § 198 (1959).

> It is well settled that a *cestui que trust* cannot bring an action at law against a trustee to recover for money had and received while the trust is still open; but when the trust has been closed and settled, the amount due the *cestui que trust* established and made certain, and nothing remains to be done but to pay over money, such an action may be maintained.

Johnson v. Johnson, 120 Mass. 465, 466 (1876). *See* Restatement (Second) of Trusts § 198 and comment d at 436 (1959) (if trustee misappropriates money which it is his duty to continue to hold in an active trust, the beneficiary, not being entitled to immediate payment, cannot maintain an action at law against trustee). The majority cites *Ingle v. Allen*, 69 N.C. App. 192, 317 S.E. 2d 1 (1984), and several cases from other jurisdictions to support its assertion that a beneficiary who has been damaged by the negligence of a fiduciary should have the remedy of suing an executor or trustee for damages in addition to any other remedy he may have. These cases can readily be distinguished from the case *sub judice* when one examines the actions of the trustee which led to the suit. It has been a longstanding rule that the trustee must perform an affirmative act in repudiation of the trust in order for the individual beneficiaries to be entitled to a cause of action.

> As long as the relation of cestui que trust and trustee is admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, no refusal or demand to comply with the terms of the trust, and no repudiation or disavowal of the trust, no cause of action rests in the cestui que trust.

76 Am. Jur. 2d *Trusts* § 589, at 796-97 (1975).

A beneficiary with no immediate and unconditional right to trust funds may only maintain an equitable action to compel the trustee to redress the breach of trust. Restatement (Second) of Trusts §§ 197, 198 and comment c at 436 (1959). The rationale behind this rule is that a beneficiary with no immediate and unconditional right to trust proceeds cannot establish individual damages with any degree of specificity. When pecuniary damages are sought, the plaintiff must present evidence of their existence and extent and some data from which they may be computed. *Norwood v. Carter*, 242 N.C. 152, 87 S.E. 2d 2 (1955); *The Asheville School v. Ward Construction, Inc.*, 78 N.C. App. 594, 337 S.E. 2d 659 (1985), *disc. rev. denied*, 316 N.C. 385, 342 S.E. 2d 890 (1986).

Plaintiff Dale Fortune was not a proper party to bring suit and could not recover individually against defendant trustee under the circumstances presented here. The Court of Appeals correctly recognized that Dale Fortune could not recover damages individually, but chose the inappropriate remedy of awarding his

individual recovery to the residuary trust created under the will of Robert L. Fortune. The majority of this Court erroneously holds in part that Dale Fortune was entitled to sue individually for damages caused by trustee's breach of fiduciary duty and further holds that, on retrial of the damages issue, his individual damages may be proved with sufficient certainty for a jury's determination. I disagree with both conclusions. If Dale Fortune, without removal of the bank as trustee, is permitted to sue individually for damages, a conflict of interest continues to exist. The bank continues as trustee, and its interest as such should be to recover the losses for all possible beneficiaries of the trusts. It is at the same time executor of the estate, in which role it will contend that it is not liable for any damages to anyone. Likewise, Dale Fortune, while acting as plaintiff, would also have his interest as one of the beneficiaries of the trusts represented by defendant bank in its role as trustee. The majority's decision makes no provision for the resolution of this conflict of interest.

As a general rule the damages resulting from a breach of trust by a trustee are to be paid into the trust fund, not directly to the trust beneficiaries:

> A [trustee's] failure to perform any of the duties placed upon him by common law, statute or trust instrument, if loss is caused thereby, will give the beneficiaries, a co-trustee or a successor trustee a right to secure from the court of equity a decree that the wrongdoing trustee pay *into the trust fund* the amount of damages suffered.

G. Bogert, *Trusts* § 157 (6th ed. 1987) (emphasis added).

While the majority correctly concludes that the damages issue was not properly presented to the jury at the trial court level, it erroneously holds that plaintiff Dale Fortune's individual damages may, on retrial, be proved with sufficient certainty that a jury may determine them. Dale Fortune clearly sought individual recovery for monetary damages based on defendant's alleged breaches of fiduciary duty as executor of the estate. The case was tried and argued by both parties on the theory that Dale Fortune was entitled to an individual recovery, and the issues submitted to the jury were so formulated. It is my belief that on retrial Dale Fortune cannot provide evidence of damages to him individually because, by the terms of the trust, damages to his expectancy in

the residuary trust cannot be actuarially computed. Dale Fortune has the burden of proving damage to his interest under the residuary trust in order to recover compensatory damages. "The burden is always upon the complaining party to establish by evidence such facts as will furnish a basis for their assessment, according to some definite and legal rule." *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E. 2d 2, 5. Dale Fortune cannot present evidence tending to show that the trustee will ever exercise its *discretion* to pay out benefits to him during his lifetime or, if so, in what amount. Nor can he produce actuarial evidence to establish the range of possibilities under which his remainder would vest or the value of his interest when it would vest. Neither N.C.G.S. § 8-46 (mortuary tables containing life expectancies) nor N.C.G.S. § 8-47 (annuity tables containing annuity valuation factors) would be of assistance in proving when the trustee might exercise its discretion.

Dale Fortune will not be able to establish values with any degree of accuracy because of the nature of his interest under the provisions of the residuary trust, which is merely speculative at best. His interest in the principal at the termination of the residuary trust upon his mother's death is not readily ascertainable because it is a mere expectancy. His interest cannot be valued until the death of his mother, if he survives her. *Brown v. Guthery*, 190 N.C. 822, 130 S.E. 836 (1925); 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 280 (2d ed. 1983). His income interest in the residuary trust is speculative because his interest in the trust *income* is in the uncontrolled discretion of the trustee. The same is true of his interest in the *principal* of the residuary trust during the trust's existence. By definition, under a discretionary trust the trustee has discretion whether, and to what extent, to apply trust income or principal to, or for the benefit of, the beneficiaries. *Lineback v. Stout*, 79 N.C. App. 292, 339 S.E. 2d 103 (1986); N.C.G.S. § 36A-115(b)(1) (1979).

In its opinion, the majority asserts that a jury should be able to determine what would have been the need of Betty Fortune in the past and what it will be in the future to have a part of the income from the residuary trust, taking into account her income from the marital trust (which is at the present time unfunded) as well as other resources she may have. The majority fails to look beyond Betty Fortune's immediate needs, however, or to consider

the very real possibility that she could, for example, suffer an extensive long-term illness or even a catastrophic illness or disease requiring untold amounts of care and the accompanying financial demands which would conceivably cause the trustee to deplete the assets of both trusts for her benefit. Because of such contingencies, a jury is not capable of determining with any degree of accuracy what the income to Dale Fortune from the family trust will be or what will be accumulated and remain for his eventual benefit. Dale Fortune cannot establish the value of his interest in the residuary trust or his damages from losses incurred by the trust. Damages which are uncertain and speculative may not be recovered. Similarly, where there is no evidence as to the amount of damage, or where the amount is extremely uncertain, recovery should be denied. *Midgett v. Highway Commission*, 265 N.C. 373, 378, 144 S.E. 2d 121, 125 (1965); E. Hightower, *North Carolina Law of Damages* §§ 2-5, 2-7 (1981). Even if Dale Fortune were a proper party, because of the contingencies referred to above, I conclude that he cannot carry his burden of proof on the issue of individual damages.

The trustee is charged with a responsibility to the beneficiaries to use reasonable care and skill to preserve the trust property. Accordingly, it is the duty of the trustee to bring such actions as are reasonably necessary for the protection of the trust estate. *Id.* If a third party has covenanted to transfer property to a trust, it is the trustee's duty to take reasonable steps to enforce such a covenant. Restatement (Second) of Trusts § 177, at 383 (1959).

It is the *trustee's* duty to preserve and administer the trusts, including the duty to bring suit against the executor of the estate for wasting assets which should go to the trusts. At least by the time the dispute concerning the sale of the automobile dealerships arose, the conflict of interest in defendant bank serving as both executor of the estate and trustee of the trusts became obvious. Either the widow (beneficiary of one trust) or Dale Fortune (having an expectancy in the other trust) could have and should have sought the discharge of defendant bank as trustee and the appointment of a substitute trustee to bring this action to recover as against defendant bank as executor for damages to both trusts. As the case is going back for retrial, this can still be accomplished, and I believe it should be so ordered by this Court.

There are yet other significant reasons for having this lawsuit prosecuted by a substitute trustee rather than by Dale Fortune. First, a suit filed on behalf of the beneficiaries and pursued by a substitute trustee would not only permit the preservation of Dale Fortune's expectancy in the assets recovered as damages, but would also enable the trustee to recover on behalf of the trusts for the widow's benefit. As a result of the substitution, the entire loss incurred by both trusts would be recoverable. Although, as the majority points out, the individual claim of the widow is not before us, on retrial of this action wherein a substitute trustee is the plaintiff, the widow's damages under the terms of the trusts would indeed be recoverable and she would not then be barred from receiving them. The fact that the trusts were never funded would not prohibit the widow or any other beneficiary from recovery. Restatement (Second) of Trusts § 176, at 382 (1959).

In the case *sub judice*, the bank is to this day continuing to act as both trustee and executor. The statute of limitations is tolled while the executor of the estate and the trustee of the companion trust are the same entity, and will therefore not begin to run in this cause of action until the conflict of interest of the bank is cured.

> It is an underlying principle in the application of the statute of limitations that before it can begin to run there must be some one in existence by whom, and a different person against whom, the claim may be enforced. . . . It is the general rule that where one person represents both sides of conflicting claims the statute does not run.

Bremer v. Williams, 210 Mass. 256, 258, 96 N.E. 687, 688 (1911). *See also Yager v. Liberty Royalties Corp.*, 123 F. 2d 44 (1941); G. Bogert, *Trusts and Trustees* § 951 (2d ed. 1982). It follows from the above analysis that neither Dale Fortune nor his mother would be barred from obtaining damages through the trust because the bank is guilty of self-dealing and is therefore proscribed from claiming lapse of time as a defense. Second, assuming arguendo that Dale Fortune's individual damages could be ascertained, the amount of these damages would be minuscule in comparison to the panoply of damages available if the trustee were the plaintiff. It is thus not in Dale Fortune's best interest to bring

suit for his individual damages. He would be far better off to have an expectancy in the significantly larger recovery available to a substitute trustee.

This action should be remanded for the removal of defendant bank as trustee, the appointment of a substitute trustee, and a new trial on *all* issues. By suggesting in this dissenting opinion how I believe this lawsuit should be prosecuted, I do not mean to express an opinion as to whether any defenses are or are not now available to the defendant bank should a new complaint be filed by a properly substituted trustee.

Chief Justice EXUM and Justice WHICHARD join in this dissenting opinion.

STATE OF NORTH CAROLINA v. JEFF MAYES

No. 514A87

(Filed 7 September 1988)

1. **Obscenity § 1— lack of statewide standard—not unconstitutional**

The North Carolina Constitution does not require that a statewide standard be judicially incorporated into the North Carolina obscenity statute, N.C.G.S. § 14-190.1, in order to render the statute facially valid.

2. **Obscenity § 1— failure to instruct the jury as to definition of community—no error**

The trial court did not err in an obscenity prosecution by failing to specifically define the term community or to instruct the jury to reach a consensus as to the geographic bounds of the community standards they were to apply. The trial court's instruction properly permitted the jurors to apply the standards of the community in which the indictment was returned and from which the jurors came, as they found them to be, in deciding whether the magazines sold in that community were obscene. N.C.G.S. § 14-190.1.

3. **Obscenity § 3— expert testimony—survey results inadmissible**

The trial court did not err in an obscenity prosecution by refusing to admit certain survey responses and testimony relating thereto because the excluded survey questions had no relevance to what the community considered obscene.

4. **Obscenity § 3— comparison magazines excluded—no error**

The trial court did not err in an obscenity prosecution by refusing to admit into evidence two magazines purchased by a private investigator in a local

convenience store for comparison by the jury with the two allegedly obscene magazines which were the subject of the trial. Availability does not indicate community acceptance; it indicates only availability.

5. **Obscenity § 3— opinion as to value of materials—excluded—not prejudicial error**

Although the trial court erred in an obscenity prosecution by excluding testimony that a professor had made a systematic study under accepted methodology of sexually explicit materials with relation to the first amendment and was of the opinion that the magazines in this case were not patently offensive, did not appeal to the prurient interest in sex, and had scientific, educational and political value, there was no prejudice because substantially the same testimony was admitted elsewhere.

ON defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 86 N.C. App. 569, 359 S.E. 2d 30 (1987), affirming a judgment entered by *Owens, J.*, at the 19 August 1986 Criminal Session of Superior Court, CLEVELAND County, upon defendant's conviction by a jury on two counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1. Heard in the Supreme Court 12 May 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

Lipsitz, Green, Fahringer, Roll, Schuller & James, by Herbert L. Greenman, and James, McElroy & Diehl, by Edward T. Hinson, Jr., for defendant-appellant.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Michael K. Curtis, amicus curiae for the North Carolina Civil Liberties Union Foundation, Inc.; Ennis, Friedman & Bersoff, by Mark D. Schneider, amicus curiae for PHE, Inc.

MEYER, Justice.

Defendant was convicted by a Cleveland County jury on two counts of disseminating obscene material in violation of N.C.G.S. § 14-190.1. The trial judge consolidated the offenses for the purpose of judgment and sentenced defendant to a term of one year's imprisonment, but suspended the sentence and placed defendant on supervised probation for five years. As a special condition of the probation, defendant was ordered to pay a $750.00 fine and to serve a six-month active prison term.

Defendant appealed his conviction to the Court of Appeals. The panel below, with one judge dissenting, found no error. Defendant entered notice of appeal on two statutory grounds: (1) the judgment of the Court of Appeals directly involves substantial questions arising under the Constitution of North Carolina, N.C.G.S. § 7A-30(1) (1986), and (2) there was a dissenting opinion in the Court of Appeals, N.C.G.S. § 7A-30(2) (1986). We allowed the State's motion to dismiss the appeal for lack of a substantial constitutional question, but allowed the defendant's petition for discretionary review as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals. The case thus is before us based on the dissenting opinion in the Court of Appeals and our discretionary grant of review of additional issues. We affirm the Court of Appeals' decision.

The State's evidence tended to show the following: Sergeant Ralph McKinney of the Cleveland County Sheriff's Department testified that he directed the department's vice and narcotics investigations. By virtue of his position, Sergeant McKinney was familiar with the Shelby III Adult Bookstore which is located west of Shelby, and on 1 October 1985, the date on which the revisions to the state's obscenity law (N.C.G.S. § 14-190.1) took effect, he paid the store a visit.

Dressed in civilian clothes, Sergeant McKinney drove to the store in an unmarked car. Upon arrival, he was met by defendant, who was standing in the store doorway. Defendant asked Sergeant McKinney if he was a "cop." McKinney responded by asking defendant if he "looked like a cop." Defendant then remarked that he had been expecting the police all day. Sergeant McKinney asked, "You mean this stuff is illegal now?" Defendant replied, "Under the new law, it is."

Sergeant McKinney then followed the defendant into the Shelby III Adult Bookstore. He described the store as featuring a mini movie theatre with individual booths and a large display area containing adult magazines, adult video tapes, and sexual novelties. After browsing in the store for about twenty minutes, McKinney selected two magazines and presented them to defendant at the cash register. Each magazine was wrapped in clear cellophane so that only its cover was visible. Defendant rang up the sale, and Sergeant McKinney paid for the magazines and left.

The State introduced both magazines into evidence at the trial. One magazine, *Express—The Pursuit of Pleasure*, contains several erotic stories, reviews of various erotic magazines and video tapes, interviews, advertisements, and many graphic and explicit photographs. The photographs portray nude and partially clad men and women engaged in a variety of sexual acts, including both vaginal and anal intercourse, fellatio, cunnilingus, masturbation, group sex, and bondage. The other magazine, *Cockscrew*, consists for the most part of graphic and explicit photographs of two men, sometimes nude and sometimes partially clad, engaging in fellatio, anal intercourse, and masturbation. A tenuous and scant story line accompanies the photographs.

Defendant did not testify. However, he attempted to present three witnesses on his behalf. The first was Dr. Terry Cole, a professor at Appalachian State University, who was subsequently qualified as an expert in speech and communication in the context of public communication. During voir dire, Dr. Cole expressed his opinion that the magazines did not depict sexual conduct in a patently offensive way and that, applying the contemporary community standards, the magazines did not appeal to the prurient interest in sex. Dr. Cole testified that in his opinion the magazines had serious political and scientific value. At the conclusion of the voir dire, the trial court refused to allow the introduction of any of Dr. Cole's testimony.

Defendant next offered the expert opinion testimony of Dr. Charles Winick, a psychologist and sex therapist, who, at defendant's request, had conducted a survey of North Carolina opinion on the explicit depiction of sexual conduct. The first question in the survey asked whether, in the opinion of those interviewed, changing standards in recent years had made the depiction of nudity and sex in materials made available only to adults more or less acceptable. The next four questions were directed to whether those persons interviewed believed that consenting adults should have the right to obtain and view materials which depict nudity and sex. The final question asked whether those persons interviewed understood that the references to "nudity and sex" in the previous questions meant "exposure of the genitals and every kind of sexual activity, no matter how graphically depicted."

The trial court allowed Dr. Winick to offer his expert opinion, based on the survey, that the two magazines were not patently

offensive and that they did not appeal to the average person's prurient interest in sex. Dr. Winick testified that the magazines had serious scientific value and that they were exceptional in their artistic handling of the subject matter. The trial court allowed Dr. Winick to introduce the cumulative responses to the first and final questions of the survey—the question concerning changing standards and the question concerning the definition of "nudity and sex" as used in the survey. The trial court did not permit the introduction of the cumulative responses to the intervening questions, however, concluding that those questions and answers were not relevant to any issue to be resolved at trial.

Finally, defendant called Jan Frankowitz, a private investigator, purportedly to lay the foundation for the admission into evidence of magazines comparable to those at issue. Mrs. Frankowitz testified that she purchased the two magazines proffered, *Allure* and *Club International*, at The Pantry, a local convenience store. The defense sought the introduction of these magazines as evidence of general acceptance in the community of sexually frank materials. The trial court rejected defendant's argument that they were relevant to prove the contemporary community standard and excluded defendant's offer of proof in toto.

Defendant brings forward two issues for this Court's consideration. First, whether the trial court erred in failing properly to instruct the jurors on the appropriate community standards to be applied in determining whether the two magazines were obscene; and second, whether the trial court erred in excluding not only evidence concerning contemporary community standards, but also expert opinion evidence relevant to the application of the obscenity test.

I.

North Carolina's obscenity statute, N.C.G.S. § 14-190.1 is modeled on the test enunciated by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419 (1972). The statute provides in part:

> (b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. § 14-190.1(b) (1986). At trial, defendant requested two jury instructions which would have required the jury to apply a statewide community standard under the "contemporary community standards" test in subsection (b)(2) of the statute. This request was denied. In its instructions to the jury, the trial court neither specifically defined the term "community standards," nor instructed the jurors to reach a consensus as to the geographic bounds of the community whose standards they were to apply.

[1] Defendant's first issue is twofold. Initially, he contends that the North Carolina Constitution requires that a statewide standard be judicially incorporated into N.C.G.S. § 14-190.1 in order to render the statute facially valid.

This question has been recently decided against defendant. *State v. Anderson*, 322 N.C. 22, 366 S.E. 2d 459 (1988). There, the defendant argued that N.C.G.S. § 14-190.1 was facially invalid under article I, sections 14 and 19 of the North Carolina Constitution because it failed to provide guidance or uniformity in selection of the community by whose standards a defendant's conduct was to be judged. Anderson contended that the flaw lay in the statute's failure to specify that obscenity was to be judged in accordance with national or statewide community standards or to specify the geographical area intended by the term "community standards." Defendant here makes the identical argument. In *Anderson* we dealt with the contention as follows:

> When the same argument has been based upon the Constitution of the United States, it has been rejected. *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed. 2d 642 (1974). We are constrained to conclude that this argument is equally untenable when based upon the Constitution of North Carolina. *See State v. Bryant and Floyd*, 285 N.C. 27, 203 S.E. 2d 27, *cert. denied*, 419 U.S. 974, 42 L.Ed. 2d 188 (1974). As presently constituted, N.C.G.S. § 14-190.1 is not facially violative of the Constitution of North Carolina. *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E. 2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E. 2d 383.

Id. at 40-41, 366 S.E. 2d at 470. Defendant's argument here is no more persuasive than was Anderson's.

[2] Defendant goes on to argue that the trial court erred in failing to instruct the jury as to precisely which community standards were relevant to their determination of whether the magazines were obscene. He contends that by instructing only that the jurors apply "contemporary community standards," the trial court left the appropriate "community" open to "sheer speculation" on the jury's part. The majority of the panel of the Court of Appeals held that the trial court did not err in failing to define the geographic boundaries of the jury's "community." We agree.

In *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed. 2d 642 (1974), the trial court instructed the jury to apply "community standards" without defining the geographical limits of "community." The United States Supreme Court approved the instructions, stating:

> We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the

> understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

Id. at 157, 41 L.Ed. 2d at 648. *See Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, *reh'g denied*, 419 U.S. 885, 42 L.Ed. 2d 129 (1974) (statewide standard not required); *Roth v. United States*, 354 U.S. 476, 1 L.Ed. 2d 1498 (1956) (fact that different juries could reach different results as to whether same material is obscene is normal consequence of jury system). As presently written, N.C.G.S. § 14-190.1 reflects the Legislature's choice in defining obscenity offenses in this state in terms of "contemporary community standards" without further specification. As the Court of Appeals majority noted, in the absence of a precise statutory specification of "community," the trial court properly declined to restrict or expand the term. Rather, it instructed the jury in part as follows:

> Again, it is for you, members of the jury, to say and to decide what the contemporary community standards are, not your own standards but those of the average adult person in the community relating—with relation to the magazines depicting, illustrating or describing sexual conduct.
>
> You are not to fix a community standard, members of the jury, at a level where you believe from a personal standpoint they should be but, rather, as you find them to be.

North Carolina is a large and diverse state. As the Court of Appeals majority pointed out, no realist would expect to find that the same standards exist throughout the state, or that the residents in one area of the state would have knowledge of the community standards held in another area. N.C.G.S. § 14-190.1 allows for such diversity. We note that the magazines in this case were sold in the same county from which the venire was drawn and defendant's petit jury was selected. *See* N.C.G.S. § 9-2 (1986). The trial court's instruction thus properly permitted the jurors to apply the standards of the community in which the indictment was

returned and from which the jurors came, as they found them to be, in deciding whether the magazines sold in that community were obscene. This task differs little from the manner in which jurors determine "the propensities of a 'reasonable' person in other areas of the law." *Hamling v. United States*, 418 U.S. 87, 104-05, 41 L.Ed. 2d 590, 613. The trial court did not err in failing specifically to define the term "community," or to instruct the jury to reach a consensus as to the geographic bounds of the community standards they were to apply.

II.

We turn now to the question of whether the trial court erred in excluding certain evidence and expert testimony proffered by the defendant.

[3] Dr. Charles Winick, a psychologist and sex therapist, conducted a survey at defendant's request among four hundred adults in forty-one counties for trial purposes. The survey included the following questions:

> Q:2 In your opinion, have standards changed in recent years, so that depictions of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications, and other materials depicting nudity and sex and available only to adults, but not [to] children? . . . .
>
> Q:3 Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children? . . . .
>
> Q:4 Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex and which are available only to adults, but not to children? . . . .
>
> Q:5 Do you agree or disagree that adults who want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children? . . . .

Q:6 Do you think it is alright [sic] or not alright [sic], for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex, which are available only to adults and not to children? . . . .

Q:7 We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think we meant something else? . . . .

After conducting a voir dire, the trial court permitted Dr. Winick to testify concerning the responses to question 2 regarding changing standards and to question 7 concerning the manner of use of the phrase "nudity and sex," but excluded all testimony relating to questions 3 through 6. Defendant argues that the excluded survey responses and Dr. Winick's proffered testimony related thereto should have been allowed because they would have assisted the jury in determining contemporary community standards. The Court of Appeals concluded that the excluded survey questions had no relevance to what the community considered obscene. We agree.

The exact same survey questions were at issue in *State v. Anderson*, 322 N.C. 22, 366 S.E. 2d 459, although there Dr. Winick only conducted the survey among the residents of Catawba County. There, as here, the trial court allowed testimony concerning questions 2 and 7, but excluded the remainder. Having reviewed the excluded questions in *Anderson*, we stated:

> We conclude that the trial court properly excluded the cumulative results of the survey with regard to questions 3, 4, 5, and 6. Those questions amounted to little more than a referendum on the desirability of the First Amendment and N.C.G.S. § 14-190.1. The issue the jury was to decide, however, was whether the average adult, applying contemporary community standards, would find that the magazines in question appealed to a prurient interest in sex in a patently offensive manner. The trial court did not abuse its discretion when it determined that the cumulative results of the responses to questions 3, 4, 5, and 6 would not assist the jury

in resolving the issue before it and excluded those questions and results. *See State v. Evangelista*, 319 N.C. at 164, 353 S.E. 2d at 384; *State v. Knox*, 78 N.C. App. 493, 337 S.E. 2d 154; N.C.G.S. § 8C-1, Rule 702 (1986).

Id. at 36, 366 S.E. 2d at 468. *Anderson* is dispositive here. The trial court properly excluded questions 3, 4, 5 and 6 and their results, as well as Dr. Winick's related testimony.

[4] Defendant next contends that the trial court erred in refusing to admit into evidence two magazines purchased by Mrs. Jan Frankowitz, the private investigator, in a local convenience store for comparison by the jury with the two allegedly obscene magazines which were the subject of the trial. The trial court found the "comparison" magazines to be irrelevant. Defendant argues that the availability of the magazines that Mrs. Frankowitz bought indicated community acceptance. We disagree.

The fallacy in defendant's argument is that availability does not indicate community acceptance; it indicates only availability. We agree with the Court of Appeals that availability of similar material alone means nothing more than that other persons are engaged in disseminating similar material. Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *See Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590; *United States v. Manarite*, 448 F. 2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947, 30 L.Ed. 2d 264 (1971). The trial court did not err in excluding this evidence.

[5] Finally, defendant argues that the trial court erred in refusing to permit Dr. Terry Cole, a professor at Appalachian State University, to testify. Dr. Cole would have testified that he had made a systematic study under accepted methodology of sexually explicit materials with relation to the first amendment to the United States Constitution and N.C.G.S. § 14-190.1, and that based on this study, he held the opinion that the magazines in this case were not patently offensive and did not appeal to the prurient interest in sex. Dr. Cole would have testified further that the magazines had scientific, educational and political value based upon their use in marriage and sex counseling, in the classroom setting and in communication of ideas among the general

population. We agree with defendant that the trial court's refusal to admit the testimony was error, but we conclude that the error was harmless.

Dr. Cole was accepted by the trial court as an expert in "speech and communication in the context of public communication." He had years of experience in teaching speech communication, including the use of sexually explicit materials, at a North Carolina university. He had used magazines of the type at issue here throughout his teaching career to assist students in the understanding and application of the first amendment and state law relating to obscenity. He had made a specific study of the subject. In our view, he was qualified to give his expert opinion that the magazines in this case were not patently offensive and did not appeal to the prurient interest in sex. However, the jury was not deprived of the essence of Dr. Cole's testimony in arriving at its verdict because that portion of Dr. Winick's testimony which was admitted covered substantially the same ground. Dr. Winick testified that the magazines were not patently offensive and that they did not appeal to the prurient interest in sex. He also testified that they had artistic and scientific value. "[A] litigant is not harmed by the exclusion of testimony, when the same, or substantially the same, testimony is subsequently admitted." *Powell v. Daniel*, 236 N.C. 489, 492, 73 S.E. 2d 143, 145 (1952). Defendant suffered no prejudice by the exclusion of Dr. Cole's testimony.

We conclude that defendant's trial was free of prejudicial error. The opinion of the Court of Appeals is therefore

Affirmed.

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

ALDERMAN v. CHATHAM COUNTY

No. 239P88.

Case below: 89 N.C. App. 610.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

BEIGHTOL v. BEIGHTOL

No. 262P88.

Case below: 90 N.C. App. 58.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

BRACE v. STROTHER

No. 317P88.

Case below: 90 N.C. App. 357.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

BRIDGES v. LINN-CORRIHER CORP.

No. 251P88.

Case below: 90 N.C. App. 397.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

CITY OF FAYETTEVILLE v. E & J INVESTMENTS, INC.

No. 271P88.

Case below: 90 N.C. App. 268.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

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

CLARK v. INN WEST

No. 180PA88.

Case below: 89 N.C. App. 275.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

COLLINGWOOD v. G. E. REAL ESTATE EQUITIES

No. 240PA88.

Case below: 89 N.C. App. 656.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

D. W. WARD CONSTRUCTION CO. v. ADAMS

No. 277PA88.

Case below: 90 N.C. App. 241.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

DOERNER v. CITY OF ASHEVILLE

No. 279P88.

Case below: 90 N.C. App. 128.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

FOSTER v. FOSTER

No. 285PA88.

Case below: 90 N.C. App. 265.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

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

GOINS v. CONE MILLS CORP.

No. 266P88.

Case below: 90 N.C. App. 90.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

GREENE v. GREENE

No. 280P88.

Case below: 90 N.C. App. 274.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

HEDRICK v. HEDRICK

No. 256P88.

Case below: 90 N.C. App. 151.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Notice of appeal by plaintiff pursuant to G.S. 7A-30 dismissed 7 September 1988.

JAMES v. JAMES

No. 208P88.

Case below: 90 N.C. App. 583.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

JONES v. FLETCHER

No. 304P88.

Case below: 90 N.C. App. 610.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Petition by defendant (Christopher D. Fletcher) for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

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

McGAHA v. NANCY'S STYLING SALON

No. 273P88.

Case below: 90 N.C. App. 214.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

MILLER BREWING CO. v.
MORGAN MECHANICAL CONTRACTORS, INC.

No. 318P88.

Case below: 90 N.C. App. 310.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

MISHLER v. MISHLER

No. 225P88.

Case below: 90 N.C. App. 72.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

NANCE v. NEASHAM

No. 342P88.

Case below: 90 N.C. App. 611.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Petition by defendants for writ of supersedeas and temporary stay denied 7 September 1988.

PARSONS v. PARSONS

No. 259P88.

Case below: 90 N.C. App. 148.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

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

PEARSON v. NATIONWIDE MUTUAL INS. CO.

No. 310P88.

Case below: 90 N.C. App. 295.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

PELICAN WATCH v. U.S. FIRE INS. CO.

No. 263PA88.

Case below: 90 N.C. App. 140.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988; review limited to the issue of the propriety of dismissal of plaintiffs' appeal. Petition by defendant (U.S. Fire Ins. Co.) for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988; review limited to the issue of propriety of dismissal of defendant's appeal.

PHIPPS v. PALEY

No. 281P88.

Case below: 90 N.C. App. 170.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

SILVERS v. HORACE MANN INS. CO.

No. 261PA88.

Case below: 90 N.C. App. 1.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

SKY CITY STORES v. UNITED OVERTON CORP.

No. 264P88.

Case below: 90 N.C. App. 124.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

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

STATE v. AGUDELO

No. 241P88.

Case below: 89 N.C. App. 640.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 September 1988.

STATE v. BUTLER

No. 333P88.

Case below: 90 N.C. App. 463.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 September 1988.

STATE v. BYRD

No. 410A88.

Case below: 91 N.C. App. 170.

Temporary stay allowed 30 August 1988 pending consideration and determination of the petition for supersedeas on the condition that the secured appearance bonds, and the conditions thereof, remain in full force and effect.

STATE v. CANTY

No. 356P88.

Case below: 90 N.C. App. 612.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

STATE v. EMERY

No. 383P88.

Case below: 91 N.C. App. 24.

Petition by Attorney General for writ of supersedeas and temporary stay denied 23 August 1988.

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

STATE v. HOLMES

No. 270P88.

Case below: 90 N.C. App. 275.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

STATE v. HOOVER

No. 343P88.

Case below: 89 N.C. App. 199.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 September 1988.

STATE v. JONES

No. 359P88.

Case below: 90 N.C. App. 610.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 September 1988.

STATE v. LAY

No. 242P88.

Case below: 89 N.C. App. 724.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 September 1988.

STATE v. LIGHTSEY

No. 289P88.

Case below: 90 N.C. App. 149.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 September 1988.

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

STATE v. PEARSON

No. 238P88.

Case below: 89 N.C. App. 620.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

STATE v. ROBEY

No. 435P88.

Case below: 91 N.C. App. 198.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 16 September 1988.

STATE v. SMITH

No. 282A88.

Case below: 90 N.C. App. 161.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 7 September 1988.

STATE v. SPEAKS

No. 149P88.

Case below: 89 N.C. App. 153.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

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

STATE v. TAYLOR

No. 268P88.

Case below: 90 N.C. App. 276.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

STATE v. WATKINS

No. 236P88.

Case below: 89 N.C. App. 599.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

STATE v. WHITE

No. 361P88.

Case below: 82 N.C. App. 358.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 September 1988.

STEWART v. JOHNSON

No. 350P88.

Case below: 88 N.C. App. 277.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 7 September 1988.

THOMPSON v. ASHWORTH

No. 269P88.

Case below: 90 N.C. App. 276.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988.

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

TOWN OF ATLANTIC BEACH v.
TRADEWINDS CAMPGROUND, INC.

No. 274P88.

Case below: 90 N.C. App. 610.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 7 September 1988.

TRADEWINDS CAMPGROUND, INC. v.
TOWN OF ATLANTIC BEACH

No. 314P88.

Case below: 90 N.C. App. 601.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 September 1988. Petition by plaintiff for writ of supersedeas denied and temporary stay dissolved 7 September 1988.

VASS v. BD. OF TRUSTEES OF
STATE EMPLOYEES' MEDICAL PLAN

No. 213PA88.

Case below: 89 N.C. App. 333.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

WILLIAMS v. INTERNATIONAL PAPER CO.

No. 257PA88.

Case below: 89 N.C. App. 256.

Petition by several parties for discretionary review pursuant to G.S. 7A-31 allowed 7 September 1988.

STATE OF NORTH CAROLINA v. JERRY RAY CUMMINGS

No. 65A87

(Filed 6 October 1988)

1. **Homicide § 21.5— first degree murder—malice, premeditation and deliberation—sufficient evidence**

The evidence raised inferences of malice, premeditation and deliberation sufficient to survive defendant's motion to dismiss a charge of first degree murder where it tended to show that defendant calmly volunteered his services as an assassin to his cousin after the cousin had a dispute with the victim about a missing dog and then worked out the details of the crime with the cousin's help; the two planned a ruse to gain access to the victim and discussed the need for assistance by the cousin's girlfriend; and defendant then carried out the plan, announcing his deadly intention to the victim before shooting him with a .22-caliber pistol.

2. **Criminal Law § 106— credibility of State's witness—interest in outcome of case—dismissal of charge not required**

The trial court was not required to dismiss a charge of first degree murder on the basis of defendant's contention that the State's chief witness lied about the murder to protect her boyfriend and cover up her own involvement in the crime since the credibility of the witness and her interest in the outcome of the case were matters for the jury to consider.

3. **Homicide § 18.1— premeditation and deliberation—intoxication of defendant**

Although some evidence of defendant's intoxication was presented in a first degree murder case, the evidence was sufficient to support a finding that defendant was not so intoxicated as to be incapable of premeditation and deliberation where it tended to show that defendant coolly and coherently planned the murder with his cousin; defendant had the presence of mind to realize that the victim would not open the door for him and to communicate this problem to his cousin; defendant was alert enough to compel participation in the crime by the cousin's girlfriend by grabbing her arm when she tried to turn back while they were on their way to the victim's house; defendant was able to give the girlfriend instructions about her role in the ruse used to get the victim to open the door to his house; defendant held a conversation with the victim and distracted him long enough to position himself for the shooting; after the shooting defendant carefully removed a spent cartridge casing from the gun; and defendant made intimidating statements to the cousin's girlfriend to coerce her silence about the shooting.

4. **Criminal Law § 102.6— jury argument—impact of murder upon victim's family**

The prosecutor's references in his jury argument in a first degree murder case to the impact of the crime upon members of the victim's family who testified for the State did not require the trial court to intervene ex mero motu. A reference to a show of emotion on the stand by the victim's brother-in-law was not a bid for sympathy but was a legitimate argument concerning credibility,

and a reference to the discovery of the victim's body by a sixteen-year-old family member was nothing more than a brief capsulization of the boy's testimony and was properly rooted in the evidence.

5. **Criminal Law § 135.6— first degree murder—sentencing hearing—prior murder conviction—eyewitness testimony**

In the sentencing phase of a first degree murder case in which the State introduced a certified copy of the court records of defendant's conviction of first degree murder in 1966, defendant was not prejudiced by the admission of eyewitness testimony detailing the factual circumstances of the 1966 murder where the testimony was neither excessive nor repetitious; the trial judge exercised the necessary discretion to prevent the hearing from degenerating into a mini-trial of the prior murder; and defendant was given the opportunity to impress upon the jury that the prior crime was alcohol related.

6. **Criminal Law § 102.3— sentencing hearing—improper jury argument—necessity for objection**

The scope of an argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings. Consequently, when remarks of the prosecutor during the sentencing argument are not objected to at trial, the alleged impropriety must be glaring or grossly egregious for the appellate court to determine that the trial judge erred in failing to take corrective action sua sponte.

7. **Criminal Law § 102.6— capital case—jury argument—effect on victim's family—harmless error**

Assuming arguendo that the prosecutor's jury argument during the sentencing phase of a first degree murder case concerning the effect of the crime on certain members of the victim's family was improper under *Booth v. Maryland*, 482 U.S. --- (1987) (use of victim impact statements during sentencing phase of capital case violates Eighth Amendment), and that the impropriety was sufficiently glaring to call for the trial judge's intervention ex mero motu, the trial judge's failure to take corrective action was harmless error in light of the aggravating circumstance found by the jury, the complete absence of mitigation, and the overwhelming evidence against defendant.

8. **Criminal Law § 135.9— capital case—mitigating circumstances—unanimity requirement not unconstitutional**

The trial judge in a capital case did not commit plain error under *Mills v. Maryland*, 480 U.S. --- (1988), by instructing the jury that its decisions as to mitigating circumstances must be unanimous.

9. **Criminal Law § 135.10— death sentence not disproportionate**

A sentence of death imposed on defendant for first degree murder was not disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2) where the jury found the single aggravating circumstance that defendant had previously been convicted of another capital felony, N.C.G.S. § 15A-2000(e)(2), and found no mitigating circumstances, and where the evidence showed that defendant volunteered his services as an assassin of the elderly victim after defendant's cousin and the victim had a dispute about a missing dog.

Chief Justice EXUM dissenting as to sentence.

Justice FRYE dissenting as to sentence.

APPEAL by defendant from judgment sentencing him to death on his conviction of murder in the first degree, said judgment imposed by *Preston, J.*, at the 19 January 1987 session of Superior Court, ROBESON County. Heard in the Supreme Court 12 April 1988 and 22 August 1988.

Lacy H. Thornburg, Attorney General, Joan H. Byers, Special Deputy Attorney General, James J. Coman, Senior Deputy Attorney General, and William N. Farrell, Jr., Special Deputy Attorney General, for the state.

Robert D. Jacobson, E. C. Bodenheimer, Jr., and Hubert N. Rogers III, for defendant.

MARTIN, Justice.

Defendant assigns error to both the guilt phase and the sentencing phase of his capital trial. Having carefully reviewed the entire record and each of defendant's arguments, we find no error in either phase and decline to disturb defendant's conviction and sentence.

The state's evidence tended to show the following: On 16 August 1986 the body of Jesse Ward, aged seventy-seven, was discovered in the kitchen of his Robeson County home. The victim had spent the previous day helping his brother-in-law, Henry Powell, fix a lawn mower and had planned to return to Powell's home on the morning of the sixteenth to finish the job. When the victim did not arrive as scheduled, Powell called him on the telephone repeatedly but always received a busy signal. Later that day Powell and his grandson Richard went by the victim's house. Richard and a neighbor entered the house through the back door and discovered the victim's body on the kitchen floor. They observed two holes in the victim's abdomen and blood on his trousers. The victim held the telephone receiver in his left hand, pressed against his ear.

Investigators recovered a cartridge casing from the grass near the back door and a spent .22-caliber bullet from the kitchen sink. There were two round holes in the back screen door. An

autopsy performed by Dr. Marvin Thompson revealed two penetrating gunshot entrance wounds on the victim's abdomen and a single exit wound on his back. A .22-caliber bullet was lodged in the victim's spinal column and his abdominal cavity contained two liters of blood. Dr. Thompson determined the cause of death to be "hemorrhage secondary to gunshot wounds."

The shooting occurred just north of Maxton near the intersection of Highway 71 and Rural Paved Road 1312. The victim's home sits approximately 135 feet east of a small grocery store located at the corner of the intersection. Haven Betsy's house is some 527 feet south of the store. On 17 August Detective A. W. Oxendine took statements from Grady Jacobs and Patty Faye Locklear, residents of the Betsy home. Shortly thereafter Oxendine obtained a warrant for defendant's arrest.

The state based its case primarily upon Patty Faye Locklear's eyewitness account of the crime. Ms. Locklear testified that on 15 August 1986 she was living at Haven Betsy's house with her boyfriend Grady Jacobs. Defendant, who is Jacobs' first cousin, had also been living there but had moved out at the end of July after threatening to kill Betsy during a drunken confrontation. Nonetheless, he continued to visit the Betsy home every evening after work. Defendant often displayed a silver .22-caliber pistol: "We would be sitting in the house—you know—drinking and he never would pull it out until he got real high."

Jacobs and Ms. Locklear had become acquainted with their elderly neighbor, the victim Jesse Ward, several weeks before the crime. Mr. Ward gave them rides to Lumberton and on one occasion they spent the night at his home. On 5 August 1986, Jacobs bought a dog from Mr. Ward, making a down payment of seven or eight dollars. However, the dog soon escaped from its new owner and returned to the Ward home. Jacobs retrieved the dog but it got loose once more, never to be seen again.

On the evening of 15 August defendant came by Haven Betsy's house. Ms. Locklear, Jacobs, and defendant drank for about thirty minutes, then walked to a friend's house about three-quarters of a mile away. Jacobs, who had broken his foot two days before, used crutches and walked very slowly. Defendant drank about a half a fifth of liquor during the visit. On the way back to Betsy's, the group stopped by the Ward home because

Jacobs wanted to inquire about the missing dog. They went around to the back door and Jacobs asked Mr. Ward if he had the dog. Mr. Ward responded that he did not. Jacobs said he wanted the money or the dog. Mr. Ward indicated that he had neither and slammed the door.

As they walked away Jacobs angrily noted that Mr. Ward "was going to pull that shit on the wrong person and they was going to kill him." A few minutes later defendant asked if Jacobs wanted him to kill Mr. Ward. Jacobs responded "Yeah, kill the old son-of-a-bitch." Jacobs suggested that defendant lure Mr. Ward away from home by asking him to help carry a washing machine. He told defendant not to shoot Mr. Ward at home because "all them houses will hear it." Defendant asked Jacobs to accompany him on the fatal errand but Jacobs declined, noting that his broken foot would prevent him from fleeing the scene if necessary. When defendant protested that Mr. Ward would probably not open the door for him, Jacobs ordered Ms. Locklear to go along. Ms. Locklear reluctantly complied because she was afraid of the two men. She tried to turn back at one point but defendant grabbed her arm.

When they got to the Ward home defendant instructed Ms. Locklear to knock at the back door and identify herself. Mr. Ward came to the door and defendant started talking about the washing machine. Mr. Ward told him it was late and the machine probably would not fit in his trunk anyway. At that point defendant drew his gun and said "I'm going to kill you you old white son-of-a-bitch." He shot twice. Mr. Ward slammed the door. Ms. Locklear heard him exclaim "Oh" and then heard something fall. She and defendant ran back to Haven Betsy's house where defendant removed the remaining bullets from the gun. He offered a spent cartridge casing to Ms. Locklear but she refused to take it. Defendant said he would "hold the evidence." He looked at Ms. Locklear and declared "That's what I do to a person that tells on me."

Jacobs and Ms. Locklear first talked to police on 17 August. Their original statements made no mention of Jacobs' role in planning the killing. Statements taken 18 December were more complete and were essentially consistent with Ms. Locklear's trial testimony. Both Jacobs and Ms. Locklear were subsequently charged with conspiracy to commit murder.

Robeson County officers arrested defendant on 17 August at Haven Betsy's house. A search incident to the arrest yielded a .22-caliber semi-automatic pistol which had been hidden in defendant's left sock. Although the bullet retrieved from the victim's body was too deformed to determine if it had been fired from defendant's gun, the bullet retrieved from the kitchen sink had rifling characteristics similar to those in the gun's barrel, and the cartridge casing retrieved from the victim's yard matched casings fired from the gun. A further search of defendant at the sheriff's department yielded fifteen hollow-point .22-caliber long-rifle cartridges.

After defendant was taken into custody, he made three brief but somewhat contradictory statements. When asked if he shot Mr. Ward, he responded "I did it." He later said "if I shot the man, I don't remember it." As he was taken to be fingerprinted, he stated "If I go down I'm not going down alone." After the fingerprinting he made a statement blaming the shooting on Grady Jacobs and Patty Faye Locklear.

At trial defendant testified on his own behalf and denied shooting Mr. Ward. His evidence tended to show the following: On 15 August he drank three cans of beer and three vodka drinks after work. He then filled up a pint bottle with vodka, put his gun in his pocket, and went to Haven Betsy's house. When he arrived Grady Jacobs approached him and asked to borrow the gun. Defendant gave it to him and they had a drink. They then walked to a friend's house and finished off the pint. At one point they drove to defendant's house for more liquor and defendant got "pretty well loaded." On the way back to Betsy's house at about 12:30 or 1:00 a.m., they stopped at the corner grocery store to get soft drinks out of the machine. Defendant was "pretty high" but was not staggering. Jacobs and Ms. Locklear went to the Ward home while defendant remained at the store. Shortly thereafter defendant heard two or three shots. Jacobs and Ms. Locklear returned to the store arguing, then hurriedly retreated to Betsy's house. Jacobs returned defendant's gun.

On cross-examination, defendant admitted convictions for larceny in 1962; murder in the first degree, escape from prison, and auto larceny in 1966; escape from prison in 1969; escape from prison and auto larceny in 1971; and driving under the influence

in 1983. The jury convicted defendant of murder in the first degree based on a theory of premeditation and deliberation.

During the sentencing phase the state presented evidence with regard to defendant's prior murder conviction. Ula Lowry testified that on 22 May 1966 she went riding with defendant and his uncle, Otis Bryant. Defendant sat in the backseat and Bryant drove while both men drank white liquor. After riding around for a few hours they came to a particular crossroads. Defendant ordered Bryant to turn left towards home, but Bryant proceeded straight across the intersection instead. Defendant then shot Bryant in the back four times with a .22-caliber pistol. When Bryant fell over onto Ms. Lowry's lap and the car came to a stop, defendant got out and ran into the woods. There had been no argument and defendant did not appear drunk.

Defendant again testified on his own behalf, expressing remorse for the death of Jesse Ward. His evidence tended to show that he has a third-grade education and cannot read or write. Otis Bryant's murder occurred after he and Bryant had finished a half-gallon jar of white liquor. He cannot say exactly what happened that day in 1966 because he was "pretty well loaded." He was paroled three times but each time returned to prison after conviction for driving under the influence. He has escaped from prison several times, including an escape while awaiting trial in the present case. Although he sought treatment for alcoholism on several occasions, he failed to take the medication he was given.

The jury found N.C.G.S. § 15A-2000(e)(2), defendant's prior capital felony conviction, to be the sole aggravating circumstance and rejected each of the four mitigating circumstances submitted. Upon unanimously finding beyond a reasonable doubt that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty, the jury recommended that defendant be sentenced to death. Judgment of execution was entered 27 January 1987. Defendant appeals this sentence as a matter of right under N.C.G.S. § 7A-27(a).

GUILT PHASE

Defendant first contends that the trial judge improperly denied his motions to dismiss the charge of murder in the first

degree. We note at the outset that the denial of defendant's motion to dismiss at the close of the state's evidence is not properly at issue on this appeal. Defendant chose to offer evidence after his motion was denied and thereby waived appellate review of the trial judge's decision. *State v. Griffin*, 319 N.C. 429, 355 S.E. 2d 474 (1987); N.C.G.S. § 15-173 (1983). We need only address defendant's motion to dismiss at the close of all the evidence.

In considering a motion to dismiss in a criminal matter, the trial court must determine whether there is substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). The evidence must be examined in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Murder in the first degree is the intentional and unlawful killing of a human being with malice, premeditation, and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); N.C.G.S. § 14-17 (1986). Premeditation means that the defendant formed the specific intent to kill for some length of time, however short, before the actual killing. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). No particular length of time is required for the mental processes of premeditation and deliberation; it is sufficient that the processes occur prior to, and not simultaneously with, the killing. *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

Premeditation and deliberation ordinarily must be proved by circumstantial rather than direct evidence. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986). Some of the circumstances which may support an inference of premeditation and deliberation are: the brutality of the killing, the nature and number of the victim's wounds, the dealing of lethal blows after the victim has been felled and

rendered helpless, a lack of provocation on the part of the victim, the conduct and statements of the defendant before and after the killing, threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased, and ill-will or previous difficulty between the parties. *Id.* Malice may be inferred from the use of a deadly weapon. *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983).

[1] Applying these familiar principles to the case at hand, we find ample evidence of the elements of first-degree murder in the shooting of Jesse Ward. In the light most favorable to the state the evidence supported the inference that defendant formed the intent to kill well in advance of the murderous deeds. The evidence tended to show that defendant calmly volunteered his services as an assassin to Grady Jacobs shortly after Jacobs' dispute with the victim, then worked out the details of the crime with Jacobs' help. The two planned a ruse to gain access to the victim and discussed the need for Patty Faye Locklear's assistance. Defendant then carried out the plan, announcing his deadly intention to the victim before shooting him with a .22-caliber pistol. Defendant's conduct and declarations, coupled with the lack of legal provocation on the part of the victim, raised inferences of malice, premeditation, and deliberation sufficient to survive the motion to dismiss.

[2] Defendant presents two arguments in support of the motion. He first submits that the testimony of Patty Faye Locklear, from which most of the state's evidence was gleaned, was not substantially sufficient to convince a reasonable trier of fact that defendant was the perpetrator of the offense. Defendant contends that Ms. Locklear had an interest in the outcome of the case and therefore lied about the murder in order to protect Grady Jacobs and cover up her own involvement in the crime. We find no merit in this argument. As previously noted, the evidence on a motion to dismiss must be viewed in the light most favorable to the state. Ms. Locklear's credibility and her interest in the outcome of the case were matters for the jury to consider. *State v. Locklear*, 322 N.C. 349, 368 S.E. 2d 377 (1988).

[3] Alternatively, defendant argues that he was so intoxicated at the time of the offense that he was incapable of forming a premeditated and deliberate purpose to kill. The general rule on

intoxication may be stated as follows: If at the time of the killing the defendant was so intoxicated as to be utterly incapable of forming a premeditated and deliberate intent to kill, he may not be found guilty of first-degree murder because an essential element of the crime is missing. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). However, no inference of the absence of premeditation and deliberation arises from intoxication as a matter of law, because intoxication does not necessarily render a person incapable of engaging in the thought processes of premeditation and deliberation. *State v. Locklear*, 322 N.C. 349, 368 S.E. 2d 377; *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983).

Here, although there was some evidence of intoxication presented, there was also considerable evidence to the contrary. Ms. Locklear's testimony painted a vivid portrait of defendant coolly and coherently planning the murder with Grady Jacobs. Defendant had the presence of mind to realize that the victim would not open the door for him and to communicate this problem to Jacobs. He was alert enough to compel Ms. Locklear's participation in the crime by capturing her as she attempted to turn back. He was also able to give her instructions about her role in the ruse. He managed to hold a conversation with the victim and distracted him long enough to position himself for the shooting. After the shooting he carefully removed "the evidence" from the gun and made intimidating statements to Ms. Locklear to coerce her silence. Viewing this evidence in the light most favorable to the state, it is sufficient to support a finding that defendant was not so intoxicated as to be incapable of premeditation and deliberation.

We conclude that the trial court properly denied defendant's motion to dismiss. For the same reasons, his motion for directed verdict of acquittal was also properly denied. Such motions challenge the sufficiency of the evidence to go to the jury and have the same legal effect as motions for dismissal. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978).

[4] By his next assignment or error, defendant contends that he was prejudiced by references to the impact of the crime upon the victim's family. Defendant challenges the following portion of the district attorney's closing argument in the guilt phase:

> This lawsuit, like I would suggest 99% of all criminal lawsuits, comes down to what Mr. Jacobson talked about.

Credibility. Just simply, who can you afford to believe as you go about doing your duty in this case? Do you believe for instance, ladies and gentlemen of the jury, Mr. Henry Powell? The 80-year-old-gentlemen sitting here. What reason has he got to tell you anything but the truth?

His emotion on that stand, ladies and gentlemen, was not fake[d] for your benefit as I would suggest to you was the emotion that this defendant sitting over here purported to display for your—whatever heart strings he could pull on. That old man misses his brother-in-law who was in good health over there that day helping at his home.

Do you believe what Mr. Powell has to say about this case? He had absolutely no reason to tell you anything but the truth about the events of August 15th and August 16th 1986. Do you believe him?

Do you believe, ladies and gentlemen of the jury, the young boy sitting there, Richard Powell, Jr., sixteen years of age. The boy that tells you when he put his hand on the door knob something struck him. He couldn't push it open. He was filled with trepidation for some reason as his grandfather and others went around the house hollering for Jesse. And eventually he got his nerve up and pushed open the door. And when he did he found his grandfather [great-uncle] lying there in the blood with the holes in his chest.

. . . .

Do you believe what little Richard Powell has to say about this case? He has no reason to tell you anything but the absolute truth about the events of that day.

Defendant urges that this argument's emotional appeal was unduly inflammatory.

We have recognized that counsel must be allowed wide latitude in the argument of a hotly contested case. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). However, we have also stressed that "the jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *State v.*

Boyd, 311 N.C. 408, 418, 319 S.E. 2d 189, 197 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985). Arguments emphasizing mercy, prejudice, pity, or fear are inappropriate in the guilt phase of the trial, in which the jury's focus is properly upon guilt or innocence. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

Defendant failed to object to the alleged error. In a capital case

> an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the 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).

Here the argument does not rise to the level of gross impropriety. Viewed in context, the reference to Henry Powell's show of emotion on the stand was not a bid for sympathy but instead a small portion of counsel's lengthy discussion of credibility issues. This discussion encouraged an assessment of the relative credibility of each and every witness based on many factors including demeanor on the witness stand. The demeanor of witnesses is a matter before the jury and may legitimately be argued to them. *Cf. State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Greene*, 33 N.C. App. 228, 234 S.E. 2d 428 (1977). Furthermore, the reference to Richard Powell's discovery of the victim's body was nothing more than a brief capsulization of the boy's testimony. As such it was rooted in the evidence.

Arguments of counsel are left largely to the discretion of the trial judge. *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). In the absence of a contemporaneous objection by defendant we do not find that the prosecutor's remarks warranted intervention by the trial judge. *See State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1 (guilt phase argument that the family of the victim had only the jury to turn to for justice not so improper as to require intervention ex

mero motu); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980) (argument questioning what went through the minds of the victim's family at the cemetery not so improper as to require intervention ex mero motu). This assignment of error is overruled.

We find no error in the guilt phase.

SENTENCING PHASE

[5] By his first assignment of error in the sentencing phase, defendant contends that he was prejudiced by the admission of direct evidence detailing the factual circumstances of the 1966 murder of Otis Bryant. He claims that the testimony of Ula Lowry transformed the sentencing proceedings into a "mini-trial" of the earlier offense.

We have held that the prosecution must be permitted to present any competent, relevant evidence relating to defendant's character or record which will substantially support the imposition of the death penalty, so as to avoid arbitrary or erratic sentencing. *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808. The preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence. *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984). Although a prior conviction *may* be proved by stipulation or by original certified copy of the court record, the state is not precluded from other methods of proof. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

The better rule is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, 463 U.S. 1213, 77 L.Ed. 2d 1398, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). Defendant cannot by stipulation foreclose the state's proof by limiting it to the bare record of the conviction. *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197. Here the evidence in question was neither excessive nor repetitious and the trial judge exercised the necessary discretion to prevent the hearing from degenerating into a mini-trial of the prior crime. Moreover, defendant was given the opportunity to impress upon the jury that the prior crime was alcohol-related. This could only have worked to the defendant's advantage as he sought to establish mitigating circumstances relating to his purported alcoholism.

In the same vein, defendant contends that the district attorney should have been precluded from cross-examining him about the prior murder and from arguing the circumstances of it in his remarks to the jury. Because we hold that evidence concerning defendant's prior conviction was relevant and properly admitted, the state was clearly entitled to cross-examine defendant with respect to the conviction and to argue the matter to the jury. These assignments of error are overruled.

Defendant next assigns error to the district attorney's mention of the victim's family in his sentencing phase jury remarks:

> Mr. Ward will never see young Richard grow up to [be] a strong young man and raise a family. He will never see great nephews and nieces of his live, and grow up because he's gone. Those little things—the opportunity to bounce on his knee the child produced by this boy here, he'll never see.
>
> . . . .
>
> Well, [defendant] took not only the life of Jesse Ward, ladies and gentlemen of the jury, he took the life of a loved one as well. He took from Mr. Henry Powell a beloved brother-in-law. No one can deny the emotions that the old man showed on the witness stand. He took from the young boy there, Richard, an uncle. He took from the family one that they loved.

[6] Defendant failed to object to these remarks. The scope of an argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings. Consequently, when remarks of the prosecutor during the sentencing argument were not objected to at trial, the alleged impropriety must be glaring or grossly egregious for this Court to determine that the trial judge erred in failing to take corrective action sua sponte. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983).

[7] Defendant maintains that the prosecutor's argument was improper under *Booth v. Maryland*, 482 U.S. ---, 96 L.Ed. 2d 440 (1987), in which the United States Supreme Court held that the use of victim impact statements during the sentencing phase of capital cases violates the eighth amendment. In discussing *Booth* we have stated that

> [t]he Supreme Court's decision in *Booth* brings into question language in *Pinch* and *Oliver* that the value of the victim's life may be considered by the jury during sentencing. *See State v. Pinch*, 306 N.C. at 25, 292 S.E. 2d at 222, *cert. denied, Smith v. North Carolina*, 459 U.S. 1056, 74 L.Ed. 2d 622, *reh'g denied, Pinch v. North Carolina*, 459 U.S. 1189, 74 L.Ed. 2d 1031; *State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326. If the touchstone for propriety in sentencing arguments is whether the argument relates to the character of the criminal or the nature of the crime, *see State v. Oliver*, 309 N.C. at 360, 307 S.E. 2d at 326, then, arguably, the effects of that crime on those the victim leaves behind are not relevant.

State v. Brown, 320 N.C. 179, 202-03, 358 S.E. 2d 1, 17.

Assuming arguendo that the remarks were improper under *Booth* and that the impropriety was sufficiently glaring to call for the trial judge's intervention ex mero motu, we nonetheless conclude that defendant was not prejudiced by the trial judge's failure to take corrective action. In light of the aggravating circumstance found, the complete absence of mitigation, and the overwhelming evidence against defendant, any error in this respect was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983).

[8] Finally, defendant contends that the trial judge committed plain error in instructing the jury that its decisions as to mitigating circumstances must be unanimous. Defendant, relying on the recent decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), urges that the instructions on unanimity entitle him to a new sentencing hearing. For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we reject defendant's argument.

PROPORTIONALITY

Having determined that the guilt and sentencing phases of defendant's trial were free of prejudicial error, we now turn to our statutory duties pursuant to the mandate of N.C.G.S. § 15A-2000(d)(2). The statute sets forth a tripartite test as a check against the random or capricious imposition of the death penalty. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). We must determine

(1) whether the record supports the jury's finding of the aggravating circumstance or circumstances upon which it based the death sentence; (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. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983).

We consider the responsibility placed upon us by subdivision (d)(2) to be as serious as any responsibility placed upon an appellate court. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703; *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982). Thus, we accord the review of capital cases our utmost care and diligence. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203; *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). We have carefully reviewed the record on appeal, transcript, and exhibits in this case along with the briefs and oral arguments presented. After full and cautious deliberation, we conclude that the record fully supports the jury's finding of the aggravating circumstance submitted. Furthermore, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary or impermissible factor.

[9] Finally, we undertake the solemn task of proportionality review, whereby we compare both the defendant and the crime to similar cases in the proportionality pool. The pool includes all cases arising since 1 June 1977 which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury failed to agree on a sentencing recommendation. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335. The pool includes only those cases which have been affirmed by this Court as to both phases of the trial. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703. In making the comparison, we do not simply engage in rebalancing the aggravating and mitigating circumstances; rather, we are obligated to scour the entire record for all the circumstances of the case and the manner in which the defendant committed the crime, as well as the defendant's character, background, and mental and physical

condition. *State v. McLaughlin*, 323 N.C. 68, 372 S.E. 2d 49 (1988); *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985). We do not feel bound to give a citation to every case used for comparison. *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983).

In this case the jury found the single aggravating circumstance that defendant had been previously convicted of another capital felony, N.C.G.S. § 15A-2000(e)(2). The jury found no circumstances in mitigation.

To date this Court has affirmed the guilt and sentencing phases in thirty-eight capital cases. We have vacated the death sentence as disproportionate in six of those: *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); *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; and *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703. Defendant's case has little in common with these six. In each there was significant mitigation found by the jury. In *Bondurant*, for example, the defendant sought immediate medical aid for his victim and cooperated with law enforcement officers. In *Stokes* and *Young*, the defendants were teenagers. In *Jackson*, *Hill*, and *Rogers*, the defendants had no significant history of prior criminal conduct. More to the point, in none of the cases held disproportionate had the defendant killed another person prior to the murder for which he received the death penalty.

Defendant's case is in fact unique among all those constituting the proportionality pool. His is the only case in which the jury found the prior capital felony aggravating circumstance under N.C.G.S. § 15A-2000(e)(2). For purposes of comparison, then, we look to cases in which a very similar circumstance, conviction of a prior violent felony, was found pursuant to N.C.G.S. § 15A-2000(e)(3), and in which the prior violent felony resulted in the victim's death. Sections (e)(2) and (e)(3) are the only enumerated aggravating circumstances which reflect upon a defendant's character as a recidivist. *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1. They tend to demonstrate that the crime committed was part of a long-term course of violent conduct. *Id.*

Our research reveals five cases in which the defendant had been convicted of a prior violent felony resulting in the victim's death. In four of the cases the jury found some circumstances in mitigation but recommended a sentence of death: *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (previous conviction of murder in the second degree); *State v. McLaughlin*, 323 N.C. 68, 372 S.E. 2d 49 (previous conviction of involuntary manslaughter); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (previous conviction of murder in the first degree); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 68 L.Ed. 2d 220, *reh'g denied*, 451 U.S. 1012, 68 L.Ed. 2d 865 (1981) (previous conviction of murder in the second degree).

In only one case did the jury recommend a life sentence: *State v. Withers*, 311 N.C. 699, 319 S.E. 2d 211 (1984). In *Withers* the defendant shot and killed his fiancee's twelve-year-old daughter after an argument concerning her accusations of sexual abuse, then shot his fiancee and himself. The defendant had previously been convicted of murder in the first degree and had served thirteen years in prison for that crime before his release on parole. The jury found as aggravating circumstances that defendant had previously been convicted of a violent felony and that the murder of his fiancee's daughter was part of a course of violent conduct. The jury also found one or more of the ten mitigating circumstances submitted but did not specify which ones. We therefore must assume for purposes of proportionality review that all ten circumstances were found. *State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653.

Because of the substantial mitigation involved, *Withers* is distinguishable from the other cases in which the jury recommended death and from the instant case. Juries have consistently returned sentences of death when the defendant previously has been convicted of homicide, unless the mitigation involved is very substantial indeed. Here, of course, the jury found no circumstances in mitigation at all. In the absence of substantial mitigation, we cannot say that defendant's sentence is disproportionate when compared to other cases involving a prior homicide conviction.

This case also bears a striking factual similarity to *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, in which the jury recommend-

ed the death penalty. As in this case, the defendant in *Brown* shot and killed an unsuspecting neighbor because of a grudge against him, the shooting occurred at the victim's home, and the defendant announced his intention to kill the victim to others in advance of the crime. Moreover, in *Brown*, as in this case, the sole aggravating circumstance found was that of a prior violent felony, and the jury found no mitigating circumstances. We find nothing in the record to meaningfully differentiate the instant case from *Brown* or to demonstrate that this defendant is any less deserving of the death penalty than the defendant in *Brown*.

All of the evidence in this case points to the senseless slaying of an elderly man undertaken in a startlingly casual manner. Defendant had no personal quarrel with the victim but took it upon himself to become involved in a dispute between his cousin and the victim about a missing dog. This evidence "paints a picture of defendant as a man shockingly ready to impose himself as an armed arbiter, to convert other's quarrels into quarrels of his own, and to go the ultimate length to dominate a situation." *State v. Green*, 321 N.C. 594, 614-15, 365 S.E. 2d 587, 599 (1988). The circumstances of this crime, like those of defendant's previous capital felony, demonstrate a callous disregard for the value of human life. Both crimes were "especially cold-blooded because of the absence of any motive of the sort which is usually powerful enough to cause one human being to destroy another." *Id.* at 614, 365 S.E. 2d at 599.

Considering the cold-blooded nature of the crime, defendant's criminal history, and the utter lack of mitigation present, we are satisfied that the facts of this case fully support the jury's recommendation of the death sentence for the murder of Jesse Ward and we hold as a matter of law that the sentence is not disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2). Upon this holding, the sentence of death is affirmed. In all phases of the trial below, we find

No error.

Chief Justice EXUM dissenting as to sentence.

I concur in the majority's treatment of the issues in the guilt phase of this case. Because I believe that most of the evidence of-

fered at the sentencing phase, much of it over defendant's objection, was incompetent, I dissent from the majority's conclusion that no error was committed in that phase and vote to remand the matter for a new sentencing hearing.

I.

The state had evidence of only one statutorily permitted aggravating circumstance—defendant's conviction in 1966 of murder in the first degree, a capital felony. To prove this circumstance the state properly offered into evidence a certified copy of the court records of this conviction. These records showed that at the November 1966 Session of Superior Court, Hoke County, defendant pled guilty to the charge of murder in the first degree and was sentenced to life imprisonment.

The state then proceeded to call an eyewitness to the 1966 murder and elicited from her a graphic, detailed description of how the defendant committed that crime. The witness was permitted to testify that in 1966 she was riding as a passenger in the front seat of an automobile being operated by the victim, Otis Bryant. Defendant was in the back seat. When Bryant refused to turn left as instructed by defendant, defendant shot him three times in the back with a .22-caliber pistol. After the first shot the victim fell into the witness's lap. Defendant shot him two more times. The witness then testified that she begged defendant not to shoot her. Defendant said, "I'm not going to bother you," and left the scene of the crime.

After offering a stipulation that defendant had been paroled from prison in 1984, the state rested.

Defendant was called to testify in his own behalf. Almost all his testimony dealt with his family and work history, including work he had done while in prison, his various paroles from prison, and his treatment for alcoholism. With regard to his conviction of the 1966 murder, defendant testified only that on the day of the murder he and the victim had drunk "pretty near a half gallon jar" of white liquor.

Thereafter, the state cross-examined defendant at length concerning the extent to which he could recall the details of the former murder, his motive for shooting his victim on that occasion, and his culpability for the murder notwithstanding his consumption of alcohol.

The state then proceeded to cross-examine defendant at length regarding other convictions and other imprisonments. This cross-examination established that defendant had been previously convicted and served time for breaking and entering and driving under the influence. It also established that he had escaped from prison three times and once from jail while awaiting trial on the instant murder charge. The cross-examination ranged from the details of defendant's various transfers from one prison unit to another, his several escapes from prison, the manner in which these escapes were effected, and defendant's activities during the time he was an escapee. The flavor of some of this cross-examination may be gained from this sample:

Q. Well, after you spent a certain amount of time at McCain they sent you down to Lumberton; isn't that so?

A. Yes sir.

Q. And you promptly escaped again when you got to Lumberton?

MR. BODENHEIMER: Objection.

THE COURT: Overruled.

Q. Sir, isn't that right?

A. Let's see. I believe it is.

Q. Sir?

A. I believe it is.

Q. Where did you escape from this time? Did you go through the fence or walk off the job, or what?

MR. BODENHEIMER: Object.

THE COURT: Overruled.

Q. Sir?

A. It's been so long I can't remember.

Q. You remember swimming the river where one of the fellows drowned in the river? The two of you on escape.

MR. BODENHEIMER: Object.

THE COURT: Overruled.

A. Yes.

Q. Six of you on escape. You remember that?

A. Yes sir.

Q. You didn't physically yourself drowned that fellow in the river, did you?

MR. BODENHEIMER: Objection.

THE COURT: Sustained.

A. I went—

THE COURT: You don't have to answer that.

MR. BODENHEIMER: Move to strike.

THE COURT: Move to strike. The question is allowed. Question.

Q. All right. Well, now you certainly remember that, don't you, sir?

THE COURT: Just a second, Mr. Britt.

MR. BODENHEIMER: Request an instruction on that, Your Honor.

THE COURT: Members of the jury, do not consider it. Strike it from your minds.

Q. What time of the day did you escape on that occasion?

A. I just don't remember.

Q. Well, was it in the nighttime?

A. It was daytime.

Q. Did you go through the fence or just walk off the job or how did you escape?

THE COURT: I believe he said he didn't remember that.

MR. BRITT: He now remembers some other things now, Your Honor, like—

MR. BODENHEIMER: Object.

THE COURT: Just give him a question.

Q. How many of you escaped on this occasion?

A. There was six I believe.

Q. Now, you remember where the six escaped from, don't you?

A. Yes sir.

Q. Where?

A. I believe that time we went over the fence.

Q. Sir?

A. Went over the fence.

Q. Went over the fence?

A. Yes sir.

Q. Have you escaped so many times that you can't remember all the details of all the times?

MR. BODENHEIMER: Object.

THE COURT: Sustained.

MR. BODENHEIMER: Move to strike.

THE COURT: Motion to strike is allowed. Members of the jury, do not consider it.

Q. How did the six of you get over the fence?

A. I don't know.

Q. Sir?

A. I don't know.

Q. Did you cut through the fence or did you go over the fence?

MR. BODENHEIMER: Object.

THE COURT: Overruled.

A. Over it.

Q. Well, did you form a human pyramid and climb up that way or did you have a ladder or what did you do?

MR. BODENHEIMER: Object.

THE COURT: Sustained.

Q. Where were you captured on this escape?

A. (No response.)

Q. Tennessee, wasn't it?

A. Yes sir.

Q. Whereabouts in Tennessee did they catch you?

A. In Chattanooga.

Q. Chattanooga?

A. Yes sir.

Q. How had you gotten from Robeson County, North Carolina to Chattanooga, Tennessee?

MR. BODENHEIMER: Object.

THE COURT: Overruled.

Q. Sir?

A. How did I?

Q. Yes.

A. By bus.

Q. Where did you get the money for the bus?

MR. BODENHEIMER: Object.

THE COURT: Overruled.

Q. Sir?

A. I don't remember where I got the money from. I had some of my own.

Evidence adduced at the sentencing hearing occupies sixty pages of the trial transcript. Of these sixty, eighteen deal with defendant's 1966 murder conviction, and of these eighteen only one page, on which defendant testified to his having drunk white liquor, was proffered by defendant. For twenty-two pages the

state cross-examined defendant with regard to his other convictions, prison escapes, and his activities as an escapee. The remaining twenty pages, concerning defendant's family and work history and his treatment for alcoholism were proffered by defendant.

II.

With regard to the 1966 murder conviction the sentencing hearing devolved, at the state's instance, into nothing less than a retrial of this incident which neither our capital sentencing statute nor the United States Constitution permits. Our capital sentencing statute, N.C.G.S. § 15A-2000, provides that "[a]ggravating circumstances which may be considered shall be limited to the following . . . :" The statute then lists eleven circumstances, one of which is "[t]he defendant had been previously convicted of another capital felony." It seems clear to me that by this language the Legislature intended to permit essentially the fact of defendant's prior conviction of a capital felony, not a retrial of the felony itself, to be considered as an aggravating circumstance by a capital sentencing jury.

I recognize the Court has said,

> the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation.

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, *reh'g denied*, 463 U.S. 1249, 77 L.Ed. 2d 1456 (1983). The Court has also said, "The defendant cannot by stipulation or otherwise foreclose the State's proof by limiting the State to the bare record of the conviction." *State v. Maynard*, 311 N.C. 1, 32, 316 S.E. 2d 197, 214 (1984). The Court's holdings in *Taylor* and *Maynard*, however, were much narrower than the language used to support them. *Taylor* involved simply the testimony of the pathologist who performed the autopsy on the victim of the prior first degree murder. The testi-

mony was offered by the state to show that the murder was an especially heinous one. *Maynard* involved testimony showing the severity of a prior felonious assault offered by the state to rebut defendant's contention that he had no significant history of prior criminal activity.

This Court has so far adhered to the principle that evidence at a sentencing hearing regarding a prior violent or capital felony should not be permitted to devolve into a "mini-trial" of that felony. *State v. McDougall*, 308 N.C. 1, 22, 301 S.E. 2d 308, 321, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983) ("The proper exercise of [the trial judge's discretionary] authority will prevent the determination of [the prior violent felony] aggravating circumstance from becoming a 'mini-trial' of the previous charge"); *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981).

A mini-trial of defendant's former conviction contravenes the intent of our capital sentencing statute and in this case, where the only aggravating circumstance available to the state is defendant's prior conviction, violates defendant's federal constitutional privilege against double jeopardy and denies him due process of law. One who has been convicted of a felony occupies a certain status, *i.e.*, the status of a convicted felon. If he again commits a crime, it is altogether proper for a sentencing authority to consider his status as a convicted felon in determining the appropriate sentence for the later crime. But to permit a capital sentencing jury to consider the details concerning defendant's manner of committing, motive and culpability for the prior crime invites the jury to impose the death penalty, not on the basis of his guilt for the crime being tried, aggravated by his convicted felon status, but on the basis of his guilt of the prior crime, committed in the past and for which defendant has already once been punished. This procedure does not accord defendant due process because it tends to confuse and distract the jury "by focusing too much of its attention on the question of defendant's guilt or degree of culpability in [the] prior crime." *State v. McDougall*, 308 N.C. 1, 38-39, 301 S.E. 2d 308, 330 (Exum, J., dissenting as to sentence); *see also State v. McCormick*, 397 N.E. 2d 276 (Ind. 1979).

III.

I see no basis for admitting into evidence, by way of the state's extensive cross-examination of defendant, much of it over

defendant's objection, defendant's prior, nonviolent felony and driving under the influence convictions, his several prison escapes and the details surrounding them. None of this evidence goes to prove any aggravating circumstance permitted by our capital sentencing statute. Neither was it offered to rebut the mitigating circumstance that defendant had no significant prior criminal history, a circumstance that was never proffered by defendant and indeed could not have been successfully proffered because of his admitted prior conviction of a capital felony. I can ascertain no other proffered mitigating circumstance which this evidence could reasonably rebut.

I recognize that although he objected to much of it at trial, defendant has not assigned as error or brought forward in his brief any argument regarding the admission of this latter category of evidence. But it has long been the practice of this Court to examine carefully the transcript of a capital case to determine, on its own motion, whether there is error prejudicial to defendant, notwithstanding defendant's failure properly to preserve the error for appellate review. *State v. Strickland*, 290 N.C. 169, 225 S.E. 2d 531 (1976); *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975); *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967); *State v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921 (1952).

Justice FRYE dissenting as to sentence.

For the reasons expressed in the Chief Justice's dissenting opinion in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), which I joined, I believe the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that defendant be given a new sentencing hearing. Accordingly, I dissent from that portion of the Court's opinion which rejects defendant's argument based upon the holding of *Mills*. I concur in the remainder of the Court's opinion.

STATE OF NORTH CAROLINA v. TIMOTHY LANIER ALLEN

No. 70A86

(Filed 6 October 1988)

1. **Criminal Law § 75.4— confession—initiation of communication by defendant—request for attorney—admissible**

The trial court did not err in a prosecution for the murder of a highway patrolman by admitting defendant's statement to officers made after defendant told the officers he wanted a lawyer where the officers did not ask any further questions of defendant after he requested counsel; one officer told defendant that all he wanted was the truth, that defendant would be returned to his jail cell, and that there would be no further interview with him; the officer also told defendant that if he wished to have a further conversation, he should call an officer; another officer suggested that defendant should ask for the first officer if he called for an officer; and defendant then indicated that he wanted to talk. There was no coercion or pressure, nor was there any "functional equivalent" to questioning, and the fact that defendant was to be handcuffed to be returned to his jail cell was not a continuation of the interrogation.

2. **Criminal Law § 75.10— confession—totality of circumstances surrounding interrogation—admissible**

The trial court did not err in admitting defendant's statement to officers in a prosecution for first degree murder despite a massive show of force at the time of defendant's capture, the fact that he was kept handcuffed in an isolated cell for several hours before interrogation, the crowding of the jail with law enforcement officers, the failure of officers to assist defendant when he requested counsel, and the defendant's mental and physical condition at the time of his capture as a result of lack of sleep, being pursued by bloodhounds and helicopters for two or three hours, and illness from drug withdrawal. None of those factors necessarily prevented the defendant's waiver of rights from being the product of a free and deliberate choice.

3. **Criminal Law § 75.1— confession—unnecessary delay in seeing magistrate—admissible**

Defendant's confession was admissible in a first degree murder prosecution despite some delay in taking defendant before a magistrate in violation of N.C.G.S. § 15A-501 because there was nothing in the record showing that defendant's confession resulted from any delay.

4. **Constitutional Law § 60; Jury § 7.14— peremptory challenges of black jurors—no error**

The defendant in a first degree murder prosecution did not make a prima facie showing of racially motivated peremptory challenges to black jurors where the State accepted seven of the seventeen black veniremen tendered and the majority of the jury which tried the defendant was black.

5. **Jury § 7.12— first degree murder—challenge to veniremen for cause—opposition to death penalty**

The trial court did not err in a first degree murder prosecution by excusing a juror for cause based on her opposition to the death penalty where it was clear from answers given by the juror to the prosecutor, defense counsel and the court that she was irrevocably committed not to vote for the death penalty.

6. **Jury § 7.14— first degree murder—qualms about death penalty—use of peremptory challenges—no error**

The prosecutor's use of peremptory challenges in a first degree murder prosecution to excuse veniremen who had qualms about the death penalty but who were not excludable pursuant to *Witherspoon v. Illinois*, 391 U.S. 510, did not violate the Eighth and Fourteenth Amendments to the U.S. Constitution or Art. I, §§ 19 and 24 of the North Carolina Constitution.

7. **Constitutional Law § 66— first degree murder—examination of jury out of presence of defendant—no error**

There was no prejudice in a prosecution for the murder of a highway patrolman from the trial court's examination of each juror in chambers with only a court reporter present following a weekend television broadcast concerning the trial where an alternate juror told the judge that her husband had been in an automobile accident, that she had driven to the scene to pick him up, that her husband had told the highway patrolman at the accident scene not to talk to her because she was on the jury, and that she had been very cautious at the scene of the accident not to talk to the patrolman. It is clear that the juror had no real contact with the patrolman, and the defendant did not show nor could the Court think of facts which would shed additional light on the question of the influence of the patrolman on the juror.

8. **Jury § 9— first degree murder— replacement of juror with alternate—no abuse of discretion**

The trial court did not abuse its discretion in a first degree murder prosecution where it was discovered that one juror had heard the case discussed by her fellow workers and the court excused the juror and replaced her with an alternate.

9. **Homicide § 15— first degree murder—widow's feelings when she heard of shooting—no prejudice**

The defendant in a prosecution for the murder of a highway patrolman could not have been prejudiced by the admission of testimony by the patrolman's widow that she was hurt, mad, and disgusted when she heard that her husband had been killed because any juror would know without this testimony that the widow would be at least hurt, mad and disgusted.

10. **Criminal Law §§ 45.1, 42.4— murder weapon—passed among jury and tested—no error**

There was no error in a first degree murder prosecution in allowing the pistol identified as the murder weapon to be passed among the jury and tested by the jury as to its pull where the evidence was more in the nature of a demonstration than an experiment and was governed by N.C.G.S. § 8C-1, Rule 403.

11. Criminal Law § 102.6— murder—argument that defendant hiding behind Constitution—no error

The trial court did not err in a first degree murder prosecution by not intervening *ex mero motu* when the prosecution argued that defendant was hiding behind the Constitution with regard to his confession but that the judge had ruled it admissible and that it was for the jury to decide if it was true. A general comment about constitutional rights does not rise to the level of gross impropriety requiring intervention by the court.

12. Criminal Law § 102.6— murder—argument concerning confession—no error

The trial court did not err by not intervening *ex mero motu* in a prosecution for first degree murder where the assistant district attorney argued that defendant had first indicated that he wanted a lawyer as a feeler to see how officers would react before he confessed where the manner in which the defendant relayed his request for an attorney could give rise to the inference for which the State argued.

13. Criminal Law § 102.6— murder—closing argument—comment on conflicting testimony

There was a sufficient conflict in the testimony in a first degree murder prosecution for the assistant district attorney to argue that, to believe defendant, the jury would have to believe that the officers were lying; arguing that a jury should believe one witness rather than another does not shift the burden of proof.

14. Criminal Law § 102.6— murder—closing argument—comment on other participants not testifying—no error

The trial court did not err by not intervening *ex mero motu* in the closing arguments of a murder prosecution where the district attorney argued to the jury that others involved in the incident with defendant had not testified because they would not survive in prison if they had testified against defendant.

15. Criminal Law § 135.8— murder—aggravating factor—victim a law enforcement officer—argument calling attention to aggravating factor—no error

It was not improper for the district attorney in a prosecution for the murder of a highway patrolman to argue that the jury should consider the bravery of law enforcement officers who captured defendant before he could go into the jurors' homes or rob or hurt someone; that the widow of the deceased highway patrolman had done her painful duty by coming to court each day to see that justice was done; that law enforcement officers across the state expected the jury to do its duty; and that unless the jury did its duty by recommending death, the jurors would be telling law enforcement officers that their lives and services were without value. One of the aggravating circumstances to be considered was that the person killed was a law enforcement officer in the performance of his duty and the argument was proper to focus attention on this factor. N.C.G.S. § 15A-2000(e)(8) (1988).

16. Criminal Law § 135.8— murder—aggravating factors—argument that factors approved by Supreme Court—no error

There was no error in a first degree murder prosecution from the district attorney's argument that the General Assembly had adopted the aggravating

factors, that the Supreme Court had held that they were proper, and that it was for the jury to determine their existence.

17. Criminal Law § 135.9— murder—mitigating factor of impaired capacity—not submitted—no error

The trial court did not err in a prosecution for first degree murder by not submitting the statutory factor of impaired capacity to appreciate the criminality of conduct where defendant may have taken a drug several hours before the shooting or may have drunk some beer. N.C.G.S. § 15A-2000(f)(6).

18. Criminal Law § 135.9— murder—mitigating circumstances—instruction that unanimity required—no error

The trial court did not err in a first degree murder prosecution by charging the jury that they must be unanimous before they could find a mitigating circumstance to exist.

19. Criminal Law § 135.7; Homicide § 12; Criminal Law § 135.8— murder—review of prior opinions—declined

The Supreme Court declined to overrule its prior cases on whether there was error in a first degree murder prosecution because defendant was not allowed to inform the jury that if they did not reach a unanimous verdict, the defendant would be sentenced to life in prison; defendant was denied a bill of particulars as to what aggravating circumstances would be submitted to the jury; and the court submitted as aggravating factors both that the murder was committed to avoid arrest and that the murder was committed against a law enforcement officer in the performance of his duties.

20. Criminal Law § 135.10— murder—death sentence—not disproportionate

The death sentence was not disproportionate for the murder of a highway patrolman where the killing was cold-blooded, unprovoked and unjustified; the defendant, although not required to do so, stopped behind a highway patrolman, took a pistol from his van as the trooper reached over in a defenseless position, and shot the trooper point blank three times resulting in the victim drowning in his blood; and defendant exhibited a course of conduct that was without regard for the law or its enforcement, culminating in the murder of a law enforcement officer while in the line of duty and motivated by desire to avoid or prevent an arrest.

Chief Justice EXUM dissenting as to sentence.

Justice FRYE joins in this dissenting opinion.

APPEAL by defendant from a death sentence imposed by *Pope, J.*, at the 4 November 1985 Criminal Session of Superior Court, HALIFAX County. The defendant's motion to bypass the Court of Appeals was allowed in those cases in which sentences of less than life were imposed. Heard in the Supreme Court 11 April 1988 and 22 August 1988.

The defendant was tried and convicted on three counts of felony possession of stolen property and one count of first degree murder for the killing of Raymond E. Worley, a member of the North Carolina State Highway Patrol. Evidence presented at trial tended to show the following: During the early morning hours of 14 May 1985, Mr. Worley was patrolling I-95 in Halifax and Northampton counties. At approximately 5:11 a.m. Mr. Worley radioed his dispatcher that he was stopping two vans with Maryland license tags just north of Highway 561. No further radio communication from Mr. Worley was received. A short time later, pursuant to a request from the dispatcher at the Enfield Police Department, Don Davenport, a Division of Motor Vehicles enforcement officer, attempted to locate Mr. Worley. Davenport and Officer Cecil Austin drove approximately twelve miles up I-95 where they spotted Mr. Worley's car sitting on the right hand side of the road near highway marker 163. They also observed a white van parked in front of the patrol car. As they pulled up behind the patrol car, they noticed Mr. Worley sitting in the driver's seat and that the rear window was slightly fogged. The officers got out of their vehicles and approached the patrol car at which time they saw that the driver's side window of the car was shattered, and that Mr. Worley's body was leaning to the right with his head tilted downward. Blood covered Worley's shirt and was spattered across the right side of his head as well as on his right arm and leg. The officers checked for a pulse but there was none. Rescue vehicles were called and arrived on the scene shortly thereafter at which time Mr. Worley was pronounced dead. A crime scene investigation was begun, with photographs and fingerprints being taken. In addition, investigators found a .22 caliber pistol as well as an identification card of a black male, Antonio Worrell.

An autopsy revealed that Mr. Worley had suffered three gunshot wounds. One shot entered behind the right ear and traveled through the neck, finally lodging in the left back behind the armpit. Another bullet entered the right shoulder and lodged near the right base of the neck. A third bullet hit the middle finger of the left hand.

Dr. John Butts, Associate Chief Medical Examiner for Halifax County, testified that due to massive blood loss Mr. Worley probably lost consciousness within a minute and died three to four

minutes after the shooting. Dr. Butts further testified that Mr. Worley's lungs were hyperinflated due to blood rushing into the airways, essentially drowning him in his own blood. The bullets found in the body were those of a .38 caliber pistol, which were subsequently compared with the gun found on Alex Allen.

At approximately 6:02 a.m. on 14 May 1985, Sergeant Everett Horton, of the North Carolina State Highway Patrol, received a call about Mr. Worley. He immediately began organizing a manhunt and alerted law enforcement officials from the surrounding counties.

The authorities subsequently received a report of an abandoned black van near the intersection of Highway 903 and U.S. 301 and a man walking down U.S. 301 near where the van had been abandoned. Around 6:20 a.m., E. D. Marshman, a member of the Highway Patrol, left his home off Highway 301 and began listening to radio accounts of the murder. He then observed a man matching the description of the man seen leaving the van walking along the highway. Marshman pulled up behind the man, subsequently identified as co-defendant Alex Allen, and ordered him to lie on the ground where he handcuffed him and placed him in custody. A subsequent search of Alex Allen revealed a .38 caliber pistol.

Around 7:15 a.m. on 14 May 1985, law enforcement officers tracked a group of three men to an abandoned house where they were arrested and taken into custody. The three were subsequently identified as Antonio Worrell, Mack Greene, and the defendant, Timothy Allen.

The co-defendants were transported back to the Halifax County Sheriff's Department. After interrogating defendants Worrell, Greene, and Alex Allen, E. C. Warren, a detective with the Halifax County Sheriff's Department, began interrogating the defendant, Timothy Lanier Allen. At 1:50 p.m., the defendant was brought into an interview room where his Miranda rights were read to him, after which a waiver was obtained and interrogation begun. The defendant ultimately confessed to the murder.

In his confession, the defendant stated that on 11 May 1985 he left Washington, D.C. with Alex Allen, Antonio Worrell and Mack Greene in a black van stolen in Maryland. They traveled to

Wallace, North Carolina, where they stayed with friends until around midnight on 13 May 1985. At that time they made plans to return to Washington, D.C. On the way they broke into a store located near Ivanhoe on N.C. 421 in Pender County, stealing beer, cigarettes and .22 and .38 caliber pistols. The defendant kept the .38 pistol and gave the .22 pistol to co-defendant Worrell and they continued their trip, stopping again along the road to steal a white van from a car lot. The defendant and Alex Allen got into the white van and followed Worrell and Greene in the black van.

As the group proceeded toward Washington, a patrol car pulled around the van driven by the defendant and stopped the van driven by Worrell. At that time the defendant pulled his van in behind the patrol car and parked on the shoulder of the highway. The defendant stated that he observed Mr. Worley get out of the patrol car, speak to Worrell, and then Worrell follow the trooper back to the patrol car. Mr. Worley then motioned for the defendant to get out of the van and come to the patrol vehicle. As the defendant approached the car, Mr. Worley reached over to unlock the door. At that time, the defendant fired at least twice at Mr. Worley. At that point, all the co-defendants fled the scene in the black van and were subsequently arrested after hiding near an abandoned house.

After giving his statement, the defendant read the written version and signed the statement as being the truth to the best of his knowledge and belief. This statement was introduced by the State and read into evidence at trial.

At the close of the State's evidence, the defendant took the stand and denied shooting Mr. Worley, stating instead that following a meeting at the patrol car between himself, Worrell and Mr. Worley, he returned to the black van to get his license when he heard shots fired. After Mr. Worley was shot, the defendant and his friends drove off.

The jury found the defendant guilty of first degree murder and three counts of felonious possession of stolen property. After a sentencing hearing the jury recommended the death penalty which was imposed. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, H. Julian Philpott, Jr., Associate Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, and Joan H. Byers, Special Deputy Attorney General, for the State.

Geoffrey C. Mangum and Glover & Petersen, by Ann B. Petersen, for defendant appellant.

E. Ann Christian and Robert E. Zaytoun, for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

WEBB, Justice.

By his first assignment of error the defendant contends that the trial court erred in refusing to grant his motion to suppress his confession made by him on the day of his arrest. The defendant advances three different arguments as to why his confession should have been suppressed. He says first, pursuant to *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh. denied*, 452 U.S. 973, 69 L.Ed. 2d 986 (1981), his in-custody statement should have been suppressed due to a failure to stop interrogating him when he invoked his right to counsel. He also says he was not taken before a magistrate without unnecessary delay as required by N.C. G.S. § 15A-501(2). The third reason the defendant advances as to why his confession should have been suppressed is that considering the totality of the circumstances the State did not show the confession was voluntary.

The defendant made a motion to suppress his confession and a hearing was had before trial. There was testimony at this hearing by William A. Thompson, a special agent of the State Bureau of Investigation, that he and E. C. Warren, a detective with the Halifax County Sheriff's Department, questioned the defendant in the interview room at the Sheriff's Department offices. The interview occurred at approximately 1:50 p.m. on 14 May 1985. Mr. Thompson testified that Mr. Warren read the defendant his constitutional rights to remain silent and to have an attorney. The defendant signed a written waiver of his constitutional rights and

Mr. Warren confronted the defendant with the evidence against him and attempted to interrogate him as to his part in the incident of that day. The defendant did not respond to Mr. Warren's questions until he was told of a statement by Antonio Worrell that the defendant had shot Mr. Worley. Mr. Thompson testified that at that point, "Timothy Allen stated something to the effect that if he made a statement that they would put him in the gas chamber—or the electric chair, is what he said." At this point the defendant said he wanted to talk to a lawyer. The two officers stopped questioning the defendant and Mr. Warren told the defendant all he wanted was the truth, that the defendant would be returned to his jail cell and there would be no further interview with him. Mr. Warren also told the defendant that if he wished to have a further conversation he should call an officer. At that point Mr. Thompson suggested that if the defendant called for an officer he should ask for Mr. Warren. At this point the defendant said, "okay." The defendant then said, "I want to talk to you now, man." Mr. Warren then took the defendant's statement in which the defendant confessed to shooting Mr. Worley.

The court found facts consistent with the above evidence and concluded the defendant initiated the contact with the officers that led to his confession, and that he knowingly, voluntarily and intelligently waived his right to remain silent and his right to counsel. The court ordered the confession admitted into evidence. The court's findings of fact are supported by the evidence and the findings of fact support the conclusions. We will not disturb them.

[1] In regard to the defendant's contention that the officers continued to interrogate him after he told them he wanted a lawyer, it is said in *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378:

> [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.* (Emphasis added.)

Id. at 484-485, 68 L.Ed. 2d at 386. The defendant contends he did not initiate further communications after he asked for an attorney because the officers did not stop the interrogation. He says that Mr. Warren's statement that all he wanted was the truth, that

the defendant would be returned to his cell and would have to contact the officers if he wanted to make a statement was a continuation of the interrogation. He also says, that when his request for counsel was met by "handcuffs and incommunicado incarceration, while . . . inviting his last chance to tell his side of the story" he was cajoled into confessing.

We do not interpret the officers' statements as does the defendant. After he requested counsel the officers did not ask any further questions of the defendant. They told him of their availability if he changed his mind. We can find no coercion or pressure, nor was there any "functional equivalent" to questioning. *See Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297 (1980). The fact that the defendant was to be handcuffed to be returned to his jail cell is not a continuation of the interrogation. We believe the facts found by the superior court support the conclusion that the defendant of his own volition initiated the continuation of the interrogation.

For other cases in which we have held the defendant initiated contact with the officers after interrogation had been stopped, *see State v. Nations*, 319 N.C. 329, 354 S.E. 2d 516 (1987); *State v. Young*, 317 N.C. 396, 346 S.E. 2d 626 (1986); *State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985); *State v. Baker*, 312 N.C. 34, 320 S.E. 2d 670 (1984).

[2] The defendant argues that even if he initiated further communications with the officers the totality of circumstances surrounding the interrogation shows the waiver of his right to counsel and his other constitutional rights was coerced and without the requisite level of comprehension. He says this is so because of the massive show of force at the time of his capture, the fact that he was kept handcuffed in an isolated cell for several hours before interrogation, the jail was crowded with law enforcement officers, the failure of the officers to assist him when he requested counsel, the defendant's mental and physical condition at the time of his capture as a result of lack of sleep, being pursued by bloodhounds and helicopters for two or three hours and illness from drug withdrawal.

None of these factors necessarily prevented the defendant's waiver of his rights from being the product of a free and deliberate choice rather than from intimidation, coercion or decep-

tion. Nor did they necessarily prevent the defendant from waiving these rights with a full awareness both of the nature of the rights being abandoned and the consequences of the decision to abandon them. The superior court so found and we are bound by its findings. *Moran v. Burbine*, 475 U.S. 412, 89 L.Ed. 2d 410 (1986).

[3] Finally, the defendant argues there was an unnecessary delay in violation of N.C.G.S. § 15A-501 before taking him before a magistrate. In *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978), we held that a confession must be suppressed if there is a violation of N.C.G.S. § 15A-501 only if the confession was obtained as a result of the violation. In *Richardson* the delay in taking the defendant before a magistrate to advise him of his rights was substantially the same as in this case. We held this did not show the confession was obtained as a result of a violation of N.C.G.S. § 15A-501. There is nothing in the record in this case that shows the defendant's confession resulted from any delay in taking him before a magistrate.

The defendant's first assignment of error is overruled.

[4] In his second assignment of error the defendant contends he must have a new trial pursuant to *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986), because he was denied equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 26 of the Constitution of North Carolina. In *State v. Jackson*, 322 N.C. 251, 368 S.E. 2d 838 (1988), we faced a *Batson* question and said the following:

> In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69, the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), and held a prima facie case of purposeful discrimination in the selection of a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial. In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a

> prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must determine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference. *Batson*, 476 U.S. 98, n. 21, 106 S.Ct. 1724, 90 L.Ed. 2d 89, n. 21.

Id. at 254-255, 368 S.E. 2d at 839-40.

In this case the jury before which the defendant was tried consisted of seven black persons and five white persons. Of the seventeen black veniremen tendered to the State (including alternates), it accepted seven or forty-one percent. In *State v. Abbott*, 320 N.C. 475, 358 S.E. 2d 365 (1987), we held that the defendant did not make a prima facie case of racially motivated peremptory challenges when the State peremptorily challenged three of five black veniremen tendered to it. In *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986), we held an inference that racially motivated peremptory challenges did not arise when the State peremptorily challenged six of the twelve black jurors tendered. In that case the State peremptorily challenged five white jurors. We hold pursuant to *Abbott* and *Belton* that the defendant has not made a prima facie showing of racially motivated peremptory challenges when the State accepted seven of the seventeen black veniremen tendered and the majority of the jury which tried the defendant was black.

[5] In his third assignment of error the defendant contends it was error to excuse a juror for cause based on her opposition to the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L.Ed. 2d 186 (1968), held that a venireman may be excused for cause if he is irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings. During the examination of one of

the jurors by the district attorney the following colloquy occurred:

MR. BEARD: All right. And also because you are a nurse. Because of those things, it is your decision that you would not be able to recommend the death penalty in this particular case?

MRS. ROOK: Yes, sir.

MR. BEARD: We challenge for cause.

The defendant then was allowed to examine Mrs. Rook and the following occurred:

MR. CHICHESTER: And if after you searched your heart and you went through the facts as you found them, and to pursuant to your duty as under, your—ah, you match these facts with the law that her Honor gives you. And you came up with death as an appropriate sentence. Would you be able to follow your oath and return a verdict of the death sentence?

MRS. ROOK: No, sir.

The court then asked the following question:

COURT: Is it your position that before the trial of this matter even begins, that you could not vote for the imposition of the death penalty? That is, the death sentence. No matter what the facts or circumstances may show?

MRS. ROOK: No, ma'am.

COURT: You could not do that?

MRS. ROOK: No, ma'am.

COURT: All right. Thank you. You may step down. That is for cause.

It is clear from the three answers Mrs. Rook gave that she was irrevocably committed not to vote for the death penalty. She was properly excused under *Witherspoon.*

The defendant contends that in *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985) and *Adams v. Texas*, 448 U.S. 38, 65 L.Ed. 2d 581 (1980), the United States Supreme Court clarified the law so that the test now 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." Under this test the juror was properly excused. The defendant argues that the answer the juror gave the court was equivocal, that is that "it is unclear whether Mrs. Rook's '[n]o' answer was '[n]o' she would not under any circumstances vote for the imposition of the death penalty or '[n]o' it is not her position that she would not vote for the death penalty no matter what the facts or the circumstances were." We believe it is clear from the three answers given by Mrs. Rook that she was irrevocably committed not to vote for the death penalty.

[6] In his fourth assignment of error the defendant contends that the State's use of peremptory challenges to remove jurors who were not disqualified under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, but who wavered in their ability to impose the death penalty violated his constitutional rights. The defendant contends the Eighth Amendment proscription of cruel and unusual punishment and the Fourteenth Amendment's due process clause require that the defendant have a jury that is not stacked against him. He says that allowing peremptory challenges to such veniremen results in a jury that does not reflect a cross section of the community and violates his rights under the United States Constitution. The defendant relies on *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69, and *Gray v. Mississippi*, 481 U.S. ---, 95 L.Ed. 2d 622 (1987), to support this argument.

Neither *Batson* nor *Gray* dealt with the prosecution's use of peremptory challenges to jurors who were not disqualified under *Witherspoon*, but who wavered in their ability to impose the death penalty. *Batson* dealt with peremptory challenges used in a racially discriminatory manner. It does not preclude the use of peremptory challenges in any other context. *Gray* dealt with the erroneous allowance of a challenge for cause. The Court recognized that prosecutors often exercise peremptory challenges to excuse jurors who are hesitant in voting for the death penalty but may not be challenged pursuant to *Witherspoon* and the courts do not review this reason for exercising a peremptory

challenge. *Gray v. Mississippi*, 481 U.S. ---, 95 L.Ed. 2d 622. In *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279 (1987), we said the prosecution can take into account concerns expressed about capital punishment when exercising peremptory challenges. *Id.* at 494, 356 S.E. 2d at 297. We hold it was not error under the Constitution of the United States for the prosecution to use its peremptory challenges to excuse veniremen who had qualms about the death penalty but were not excludable pursuant to *Witherspoon.*

The defendant argues further that if we hold it did not conflict with the United States Constitution for the State to use peremptory challenges to strike veniremen with qualms about the death penalty, it nevertheless violates Article I, Sections 19 and 24 of the Constitution of North Carolina. We hold that for the same reasons this does not violate the United States Constitution, it does not violate the North Carolina Constitution.

[7] The defendant next assigns error to what he contends was the deprivation of his right to be present at every stage of the trial. During a weekend while the trial was in progress a television station broadcast a news report in which it was said that Mr. Worley's widow did not care or did not want the death penalty imposed on the defendant. In order to be certain the jury was not tainted by this television broadcast the court examined each of the jurors and alternates in her chambers with only a court reporter present. Following the examination of each of the jurors the court reported to the parties what was said. A transcript of the proceedings was made available to the parties. One of the alternate jurors told the judge that her husband had been in an automobile accident and she had driven to the scene to pick him up. She said her husband told the highway patrolman at the accident scene not to talk to her because she was on the jury. She said she was very cautious at the scene of the accident not to talk to the patrolman.

The defendant, relying on *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612 (1987), argues that his constitutional right to be present at every stage of the proceeding was violated. He says the State cannot show this was harmless error because there is no way of telling what information he could have obtained from the juror as to her contact with the patrolman had his attorney been present when she was examined by the court in chambers. This

juror told the court that during a recess in the trial she drove to the scene of an automobile accident in which her husband had been involved. Her husband told the highway patrolman at the scene not to speak to his wife because she was on the jury. She said she was careful not to speak to the patrolman at the scene. The defendant has not shown us and we can think of no facts which would shed additional light on the question of the influence of the patrolman on the juror. It is clear that the juror had no real contact with the patrolman. We hold that any error which may have been committed by the court was harmless beyond a reasonable doubt. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). *See* N.C.G.S. § 15A-1443(b) (1983).

[8] In his sixth assignment of error the defendant argues it was error to remove one of the jurors during the trial and replace her with an alternate juror. When the court was examining the jurors as to whether they had seen the television program about the trial, it was discovered that a Mrs. Johnson who was on the jury had heard the case discussed by her fellow workers. She had worked at Stephens Textiles for three years and four months and worked on one weekend during the trial. While she was working that weekend, she took a break with approximately seven of her co-workers. She viewed them as her "working partners." During the break two people discussed the case in her presence for ten to fifteen minutes. The discussion was about the trial in general. One of the persons said she did not think the defendant could get a fair trial in Halifax County. After this was said Mrs. Johnson left the room. Mrs. Johnson had been instructed by the court not to discuss the case with anyone or to let the case be discussed in her presence. Based on this information the court excused Mrs. Johnson and replaced her with the alternate who had picked up her husband after he had an accident.

In *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), it was obvious on a Friday that the case could not be completed that day. The court asked the jury if they could continue on Saturday and one member of the jury said she could not. The court then removed that juror and substituted an alternate. In holding there was no error we said:

> The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant

> may receive a fair trial. . . . This discretionary power to regulate the composition of the jury continues beyond empanelment. . . . These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error. (Citations omitted.)

Id. at 593, 260 S.E. 2d at 644. If it was not an abuse of discretion to remove a juror in *Nelson* in order to keep the trial from going into the next week, then it was not an abuse of discretion here to remove a juror who had heard other people discuss the case; and we so hold. *See also State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988) and *State v. Barts*, 316 N.C. 666, 343 S.E. 2d 828 (1986).

[9] In his seventh assignment of error the defendant argues it was error to allow Mr. Worley's widow to testify as to her feelings when she heard of the shooting. During Mrs. Worley's testimony the prosecuting attorney asked her how she felt when she heard her husband had been killed. Over the defendant's objection Mrs. Worley testified, "I was hurt and I was mad; disgusted." The defendant argues that this evidence was irrelevant on any issue in the case and its sole tendency was to inflame the jury on both the guilt and penalty phase of the trial. The defendant cites *Booth v. Maryland*, 482 U.S. ---, 96 L.Ed. 2d 440 (1987), for the proposition that the emotional impact on the family may not be considered in the penalty phase of a capital case. We hold that if this testimony was admitted in error it was harmless beyond a reasonable doubt. It is hard to believe any juror would not know without this testimony that Mr. Worley's wife would be at least hurt, mad and disgusted when she heard he had been killed. The defendant could not have been prejudiced by the admission of this evidence.

[10] In his eighth assignment of error the defendant contends it was error to allow a .38 caliber pistol to be passed among the jury and tested by the members of the jury as to its pull for single and double action. The pistol had been identified as the weapon with which Mr. Worley was shot and it was introduced into evidence. We are bound by *State v. Walden*, 311 N.C. 667, 319 S.E. 2d 577 (1984), to overrule this assignment of error. In *Walden* a shotgun was introduced into evidence and the court in-

structed the jury as follows: "[y]ou may look at the weapon, if you like, and use the hammer to cock it, if you desire." *Id.* at 675, 319 S.E. 2d at 582. In finding no error we said, "[w]e can see no reason why a prosecutor should not be allowed to suggest to a jury how it should examine real evidence, so long as he does not give his opinion as to the proof of a fact or state facts not in evidence." *Id.* at 676, 319 S.E. 2d at 583.

The defendant, relying on *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979); *State v. Hunt*, 80 N.C. App. 190, 341 S.E. 2d 350 (1986); and *State v. Graham*, 38 N.C. App. 86, 247 S.E. 2d 300 (1978), argues that the conditions under which the jury was allowed to experiment with the weapon were different from the conditions under which the pistol was allegedly fired on the roadside. In *Mayhand* we found no reversible error in allowing a prosecuting witness to sit in the lap of an officer to demonstrate the position she was in when she was raped. In *Graham* the Court of Appeals ordered a new trial when a prosecutor put a shirt, worn by the defendant at the time of the alleged shooting, in front of a defendant and directed him to cut the shirt with a knife. In *Hunt* the Court of Appeals found no error when a police officer, who testified he was not an expert, was allowed to demonstrate the operation of the weapon allegedly used in an assault and give his opinion that the gun would not fire unless the hammer was cocked and the trigger pulled.

In *Hunt*, Judge Becton, writing for the panel, made a distinction between a demonstration and an experiment. He defined a demonstration as "an illustration or explanation, as of a theory or product, by exemplification or practical application." He defined an experiment as "a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried." *Hunt*, 80 N.C. App. at 193, 341 S.E. 2d at 353. We believe the evidence challenged by this assignment of error is more in the nature of a demonstration than an experiment. We agree with Judge Becton that the test of the admissibility is as set forth in N.C.G.S. § 8C-1, Rule 403. If the evidence is relevant it will be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury.

[11] The defendant next argues that the court committed reversible error by not intervening *ex mero motu* to stop certain argu-

ments by the prosecution to the jury at the guilt phase of the trial. Ordinarily, objection to the prosecutor's jury argument must be made prior to the verdict in order for the alleged impropriety to be reversible on appeal. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). In the absence of such objection, we will review the prosecutor's argument to determine only whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error. We have said:

> "We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. Even so, counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence[.] It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence . . . and, in cases of gross impropriety, the court may properly intervene, *ex mero motu*." (Citations omitted.)

State v. Williams, 314 N.C. 337, 358, 333 S.E. 2d 708, 722 (1985) (quoting *State v. Covington*, 290 N.C. 313, 327-28, 226 S.E. 2d 629, 640 (1976)).

State v. Jones, 317 N.C. 487, 500-01, 346 S.E. 2d 657, 664-65 (1986).

The assistant district attorney appearing in this case argued:

> He will hide behind the Constitution of this country that protects all of us. Not just selected ones of us, but all of us. But it's not something for a criminal to hide behind.
>
> The Constitution of this land has been complied with. The judge has ruled on the admissibility of the confession, and it has come before you. The only thing left for you to decide right now is was it true.

The defendant argues that the prosecution invited the jury to disapprove of the defendant for relying on his constitutional rights. He says the State is not allowed to obtain a conviction by punishing a defendant for relying on his constitutional rights. The defendant relies on *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91 (1976), which holds that the defendant's silence after receiving Miranda warnings cannot be used against him, and *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106 (1965), which holds the State cannot comment on the defendant's failure to testify. *Doyle* and *Griffin* deal with a specific constitutional right which would be infringed if comments are made about it. A general comment about constitutional rights as was made in this case does not rise to the same level. It is certainly not such a gross impropriety that the court should have intervened *ex mero motu*.

[12] The defendant next says that by arguing that the judge had ruled upon the admissibility of the confession the assistant district attorney argued that the judge had held the confession was valid and the jury should accept this ruling as to the validity of the confession. When the defendant challenged the confession the judge had to rule on its admissibility. When she ruled it was admissible the jury then had to pass on its truthfulness. This is what the assistant district attorney told the jury and it was not error for the court not to intervene.

The assistant district attorney also argued:

> [The defendant] was looking [out for] himself [by minimizing his culpability], the same as he had been when he went in there and said, "Well, I *think maybe* I need a lawyer." That was a feeler. That was, that was for number one, you put it out there and see how [the officers] react. Are they going to deal with me on this?

The defendant argues that the right to counsel was a constitutional right and the prosecution may not be allowed to characterize it as something nefarious. The manner in which the defendant delayed his request for an attorney could give rise to the inference for which the State argued. It was not error for the court not to intervene *ex mero motu*.

[13] At one point the assistant district attorney argued, "[y]ou have to believe now, that this man is telling you the truth and

these officers are the ones who made it all up." The defendant first argues that this shifts the burden of proof to the defendant because the prosecutor told the jury they would have to find the defendant guilty unless the defendant proved the officers were lying. He also says that it was not his contention that he did not tell the officers he shot Mr. Worley but that he had not been truthful when he told them he had done so. In many cases the outcome of a case depends on which of the witnesses is to be believed. It does not shift the burden of proof for an attorney to argue to a jury that it should believe one witness rather than another. There was sufficient conflict in the testimony for the assistant district attorney to argue as she did.

[14] The district attorney argued to the jury that the defendant's attorney had commented on the fact that the others involved in the incident with the defendant had not testified. The district attorney then told the jury that they would not survive in prison if they had testified against the defendant. The defendant contends the most likely reason they did not so testify was that they were afraid of implicating themselves and under no circumstances should the prosecutor have speculated on this matter which was not in evidence. The inference which the district attorney made was not so unreasonable that the court should have intervened *ex mero motu* and stopped the argument.

The defendant's ninth assignment of error is overruled.

[15] In the tenth assignment of error the defendant argues it was improper for the district attorney to argue that the jury should consider the bravery of the law enforcement officers who captured the defendant before he could go into the jurors' homes or rob or hurt someone, that the widow of the deceased highway patrolman had done her painful duty by coming to court each day to see that justice was done, that the law enforcement officers across the state expected the jury to do its duty, and that unless the jury did its duty by recommending death, the jurors would be telling law enforcement officers that their lives and services were without value. One of the aggravating circumstances to be considered in determining whether to impose the death penalty is that the person killed was a law enforcement officer in the performance of his official duty. N.C.G.S. § 15A-2000(e)(8) (1983). This argument was proper to focus the jurors' attention on this aggra-

vating factor. It is not, as argued by the defendant, an appeal to the jury to impose the death penalty because that is what is desired by the public, an argument which we held to be improper in *State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985).

[16] The district attorney argued at one point:

> First of all, the State has to prove the existence of some aggravating circumstances. Now, the aggravating circumstances that the State can submit to you are set out by statute. They were set out by the Legislature and they've been approved by the Supreme Court. These aggravating circumstances that will be submitted to you have already been set out in the statute but what you have to decide is whether . . . these aggravating circumstances exist in this case. I'm confident that you will find that two aggravating circumstances do exist and two aggravating circumstances are all that will . . . be submitted to you.

The defendant argues that because the district attorney said the two aggravating factors had "been approved by the Supreme Court," it conveyed to the jury the idea that the Supreme Court commended these aggravating factors to the jury. When read in context we believe this is not the reasonable interpretation. The district attorney told the jury the General Assembly had adopted these aggravating factors and this Court has held they are proper aggravating circumstances. It is the jury, however, which must determine whether they exist. We do not think this argument misled the jury regarding the manner in which it was to consider this aggravating circumstance.

This assignment of error is overruled.

[17] In his eleventh assignment of error the defendant contends the court should have submitted to the jury the statutory mitigating circumstance set forth in N.C.G.S. § 15A-2000(f)(6), that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. We dealt with this mitigating circumstance in *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). We said impaired mental capacity would exist "if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or

diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished)." *Id.* at 68, 257 S.E. 2d at 613.

The defendant contends there was sufficient evidence of his impaired mental capacity to submit this mitigating factor to the jury. He says the evidence shows he was a heroin user and had taken a drug three or four hours before the shooting. There were beer cans found in the van in which the defendant was riding. Mr. Thompson testified that during the interrogation, the defendant said he had taken drugs the day before the shooting and "felt bad," although he was not experiencing withdrawal symptoms. The defendant testified he told Mr. Thompson that "he was experiencing withdrawal symptoms, was sick and requested a doctor." A Dr. Brown was called to the jail because the defendant had vomited and may have had withdrawal problems. Dr. Brown testified that when he saw the defendant he did not notice any withdrawal symptoms but prescribed some medicine for heroin withdrawal. The defendant testified when asked if he was suffering withdrawal symptoms from heroin use, "[m]aybe at that particular moment, no, sir, but I have been feeling bad so I knew later on that I would be withdrawing, yes, sir." There was no expert testimony as to the defendant's diminished capacity.

The fact that defendant may have taken a drug several hours before the shooting or that he may have drunk some beer is not sufficient alone to show a diminished capacity to appreciate the criminality of the offense or to refrain from illegal conduct. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). The defendant has shown no more than this. It was not error not to submit this mitigating circumstance to the jury.

[18] The defendant next contends it was error for the court to charge the jury that they must be unanimous before they could find a mitigating circumstance to exist. The defendant bases this assignment of error on *Mills v. Maryland*, --- U.S. ---, 100 L.Ed. 2d 384 (1988), which dealt with the finding by a jury of mitigating circumstances in a capital case. Oral arguments in this case were heard prior to the date of the decision of the United States Supreme Court in *Mills*. As a result of that decision we ordered that new briefs be filed and additional oral arguments made in this case. For the reasons expressed in *State v. McKoy*, 323 N.C. 1,

372 S.E. 2d 12 (1988), we reject defendant's argument based on *Mills*.

[19] The defendant also argues under separate assignments of error three issues which he recognizes have been determined against his position in previous cases. He asks that we find error because (1) he was not allowed to inform the jury that if they did not reach a unanimous verdict the defendant would be sentenced to life in prison, (2) he was denied a bill of particulars as to what aggravating circumstances would be submitted to the jury, and (3) the court submitted as aggravating factors that the murder was committed to avoid arrest and the murder was committed against a law enforcement officer in the performance of his duties. He contends these two aggravating factors are duplicative.

The defendant concedes this Court has rejected all three contentions in several cases including *State v. Smith*, 320 N.C. 404, 358 S.E. 2d 329 (1987) for his first contention, *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985) for his second contention, and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981) for his third contention. We decline to overrule any of these cases.

PROPORTIONALITY REVIEW

[20] Having determined there was no error in the guilt or penalty phase of the trial sufficient to require a new trial or sentencing hearing, we are required by N.C.G.S. § 15A-2000(d)(2) to determine (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentence of death was imposed, (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 the pool of similar cases, considering both the crime and the defendant.

We have thoroughly examined the record, transcripts, and briefs in this case. We find that the record clearly supports the submission of the aggravating circumstances considered and found by the jury. Further, we find no indication at all that the death penalty was imposed under the influence of passion, prejudice or arbitrary factors.

We turn then to our final statutory duty of proportionality review. In dealing with a review as to whether "the sentence of

death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant" in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983), this Court said it would use a "pool" of cases which included:

> *[A]ll cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

Id. at 79, 301 S.E. 2d at 355. This pool includes only those cases which this Court has found to be error free in both phases of trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E. 2d 703, 717 (1983).

In *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985), we said that in comparing a case with those in the pool, we would limit our consideration to those cases "roughly similar with regard to the crime and the defendant." We also said:

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Lawson, 310 N.C. at 648, 314 S.E. 2d at 503.

With the magnitude and seriousness of our task in mind, we have reviewed the facts and circumstances of this case and compared them to other cases in the proportionality pool. The distinguishing features of the present case are: (1) it is the first degree murder of a law enforcement officer while engaged in the performance of his duty; (2) it is a case in which the motive for the murder was to avoid lawful arrest; (3) it is a case in which the murder was preceded by a violent course of conduct (i.e., multi-

state crime spree); and (4) it is a case in which the defendant appeared in control of his mental and physical faculties before, during, and after the killing and gave a knowing and voluntary confession thereto.

Our careful analysis of the pool reveals a total of seven cases in which a defendant was charged with the murder of a law enforcement officer. Those cases are *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988); *State v. Bray*, 321 N.C. 663, 365 S.E. 2d 571 (1988); *State v. Rios*, 322 N.C. 596, 369 S.E. 2d 576 (1988); *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983); and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). Of these seven cases, in three, *Hutchins*, *Hill* and *McKoy*, did the jury recommend death.

In *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163, defendant was charged and convicted of the first degree murder of a Hendersonville police officer. Following the jury's recommendation and the trial court's sentence of death, this Court vacated the sentence holding it to be disproportionate pursuant to N.C.G.S. § 15A-2000 (d)(2). In support of this decision, the Court in *Hill* cited the speculative nature of the evidence surrounding the murder, not only as to the defendant's whereabouts at the time of the murder but also as to what he might have been doing just prior to his encounter with the officer. Likewise, the Court cited the lack of evidence as to who drew the murder weapon out of the officer's holster. The Court in *Hill* further focused its attention on the failure to submit N.C.G.S. § 15A-2000(e)(4) (that the murder "was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody") as an aggravating circumstance for the jury's consideration. Thus, given the speculative nature of the evidence surrounding the murder, the apparent lack of motive, and the short amount of time involved in the murder itself, the Court in *Hill* ordered the defendant sentenced to life imprisonment in lieu of the death sentence.

In contrast to the holding in *Hill*, this Court in *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788, affirmed the trial court's sentence of death. *Hutchins* involved the murder of three law enforcement officers, two of which were first degree murder convictions. The jury found three aggravating factors: (1) that the

murder was committed to avoid lawful arrest; (2) that the murder was committed against a law enforcement officer while engaged in the performance of his duties; and (3) the murder was part of a course of conduct involving crimes of violence. The Court further cited the clear evidence of guilt and the defendant's conduct and wanton disregard for the value of human life and for the enforcement of the law by duly appointed authorities.

As previously mentioned, defendant offered three other cases for our proportionality review as they relate to the case at bar: *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100, involved a conspiracy to commit an armed robbery by defendant and five other co-defendants. While defendants were committing the robbery, a law enforcement officer entered the store to make a purchase whereupon he was shot several times and left to die. Although finding four aggravating factors ((1) defendant had previous convictions of violent crimes, (2) the murder was committed to avoid arrest, (3) the murder was committed while engaged in an armed robbery, and (4) the murder was committed against a law enforcement officer while in the line of duty), the jury refused to impose the death sentence. The defendant introduced evidence to cast doubt on the credibility of the co-defendants who turned State's evidence against defendant Abdullah. This was especially true in light of the jury's knowledge that the co-defendants received lesser sentences. Thus, there appeared to be some residual doubt in the jury's mind which led to its refusal to impose the death penalty.

Likewise in *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205, and *State v. Bray*, 321 N.C. 663, 365 S.E. 2d 571, the participation in the crimes and subsequent testimony of the co-defendants cast some doubt as to whether the victims' deaths in each case were a result of the acts of one or several. We believe this degree of residual doubt necessarily influenced the jury's decision to recommend a life sentence in each case.

Considering all of the cases in the proportionality pool, but more specifically the aforementioned seven, we believe that the present case compares most favorably to *Hutchins*, while being distinguishable in several respects from *Hill*, *Abdullah*, *Payne* and *Bray*.

As previously mentioned, in *Bray*, *Abdullah*, and *Payne*, the evidence was far more equivocal as to the degree of the defendant's culpability than it is here. It was such that it could have created a residual doubt in the minds of the jury as to the defendant's culpability. Likewise in *Hill*, this Court voiced the same kind of doubt in setting aside the sentence of death in favor of that of life imprisonment. Although there is some evidence that one of defendant Allen's co-defendants in the case at bar may have been involved in the actions at the patrol car, the evidence that the defendant was the person who pulled the trigger and killed Mr. Worley while he was in a defenseless position is relatively overwhelming. Any doubts to the contrary are largely dispelled by the voluntary and knowing confession of the defendant a short time after the events of 14 May 1985.

Thus, we hold that the case at bar aligns itself more closely with the facts and the defendant in *Hutchins*. In *Hutchins*, as in the present case, the defendant exhibited a course of conduct that was without regard for the law or its enforcement. This course of conduct culminated in the murder of a law enforcement officer while in the line of duty and was motivated by a desire to avoid or prevent an arrest (both factors being found by the jury as aggravating circumstances). In the present case, the killing was cold-blooded, unprovoked, and unjustified. The defendant, although not required to do so, stopped behind a highway patrolman, took a pistol from his van and as the trooper reached over in a defenseless position, shot him point blank three times resulting in the victim drowning in his own blood. This murder was the result of an intentional, knowing act of a responsible adult.

After a careful consideration of the briefs, transcripts, and record, we conclude that the sentence of death is not disproportionate or excessive, considering both the crime and the defendant. We therefore decline to disturb the sentence imposed.

No error.

Chief Justice EXUM dissenting as to sentence.

The majority concludes the sentencing hearing jury instructions on the unanimity requirement do not violate the federal constitution as interpreted in *Mills v. Maryland*, 486 U.S. ---, 100

L.Ed. 2d 384 (1988), on the basis of this Court's decision on this issue in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988). For the reasons stated in my dissenting opinion in *McKoy*, I disagree with this conclusion and vote, because of this error in the instructions, to give defendant a new sentencing hearing.

When the majority in *McKoy* concluded that *Mills* had no application to North Carolina's jury instructions on unanimity, it relied in part on the United States Supreme Court's having denied certiorari in two North Carolina cases in which these instructions formed the principal basis for the defendant's petition for the writ. The majority said:

> The Supreme Court granted certiorari in *Mills* "[b]ecause of the importance of the issue in Maryland's capital-punishment scheme." *Id.* at ---, 100 L.Ed. 2d at 393. The decision in *Mills* thus appears to be statute-specific. This conclusion is further supported by the Court's treatment of three cases immediately after the decision in *Mills*. The Court denied certiorari in two cases from this state which raised the issue of whether North Carolina's requirement of jury unanimity on the existence of mitigating circumstances is unconstitutional. *See State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1983), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988). However, in a Maryland case raising the same issue as in *Mills*, the Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Mills*. *See Jones v. Maryland*, 310 Md. 569, 530 A. 2d 743 (1987), *cert. granted and judgment vacated*, --- U.S. ---, 100 L.Ed. 2d 916 (1988). We recognize that "a denial of a petition for a writ of certiorari . . . carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919, 94 L.Ed. 562, 566 (1950) (Frankfurter, J., opinion re: denial of certiorari); *see also Singleton v. Commissioner of Internal Revenue*, 439 U.S. 940, 944, 58 L.Ed. 2d 335, 336 (1978) (Stevens, J., opinion re: denial of certiorari). We do not suggest that the denial of certiorari in *Holden* and *Gardner* alone indicates that the Court decided that the defendants' arguments in those cases were without merit. However, we view the Court's action on *Jones*

> and its different treatment of *Holden* and *Gardner*, all in the immediate wake of *Mills*, as some indication that our capital-sentencing procedure differs sufficiently from Maryland's that *Mills* does not control the question presented here.

McKoy, 323 N.C. at 43-44, 372 S.E. 2d at 35.

On 3 October 1988 the United States Supreme Court entered the following order in *Oscar Lloyd v. North Carolina*, No. 87-6833 (our *State v. Lloyd*, 321 N.C. 301, 374 S.E. 2d 316 (1988)):

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of *Mills v. Maryland*, 486 U.S. --- (1988).

This order was granted on the basis of (1) Lloyd's petition for writ of certiorari filed in April 1988 (before the decisions in *Mills* and *McKoy*), which relied solely on the assertion that North Carolina's unanimity jury instructions for mitigating circumstances in capital cases violated Lloyd's Eighth and Fourteenth Amendment rights and (2) a supplemental brief filed in September 1988 calling the Court's attention to its decision in *Mills* and our decision in *McKoy*.

To the extent the *McKoy* majority relied for its conclusion on the United States Supreme Court's denial of petitions for certiorari in other North Carolina cases involving the unanimity jury instruction issue, that conclusion has been substantially undercut by the United States Supreme Court's action in *Lloyd*. The *Lloyd* order, considered with the filings upon which it rests, renders the conclusion reached in *McKoy*—that *Mills* has no application to North Carolina's unanimity jury instructions—far more untenable than it otherwise was.

I concur in the result reached by the majority on the guilt phase issues.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, NORTH CAROLINA NATURAL GAS CORPORATION, AND THE PUBLIC STAFF v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., THE ALUMINUM COMPANY OF AMERICA, AND THE CITIES OF WILSON, ROCKY MOUNT, GREENVILLE, AND MONROE, NORTH CAROLINA

No. 467A86

(Filed 6 October 1988)

1. **Gas § 1.1— natural gas—different rates for various customer classes**

Findings of fact by the Utilities Commission, which were supported by substantial evidence in view of the whole record, supported the Commission's conclusion that different rates of return adopted for the various classes of customers of a natural gas company are just and reasonable and do not unreasonably discriminate among the customer classes. While an assessment of the rates based simply on the cost of service might suggest that the approved rates are unnecessarily discriminatory, the Commission's analysis of the noncost factors permitted in our case law was sufficient to justify the Commission's decision. N.C.G.S. §§ 62-130(a), 62-131(a), 62-133(d) and 62-140(a).

2. **Gas § 1.1— natural gas—transportation rates not discriminatory**

Rates which allow a natural gas company to earn the same margin of profit for transporting customer owned gas as it earns for transporting gas under a sales contract are not unjust and unreasonably discriminatory.

3. **Gas § 1.1— natural gas—Industrial Sales Tracker Formula**

A modified Industrial Sales Tracker Formula adopted by the Utilities Commission for a natural gas company does not unreasonably discriminate between customer classes in violation of N.C.G.S. § 62-140(a) and does not result in unjust and unreasonable rates in violation of N.C.G.S. §§ 62-130(a) and 62-131(a).

Justice MEYER dissenting.

APPEAL by the cities of Wilson, Rocky Mount, Greenville, and Monroe (Cities), the Carolina Utility Customers Association, Inc. (CUCA), and the Aluminum Company of America (Alcoa), pursuant to N.C.G.S. § 7A-29(b), from the North Carolina Utilities Commission's (Commission) ORDER ON REMAND (ORDER) entered 31 January 1986 in Docket Nos. G-21, Sub 235 and Sub 237, approving rates and charges for natural gas service provided by North Carolina Natural Gas Corporation (NCNG). Heard in the Supreme Court 11 May 1987.

McCoy, Weaver, Wiggins, Cleveland & Raper by Donald W. McCoy and Alfred E. Cleveland for North Carolina Natural Gas Corporation, appellee.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and Vickie L. Moir, Staff Attorney, for Public Staff—North Carolina Utilities Commission, intervenor appellee.

Jerry B. Fruitt for Carolina Utility Customers Association, Inc., defendant appellant.

LeBoeuf, Lamb, Leiby & MacRae by Samuel Behrends, IV, for Aluminum Company of America, intervenor appellant.

Spiegel & McDiarmid by David R. Straus, Gary J. Newell and Barbara S. Esbin; Poyner & Spruill by J. Phil Carlton for Cities of Wilson, Rocky Mount, Greenville, and Monroe, North Carolina, appellants.

EXUM, Chief Justice.

This is the second appeal in this general rate case. In the first appeal, *State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc.*, 313 N.C. 215, 328 S.E. 2d 264 (1985), we remanded the proceeding to the Commission for further findings and for modification consistent with our opinion. From the Commission's subsequent ORDER the questions presented are whether the Commission erred in concluding: (1) the adopted rate of return levels do not unreasonably discriminate between classes of customers; (2) transportation rates that allow for the same margin of profit whether the gas is customer-owned or transported under a sales contract are not excessive and do not unreasonably discriminate; (3) a modified Industrial Sales Tracker Formula (IST) is not unreasonably discriminatory to or within customer classes. We conclude the Commission did not err and affirm its ORDER.

I.

On 27 April 1983 NCNG filed an application with the Commission to adjust certain rates charged for natural gas. The Commission declared the matter a general rate case and combined it with NCNG's 10 June 1983 application for revision of its Transportation Rate Schedule T-1. After conducting hearings, the Commis-

sion issued its order on 6 January 1984 in which it approved a rate increase of $1,117,531, terminated the curtailment tracking rate (CTR), implemented an IST, adopted a revised transportation rate and allowed NCNG to include a portion of its investment in a certain gas pipeline in its rate base.[1] Cities and North Carolina Textile Manufacturers, predecessor to CUCA, appealed. We affirmed the Commission's Order in part, reversed it in part, and remanded the case to the Commission for reconsideration. *Id.* at 230, 328 S.E. 2d at 273. On 31 January 1986 the Commission issued its ORDER from which Cities, CUCA, and Alcoa now appeal.

NCNG provides natural gas to the public under a Certificate of Public Convenience and Necessity issued by the Commission. Wholesale natural gas service is provided to Cities, each of which is authorized under N.C.G.S. §§ 160A-311(4), -312 to own and operate a natural gas distribution system for their respective citizens. The Commission has no authority to regulate rates set by Cities for gas sold by Cities to their respective citizens. NCNG furnishes retail natural gas service in eastern North Carolina to residential, commercial and industrial customers.

NCNG has separate rate schedules for each customer class. These schedules include: Rate Schedule 1—Residential; Rate Schedule 2—Commercial and Small Industrial; Rate Schedules 3A and 3B—Industrial Process Uses; Rate Schedule 4A—Other Commercial and Industrial Non-IST customers; Rate Schedule 4B—Other Commercial and Industrial IST customers; Rate Schedule 5A—Boiler Fuel Non-IST customers; Rate Schedule 5B—Boiler Fuel IST customers; Rate Schedule 6A—Large Boiler Fuel Non-IST customers; Rate Schedule 6B—Large Boiler Fuel IST customers; Rate Schedule RE-1—wholesale service to Cities; Rate Schedule SM-1—Cities negotiated rates for industrials served by Cities; Rate Schedule S-1—NCNG's negotiated rates for industrials served by NCNG; Rate Schedule T-1—transportation rate applicable to boiler fuel industrial volumes; Rate Schedule T-2—transportation rate applicable to non-boiler fuel industrial volumes.

1. The legitimacy of this inclusion was resolved in favor of NCNG in the first appeal. *State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc.*, 313 N.C. at 230, 328 S.E. 2d at 273.

In its original Order the Commission imposed the entire rate increase on customers in Rate Schedules 1 and 2. Notwithstanding this decision not to increase the rates of the other customers, including appellants, the Court on the first appeal noted:

> The evidence before the Commission makes it clear that there is substantial discrimination between the various classes of customers. Residential customers in Rate Schedule No. 1 and commercial and small industrial customers in Rate Schedule No. 2 pay rates which yield a return considerably below the costs incurred by NCNG in serving them. The customers in the remaining rate schedules pay rates which yield returns in excess of their cost of service. The customers in Rate Schedule Nos. 3B, 4, 5 and 6 in particular pay rates which are far in excess of NCNG's cost of serving them. The effect of this rate structure is that the rates of residential, certain commercial and small industrial customers are subsidized by the remaining industrial, wholesale and commercial customers.

Id. at 222-23, 328 S.E. 2d at 269. We remanded this aspect of the Commission's first Order, saying:

> In light of the substantial difference between cost of service and rate of return for the various classes of customers, the question of unreasonable discrimination among and within the classes of service is a material issue of fact and of law. The Commission's failure to address this issue in its findings of fact is error prejudicing the substantial rights of defendants. Therefore, the case must be remanded to the Commission so that it may consider this issue and make appropriate findings. N.C. Gen. Stat. §§ 62-79(a) and 62-94(b); *Utilities Commission v. Public Staff*, 309 N.C. at 207-08, 306 S.E. 2d at 442.

Id. at 223, 328 S.E. 2d at 269-70. Three other aspects of the Commission's Order were remanded for the Commission's further consideration: (1) the implementation of the IST; (2) the elimination of the CTR and (3) the approval of Transportation Rate T-1.

The Commission on remand conducted further hearings, made additional findings and concluded: (1) the rates it originally approved, including Transportation Rate T-1, did not discriminate

unreasonably among the various classes of NCNG's customers; (2) a modified IST would not operate in an unreasonably discriminatory fashion; and (3) elimination of the CTR did not result in an unjust rate increase.[2]

II.

[1] On this second appeal Cities, CUCA, and Alcoa continue to urge that the Commission has not adequately, through appropriate findings supported by evidence, justified the differences in the rates of return on cost of service permitted to NCNG's various customer classes. They argue that without such justification these differences amount to unreasonably discriminatory rates which violate N.C.G.S. § 62-140(a)[3] and unjust and unreasonable rates which violate N.C.G.S. §§ 62-130(a) and 62-131(a).[4] They further argue that the Commission failed to consider all the material facts of record in determining what were just and reasonable rates in violation of N.C.G.S. § 62-133(d).[5] As the Court noted on the first appeal:

2. Eliminating the CTR increased NCNG's revenues by $3,420,423. On the first appeal the Court instructed the Commission on remand to "make findings on whether the increased rates brought about by the termination of the CTR are just and reasonable." *State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc.*, 313 N.C. at 221-22, 328 S.E. 2d at 268-69. In its ORDER now appealed from the Commission made the necessary findings to support its conclusion that the increase in revenues produced by elimination of the CTR is just and reasonable. No challenge to this conclusion has been raised in this second appeal.

3. This statute provides, in pertinent part:

> (a) No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

N.C.G.S. § 62-140(a) (1982 Replacement Volume).

4. These statutes provide: "The Commission shall make, fix, establish or allow just and reasonable rates for all public utilities subject to its jurisdiction. . . ." N.C.G.S. § 62-130(a) (1982 Replacement Volume).

"Every rate made, demanded or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable." N.C.G.S. § 62-131(a) (1982 Replacement Volume).

5. This statute provides: "The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates." N.C.G.S. § 62-133(d) (1982 Replacement Volume).

> A substantial difference in service or conditions must exist to justify a difference in rates. *Utilities Comm. v. Edmisten*, 291 N.C. 424, 428, 230 S.E. 2d 647, 650 (1976). "There must be no *unreasonable* discrimination between those receiving the same kind and degree of service." *Utilities Comm. v. Mead Corp.*, 238 N.C. 451, 462, 78 S.E. 2d 290, 298 (1953) (emphasis added). While decisions of the Commission involving the exercise of its discretion in fixing rates are accorded great deference, *see Utilities Comm. v. Edmisten*, 291 N.C. at 428, 230 S.E. 2d at 650; *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 54, 132 S.E. 2d 249, 254 (1963), the Commission has no power to authorize rates that result in unreasonable and unjust discrimination. *Utilities Comm. v. Edmisten*, 291 N.C. at 428, 230 S.E. 2d at 650; *Salisbury and Spencer Ry. v. Southern Power Co.*, 180 N.C. 422, 425, 105 S.E. 28, 29-30 (1920).

State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc., 313 N.C. at 222, 328 S.E. 2d at 269.

The scope of appellate review of a decision by the Commission is provided in N.C.G.S. § 62-94. Under this standard, the reviewing court

> (b) . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence, in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C.G.S. § 62-94 (Replacement Volume 1982). This Court's statutory function is to assess whether the Commission's order is affected by errors of law, and to determine whether there is sub-

stantial evidence, in view of the entire record, to support the position adopted. *See State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E. 2d 339, 347 (1987); *State ex rel. Utilities Commission v. Carolina Utilities Customers Assoc.*, 314 N.C. 171, 179-80, 333 S.E. 2d 259, 265 (1985).

At the outset we emphasize that the Court on the first appeal of this case did not hold that the differences in rates of return between NCNG's customer classes were unreasonably discriminatory or unjust and unreasonable in violation of these statutes. We held simply that the Commission's findings of fact failed adequately to justify the discrimination.

As the record is now before us the Commission has taken additional evidence and made additional findings in its ORDER. The principal questions are whether the Commission's ORDER now contains findings sufficient to justify its conclusions and whether those findings, are, in turn, supported by evidence in light of the whole record. Appellants continue to argue that the discrimination in the rates of return among NCNG's several customer classes approved by the Commission are not justified by adequate findings supported by the whole record; therefore, by approving them the Commission exceeded its statutory authority. Appellees counter that the evidence and findings adequately justify the approved rates and demonstrate that they do not unreasonably discriminate among NCNG's various classes of customers.

In order properly to address each side's contentions we think it helpful to review what "rates of return" represent and how they are determined for each class of customers.

The "rate of return" is a percentage which the Commission concludes should be earned on the rate base. N.C.G.S. § 62-133(b)(4) (1982 Replacement Volume). The "rate base" is the cost of the utility's property which is used and useful in providing service to the public. N.C.G.S. § 62-133(b)(1) (1982 Replacement Volume). The Commission in its prior Order concluded that NCNG should be allowed to earn a company-wide rate of return of 13.08%, and no appellant has challenged this conclusion in either appeal.

Determining the effective rate of return for a particular NCNG customer class involves a mathematical computation con-

taining several components. The computation must be performed after the fact by utilizing the financial information for a given test year with adjustments made for any subsequent increase in rates. There are in the computation three basic components which must be ascertained. First, an allocation must be made to determine the portion of the total rate base applicable to each customer class. Likewise an allocation, which is in this case the most controversial, must be made to determine the cost of service or operating expenses applicable to each customer class. Finally, the revenues NCNG collected from each customer class for the test period, adjusted for any subsequent increase in rates, must also be determined. Once all of the components have been agreed upon the computation itself is not complicated. The formula for determining the rate of return for each customer class is as follows: Operating revenues less cost of service (operating expenses and taxes) divided by the rate base equals the rate of return. Thus, the rate of return for any particular customer class varies inversely with the amount of the rate base and the amount of the cost of service, and directly with the amount of the revenues, allocated to that customer class.

On remand the Commission reaffirmed its previously approved rate levels. The Commission concluded the "approved rates do not unreasonably discriminate among the various classes of NCNG customers in violation of G.S. 62-140(a)." The Commission was

> of the opinion that the rates previously approved in this proceeding result in a fair distribution of the overall rate increase granted to NCNG among customer classes and that it would be unjust and unreasonable, based upon the evidence presented in this case, to place any greater rate increase on the residential and small industrial customers served by the Company who are already paying and will continue to pay the highest unit price rates on the system.

As the Court noted on the first appeal:

> In determining whether rate differences constitute unreasonable discrimination, a number of factors should be considered: "(1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 23, 273 S.E. 2d 232, 238 (1980). Other fac-

> tors to be considered include "competitive conditions, consumption characteristics of the several classes and the value of service to each class, which is indicated to some extent by the cost of alternate fuels available." *Utilities Comm. v. City of Durham*, 282 N.C. 308, 314-15, 193 S.E. 2d 95, 100 (1972).

State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc., 313 N.C. at 222, 328 S.E. 2d at 269.

In deciding to reaffirm its previously established rates the Commission gave "careful consideration to, and . . . weighed and balanced all of the relevant factors." The Commission's ultimate conclusion on the discrimination issue is: "It would be unjust and unreasonable to establish rates . . . based upon equalized rates of return for all customer classes." In support of this conclusion the Commission relied upon the following evidence, findings of fact, and conclusions of law:[6]

First, the Commission emphasized "it would be unjust and unreasonable . . . to place any greater rate increase on the residential and small industrial and commercial customers served by the Company who are already paying and will continue to pay the highest unit price rates on the system." The evidence indicated that setting rates entirely in terms of cost of service, as advocated by CUCA, would result in a 32% rate increase to residential customers. Additionally, NCNG witness Gerald A. Teele testified that under CUCA's proposed rates, the residential customers, who comprise about 14% of NCNG's annual sales volume, would be called to pay approximately 46% of NCNG's allowed profit margin. The evidence also demonstrated that the residen-

6. In this case as in previous proceedings the Commission's summary of evidence, findings of fact and conclusions of law are mixed together in portions of the record denominated "Findings of Fact" and "Evidence and Conclusions for Findings of Fact." *See State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 693, 370 S.E. 2d 567, 570 (1988); *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 351-52, 358 S.E. 2d at 345-46. Some of the Commission's so-called "Findings of Fact," including those regarding the reasonableness of the approved rates of return, are actually matters of judgment and are more appropriately denominated conclusions. Throughout this opinion we have tried to distinguish between and denominate findings and conclusions on the basis of the distinctions we drew in *Public Staff* and *Eddleman*. As this Court noted in *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 352, 358 S.E. 2d at 346, "[a]s long as 'each link in the chain of reasoning' appears in the Commission's order, mislabeling is merely an inconvenience to the courts."

tial and commercial and small industrial customers absorbed the entirety of the rate increase approved in this proceeding.

Second, the Commission was of the opinion that though cost of service studies are both important and relevant in designing rates, they are highly judgmental and should be considered as only one among many factors. NCNG witness Teele, CUCA witness L. W. Loos, and Cities' witness Fred Saffer prepared and presented the results of several cost of service studies. While these studies all demonstrated that the rates of return for customers in Rate Schedules 1 and 2 are generally below those of other customer classes, each study generated divergent outcomes. The rates of return for customers in Rate Schedules 1 and 2 ranged from −14.33% to 17.64%. The rates of return for the Cities ranged from 14.12% to 38.49%. The rates of return for the large industrial customers in Rate Schedules 4, 5, and 6 showed the greatest variability. Depending on the methodologies followed and the assumptions used, these rates of return ranged from a low of −5.34% to a high of 179.95%.

Last, the Commission found that rates of return between NCNG's customers are not directly comparable. The evidence presented indicated that NCNG's residential, industrial, and city customers are not equally situated. Seventy-five percent of industrial customers can negotiate lower gas prices by threatening to switch to alternate fuels. Approximately 35% of the Cities' customers have this fuel switching capacity as well. This ability to negotiate lower rates gives the large industrial and commercial customers of NCNG and Cities a bargaining power unavailable to residential and small commercial customers. Such power renders NCNG's large industrial and commercial customers, and indirectly Cities,[7] risky ratepayers because they can force NCNG to meet competitive costs in order not to lose substantial sales. This risk justifies a higher rate of return relative to residential and small

7. Cities' industrial customers with fuel switching capacity are served under Rate Schedule SM-1. Cities negotiate gas prices with these customers and pass the results of their negotiations on to NCNG, which, in turn, adjusts its price to Cities of gas volumes used to serve these customers. The ability of the Cities to negotiate lower prices with these customers in order to retain them also enables the Cities to lower their overall cost of gas from NCNG.

commercial customers who ultimately bear the burden of these negotiated prices through the IST.[8]

In the Commission's ultimate conclusion on the discrimination issue it also stated:

> Other relevant factors which must be considered in setting rates in addition to the estimated cost of service include value of service, quantity of natural gas used, the time of use, the manner of use, the equipment which NCNG must provide and maintain in order to meet the requirements of its customers, competitive conditions, and consumption characteristics and other factors . . . .

The Commission's ORDER does not specifically address each of these factors seriatim. The ORDER does, however, set forth evidence, findings of fact, and conclusions of law which demonstrate that the Commission gave consideration to these interrelated factors and their applicability to each customer class. This evidence and findings include the following:

The Commission found that capital costs allocated to the rate bases of industrial customers and Cities were substantially below those of residential and commercial customers. Capital costs allocated to the industrial customers and Cities were incurred by NCNG twenty-five to thirty years ago. Since the residential and commercial customers have substantially more of the most recent capital costs allocated to them, they suffer most of the brunt of the post 1973 inflation in those costs. Cities cogently argue that if, in fact, more expensive capital is properly allocable to residential and commercial customers, they and not Cities ought to pay for it. The Commission nevertheless determined that, capital costs not having been adjusted for inflationary trends, it was not fair to saddle the residential and commercial customers with the entire brunt of this circumstance. The Commission considered this to be a legitimate difference between customers which should be taken into account in setting rates.

With respect to the large industrial customers, the evidence showed that very few of them have long-term contracts, none of them pay demand charges, and very few pay facilities charges.

8. The operation of the IST is discussed, *infra*, in section IV.

This, coupled with the ability to switch to alternate fuels, enables these customers to leave NCNG's system at any time without further obligation for the costs incurred in serving them. NCNG, on the other hand, must maintain long-term contracts with its supplier in order to ensure adequacy of service to all customers. The Commission found "NCNG has been transporting lower cost, spot-market gas for many of these customers, thus saving them substantial amounts of money compared to alternative fuel prices. In many instances, NCNG's affiliate acted as agent without charging an agency fee in securing these customers' natural gas requirements . . . ." Additionally, although the large industrial customers are charged a relatively low per unit price for gas, in part as a result of their relatively high priority of service interruption, the evidence was uncontroverted that actual interruptions in service for these customers has been rare. The Commission found that this factor "strongly indicates that . . . industrial customers are served on what amounts to a firm basis and, considering the value of service to these customers, . . . indicates that industrial rates of return . . . should be higher than the system average."

The consumption characteristics of the large industrial customers also played a part in the Commission's decision to elevate the industrial rates of return above the system average. The large volume of gas used by industrial customers requires NCNG to increase its capacity and use compressors in order to provide service without constant interruption. CUCA witness Loos admitted that such extensive service required that NCNG purchase both the quantity of gas, and the equipment necessary, to meet this demand. Yet, as already noted, the majority of large industrial customers pay no demand charges.

With respect to the Cities, the Commission recognized that the manner in which Cities are served separates them from residential and small industrial customers. The wholesale rate to each of the Cities enables them to control entirely the rates they charge their own customers. Additionally, the Cities are free to add new industrial and residential customers at will. Thus, while neither NCNG nor the Commission has any control over how many industrial and residential customers the Cities obtain, NCNG must provide sufficient gas and line capacity to meet the Cities' average and peak demands. Furthermore, Cities witness

Saffer confirmed in testimony that NCNG has cooperated with the Cities in their efforts to expand their systems and retain their own large industrial customers.

According to Public Staff witness Raymond J. Nery, the value of service to Cities is enhanced by the fact that their overall demand rate or load factor for gas is less than 50% of their possible maximum requirement compared with NCNG's system average of 63% in the test year and 71% in fiscal year 1985. NCNG is required, nevertheless, to purchase gas to cover these possible peak day demands which can exceed average daily use of gas by as much as 2½ times. The lower load factor means that the Cities get the benefit of having sufficient gas to meet peak demands without paying added demand charges for periods when they do not require such quantities. According to Nery, if the Cities had to pay demand charges, the increased cost to the Cities would be approximately $446,000. The Commission concluded that all of the preceding factors "point to a higher rate of return requirement for NCNG's sales to Cities."

The evidence supports the Commission's concern that an additional increase in residential and commercial and small industrial rates might cause substantial hardships to these customers. The uncontradicted evidence shows that residential and commercial and small industrial customers pay the highest per unit price of gas on NCNG's system. Though these customers account for only 14% of NCNG's sales volume, they pay 25% of NCNG's margin (revenues less cost of gas and gross receipts tax) under the approved rates. To set rates based entirely on cost of service, as promoted by the appellants, fails to recognize these customers' limited alternatives. We have recently recognized that unforeseen substantial burdens on customers due to a sudden rate increase should be avoided. *See State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 314 N.C. at 196, 333 S.E. 2d at 274-75. So too in this case, the Commission reasonably concluded that additional increases in rates of return of residential and commercial and small industrial customers would be unjust at this time.

The evidence regarding the other noncost factors considered by the Commission also serves to justify differing rate of return levels for the individual customer classes. In analyzing and distinguishing the application of these factors to the opposing cus-

tomer classes, the Commission complied with the demands of our case law regarding a decision to set discriminatory rates. The Commission drew legitimate distinctions which justify its decision to maintain industrial and Cities' rates of return at a higher level than residential and commercial and small industrial rates.

Even if "[u]pon the same facts we might have reached a different result," *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 54, 132 S.E. 2d 249, 257 (1963), it is not for this Court to reverse or remand the Commission's decision on this account. We are cognizant of the cogent arguments made by appellants that the differences relied on by the Commission in approving NCNG's rate schedules do not justify the discriminations in rates of return so as to make them reasonable discriminations. Appellees argue with equal cogency to the contrary. Both sets of arguments are essentially fact based and are more properly made to the Commission than to this Court. The Commission has, on remand, supported its conclusions on the discrimination issue with evidentially supported factual findings that it has determined in its administrative expertise *do* justify the discriminations it has approved. It is not this Court's duty to evaluate the accuracy of complex statistical models, conflicting methodologies, and the opposing expert opinions drawn therefrom. This, instead, is the duty of the Commission which has the special knowledge, experience and training best suited to make such determinations. *See Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 456, 130 S.E. 2d 890, 895 (1963); *Utilities Comm. v. State and Utilities Comm. v. Telegraph Co.*, 239 N.C. 333, 349, 80 S.E. 2d 133, 144 (1953).

We also note as particularly significant that this proceeding has not resulted in any increase in the rates of the appellants. Only the rates of the residential and commercial and small industrial customers have been increased. Thus, the approved rates at least move in the direction of more nearly equalizing the rates of return among all NCNG's customer classes.

After a careful review of the record we hold the Commission's ORDER does contain findings sufficient to justify its conclusion that the approved rates of return are just and reasonable and do not unreasonably discriminate among the various classes of NCNG customers. Furthermore, the Commission's findings are

supported by substantial evidence in view of the whole record. While an assessment of the Commission's ORDER based simply on the cost of service evidence might suggest the adopted rates are unreasonably discriminatory, the Commission's analysis of the noncost factors permitted in our case law is sufficient to justify the Commission's decision.[9]

III.

[2] CUCA argues that the Transportation Rates T-1 and T-2 approved by the Commission are unreasonably discriminatory and unjust and unreasonable.

In its original Order the Commission approved transportation rates which enabled NCNG to earn the same profit margin for transporting customer-owned gas as it would have earned for gas sold under a sales rate schedule. Margins allowed under both transportation rates were based on margins allowed under the sales Rate Schedules 4, 5, and 6. In light of our concern over the discrimination present in the sales rate schedules between the various classes of customers and our decision to remand the proceeding so the Commission could consider this issue and make appropriate findings, we also directed the Commission to assess whether the adopted transportation rates were unreasonably discriminatory. We qualified our decision to remand on this issue by stating:

> We do not hold that it is unjust and unreasonable as a matter of law for a utility to earn the same profit margin on transported gas that it earns on its own retail sales of gas. TMA has not indicated that it argued this issue before the

9. In the first appeal we instructed the Commission to "decide whether the present rates result in unjust and unreasonable discrimination among ratepayers . . . [and] *[i]f the Commission finds such discrimination to exist, . . . [to] examine the remedies proposed by TMA and Cities and decide if one of those or some other remedy is appropriate.*" *State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc.*, 313 N.C. at 224, 328 S.E. 2d at 270 (emphasis supplied). Because the Commission has concluded that NCNG's rates are just and reasonable and do not result in any unjust or unreasonable discrimination it was not required to examine these proposals. We note, however, the Commission's ORDER does include an extensive discussion of the Cities' "look-through" ratemaking proposal and gives reasons for its rejection. Since we are affirming the Commission's conclusion regarding the reasonableness of the discriminatory rates, we express no opinion on that portion of the Commission's ORDER rejecting the Cities' proposal.

> Commission or that the Commission failed to make adequate findings of this question. For that reason the Commission need not consider it on remand.

State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc., 313 N.C. at 225, 328 S.E. at 270.

In its ORDER on remand, the Commission concluded that Transportation Rates T-1 and T-2 are neither unjust nor unreasonably discriminatory. The Commission found

> no justification for a difference between the margins earned on the Company's sales rate schedules and its transportation rate schedules. . . . It is obvious to the Commission that the services performed by NCNG are the same whether service is provided under the sales rate or transportation rate. The gas passes through the same pipes, meters and regulators. The Company provides the same load balancing and use of storage. The same employees perform the billing services. As the services performed by NCNG are the same, common sense dictates that the cost would also be the same. Certainly there is no difference to the customer in the value of service received under the transportation rate schedule from that received under the sales rate schedule.

The Commission also concluded: "The Company's Transportation Rates T-1 and T-2, being based on the margin included in sales Rate Schedules 4, 5 and 6, are not excessive and do not unreasonably discriminate as the applicable sales rates have been found to be just and reasonable and not unreasonably discriminatory."

CUCA maintains that allowing NCNG to earn the same margin of profit for transporting customer owned gas as it earns for transporting gas under a sales contract is unjust and unreasonably discriminatory for two reasons. First, CUCA contends the underlying sales rate schedule is unreasonably discriminatory and unjust. Second, CUCA argues allowing full margin transportation rates is an abuse of NCNG's monopoly power.

We reject both of CUCA's contentions and affirm the Commission's decision. As our earlier decision makes clear, our reason for remanding this issue centered on our concern regarding whether the various customer rate schedules were unreasonably discriminatory. Since the approved margins in transportation

rates track the sales rate margins, a finding that the sales rate schedule is unreasonably discriminatory would necessarily have affected our decision regarding the transportation rates. Having held that the Commission's findings are sufficient to support its conclusion that the approved sales rates do not discriminate unreasonably, our expressed concern regarding the transportation rates is alleviated.

CUCA's second argument is foreclosed by our decision on the first appeal. We concluded in that decision, as noted above, that on this record it was not unlawful to permit the transportation rates to have the same margins as the sales rates.

IV.

[3] CUCA argues the Commission erred when it modified and reapproved the IST in that the IST unreasonably discriminates between customer classes in violation of N.C.G.S. § 62-140(a) and results in unjust and unreasonable rates in violation of N.C.G.S. § 62-130(a) and N.C.G.S. § 62-131(a).

For a proper understanding of appellants' argument a brief explanation of how the IST operates is in order. As the Court explained on the first appeal:

> The IST applies to customers presently being served under Rate Schedule Nos. 4, 5, 6 and RE-1 that are capable of using heavy fuel oil as an alternate fuel. The Commission estimated the level of fixed cost recovery NCNG would obtain from these customers by subtracting projected variable costs from the revenues NCNG could expect to receive from IST customers. This calculation was based on anticipated sales and oil prices. The resulting figure is NCNG's allowed profit margin. If oil prices drop so that heavy fuel oil becomes cheaper to use than natural gas forcing NCNG to negotiate lower rates with its IST customers, the IST allows NCNG to add a surcharge to the rates of customers not covered by the IST to maintain its profit margin. If oil prices should increase allowing NCNG to make profits in excess of its allowed profit margin, the excess is passed on to the Non-IST customers by a credit. At the end of each year there is a "true-up."

State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc., 313 N.C. at 226, 328 S.E. 2d at 271.

Under the Commission's original order, the IST did not include industrial and large commercial customers added to NCNG's system after 30 June 1983. The effect of this exemption was to enable NCNG to earn large profits from any new industrial and large commercial customers while shifting all risk of loss on the non-IST ratepayers who were part of the NCNG system before July 1983. The original version of the IST applied only to customers served under Rate Schedule Nos. 4, 5, 6, and RE-1 which had the capacity to use heavy oil as an alternative fuel rather than all customers having this capacity.

Concerning the original IST formula, we held that excluding new industrial and large commercial customers "from the operation of the IST is unjust and unreasonable as a matter of law." *Id.* at 228, 328 S.E. 2d at 272. We instructed the Commission on remand to include new industrial and large commercial customers in any form of an IST which they might adopt. We further instructed the Commission to consider whether any modified IST adopted "is unreasonably discriminatory and make appropriate findings of fact." *Id.* at 229, 328 S.E. 2d at 273.

On remand, the Commission complied with our directive by modifying the IST "to include as IST customers all customers who have heavy oil as an alternate fuel. . . . The IST will also include new customers in Priorities 2.8 through 9.0 as ordered by the Supreme Court." Additionally, the Commission concluded "the IST affirmed in this proceeding is not unreasonably discriminatory to or within customer classes." In making this conclusion the Commission commented that "whether or not heavy fuel oil is an alternative fuel is a reasonable basis for differentiating among customers, and including or excluding customers in the IST on that basis is not unreasonably discriminatory."

In support of its conclusion, the Commission recited extensive evidence regarding the necessity for a mechanism such as the IST. Illustrative of this evidence was the testimony of NCNG witness Calvin B. Wells. Wells testified:

> We are currently in a period of very unstable prices for heavy oil used by large industrial and commercial customers and for natural gas. This situation, together with the fact that our natural gas rates are at or above the cost of fuel oil to several industrial customers, make it impossible to project

> with reasonable assurance the volume of natural gas that can be sold under the various industrial rate schedules or the price at which natural gas can be sold to industrial customers at negotiated prices under our Rate Schedule No. S-1. . . . Unfortunately, a modest change in either the cost of oil or natural gas could significantly alter the total sales volume and/or sales mix. Because of the significant impact which this could have on the customers and the Company, we believe it is prudent to adopt a mechanism which provides some protection for both.

With regard to the discrimination issue, the Commission cited the testimony of NCNG's witness Teele. According to Teele:

> The IST is not discriminatory because the industrial IST customers get a cap through tariff rates which fix the customers' maximum cost of gas and they also get the benefit of lower gas rates by negotiation when the price of oil decreases. This treatment is generally available only to the industrial IST customers including industrial customers of our municipal customers and not to the residential, commercial and other general service customers. Hence, there is no discrimination in the fact that any excess margin flows back only to the general service customers who are at risk for carrying the company's entire cost of service if the larger IST customers decide to switch to alternate fuel.

Reviewing these persuasive testimonies and the other evidence contained in the whole record, we hold that the Commission's ORDER contains findings sufficient to justify its conclusion that the IST does not unreasonably discriminate between NCNG's customer classes and that these findings are supported by substantial evidence in light of the whole record. The testimonies of NCNG's witnesses Wells and Teele provide substantial support for the conclusion that the availability of heavy oil as alternative fuel is a reasonable basis for differentiating among customers. Moreover, taken as a whole, the record contains additional substantial evidence indicating that the IST facilitates the fixing of just and reasonable rates. While it serves to protect NCNG from losses due to negotiations with customers threatening to switch to heavy oil, it also limits the level of profit the company can make on sales to that segment of customers. The Commission's

conclusion that the modified IST does not violate N.C.G.S. § 62-130(a) or N.C.G.S. § 62-131(a) is not in error.

In conclusion and for the reasons stated, we hold that the Commission did not err in the proceedings on remand. Its ORDER is, therefore,

Affirmed.

Justice MEYER dissenting.

Upon a careful review of the record, I am unconvinced that the Commission's conclusions on the discrimination issue are supported by the findings contained in the Commission's Order on Remand. The Commission has simply enumerated certain purported non-cost factors (some of which are not even discussed in the Commission's Order on Remand), which it says justify the discrimination in the rates it has approved. Even as to those factors which the Commission actually addressed in its Order on Remand, it does not even discuss (much less attempt to justify) the specific *magnitude* of rate disparity it approved. Thus, it is absolutely impossible for this Court to discern the linkage between the factors the Commission considered and the degree or magnitude of the rate discrimination which the Commission approved. While I recognize the difficulty in quantifying precisely how much discrimination is justified by particular factors, the Commission has made no attempt to do so and, indeed, has not even addressed the subject.

While N.C.G.S. § 62-140 allows the Commission to discriminate, it charges the Commission with the responsibility of eliminating *unreasonable* discrimination in the rates of public utilities. It cannot be disputed that the reasonableness of any permitted discrimination is gauged by the relationship between the variances in the conditions of service and the variances in the rates. *See State ex rel. Utilities Comm. v. Mead Corp.*, 238 N.C. 451, 465, 78 S.E. 2d 290, 300 (1953). Rate differentials must be supported by findings (1) that there exists a substantial difference in service or conditions of service and (2) that there exists a reasonable relationship between the degree of the variances in the service and the degree of variances in the rates.

As the majority points out, this Court on the first appeal in this case noted that the evidence before the Commission made it clear that there was *substantial* discrimination between the various classes of customers. Our opinion noted that the effect of the rate structure approved by the Commission is that the rates of residential and certain commercial and small industrial customers are subsidized by the remaining industrial, wholesale, and commercial customers. We remanded the case to the Commission so that it could consider the substantial difference between the cost of service and rate of return for various classes of customers and the question of unreasonable discrimination among and within the classes of service. The Commission thus had a duty to review the evidence on discrimination, to enter detailed findings based upon the evidence, and to reach reasoned conclusions on the basis of those findings. N.C.G.S. § 62-79(a). While I believe the Commission attempted to address the issues, I conclude that it has not done so adequately.

When, as here, the rates approved by the Commission deviate so drastically from rates which would be dictated by the cost-of-service studies which are presented in the proceedings, the Commission has a duty not only to explain the reasons therefor, but also to *justify* and *attempt to quantify* the magnitude of the variances dictated by the non-cost factors upon which it relies to justify the rate discrimination it approves.

Because the Commission failed to describe in detail the non-cost factors it employed, failed to explain how each of these non-cost factors justifies discrimination, and failed to quantify (as best it could) the amount of deviation justified by each non-cost factor, this Court is left to guess what precise role each of the non-cost factors listed by the Commission played in the rates the Commission approved.

With full realization of the difficulty which the Commission necessarily encounters each and every time it attempts to justify the discrimination which exists in long-existing rate patterns and schedules, I cannot vote to affirm the Commission's Order on Remand and would vote either to reverse the Commission's order or to remand the case yet another time for further findings and conclusions.

SUSIE HALL v. ROSE POST AND THE POST PUBLISHING COMPANY, INC., D/B/A THE SALISBURY POST AND MARY H. HALL v. ROSE POST AND THE POST PUBLISHING COMPANY, INC., D/B/A THE SALISBURY POST

No. 340PA87

(Filed 6 October 1988)

Privacy § 1— truthful disclosure of private facts—not recognized

The Court of Appeals improperly reversed the trial court's granting of summary judgment for defendants in an action for tortious invasion of privacy by truthful public disclosure of private facts arising from a series of newspaper articles regarding a search for Susie Hall by her natural mother, a carnival worker who had abandoned her seventeen years earlier. This branch of the invasion of privacy tort, which has not been recognized in North Carolina, would duplicate or overlap other torts, such as intentional infliction of emotional distress, and is constitutionally suspect because it directly confronts the freedoms of speech and press.

Justice FRYE concurring in the result.

Justice MEYER joins in this concurring opinion.

ON discretionary review of the decision of the Court of Appeals, 85 N.C. App. 610, 355 S.E. 2d 819 (1987), reversing summary judgment entered by *Fountain, J.*, on 20 May 1986 in Superior Court, LINCOLN County. Heard in the Supreme Court on 11 November 1987.

Palmer, Miller, Campbell & Martin, P.A., by Joe T. Millsaps, for plaintiff-appellees.

Adams, McCullough & Beard, by H. Hugh Stevens, Jr., Steven J. Levitas and Pope McCorkle, III; and Woodson, Linn, Sayers, Lawther & Short, by Donald D. Sayers, for defendant-appellants.

Smith, Helms, Mulliss & Moore, by E. Osborne Ayscue, Jr., Jonathan E. Buchan and James G. Middlebrooks, for The Knight Publishing Company and The North Carolina Press Association, Inc., amici curiae.

Tharrington, Smith & Hargrove, by Wade H. Hargrove and Mark J. Prak, for The North Carolina Association of Broadcasters, Inc., The Radio-Television News Directors Association of the Carolinas, The Associated Press, The News and Observer Publishing Company, Wilmington Star-News, Inc., Hendersonville Newspaper Corporation, The Dispatch Publishing Company, and TSP Newspapers, Inc., amici curiae.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr., and W. Andrew Copenhaver, for Piedmont Publishing Company, amicus curiae.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr., for The Durham Herald Company, Inc., amicus curiae.

Smith, Helms, Mulliss & Moore, by Alan W. Duncan, for The Greensboro News & Record, Inc., amicus curiae.

MITCHELL, Justice.

In the present case, this Court must decide whether claims for tortious invasion of privacy by truthful public disclosure of "private" facts concerning the plaintiffs are cognizable at law in North Carolina. We hold that they are not and reverse the decision of the Court of Appeals.

The plaintiffs, Susie Hall and her adoptive mother, Mary Hall, brought separate civil actions against the defendants for invasion of privacy. The actions were based upon two articles printed in The Salisbury Post and written by its special assignment reporter, Rose Post. The defendants answered asserting among other things that each plaintiff's complaint failed to state a claim upon which relief could be granted. The defendants moved for summary judgment in both actions, and a consolidated hearing was held on their motions. The trial court entered summary judgment for the defendants in both cases on 20 May 1986.

The plaintiffs' cases were consolidated for purposes of appeal. The Court of Appeals concluded that summary judgment for the defendants had been improperly granted and reversed the trial court. On 23 June 1987, the defendants petitioned this Court for discretionary review of the decision of the Court of Appeals. On 28 July 1987, we allowed discretionary review.

The pleadings and affidavits forming the forecast of evidence at the hearing on the defendants' motions for summary judgment tended to establish that, on 18 July 1984, The Salisbury Post published an article by Rose Post which bore the headline "Ex-Carny Seeks Baby Abandoned 17 Years Ago." The article concerned the search by Lee and Aledith Gottschalk for Aledith's daughter by a previous marriage, whom she and her former husband had abandoned in Rowan County in September of 1967. The article told of Aledith's former marriage to a carnival barker named Clarence Maxson, the birth of their daughter in 1967, their abandonment of the child at the age of four months, events in Aledith's life thereafter, and her return to Rowan County after seventeen years to look for the child. The article indicated that Clarence Maxson had made arrangements in 1967 for a babysitter named Mary Hall to keep the child for a few weeks. Clarence and Aledith then moved on with the carnival, and Clarence later told Aledith that he had signed papers authorizing the baby's adoption.

Aledith was married to Lee Gottschalk in 1984, and they decided to travel to Rowan County to look for Aledith's child. The newspaper article of 18 July 1984 related the details of their unsuccessful search and then stated:

> If anyone, they say, knows anything about a little blonde baby left here when the county fair closed and the carnies moved on in September 1967, Lee and Aledith Gottschalk can be reached in Room 173 at the Econo Motel.

Shortly after the article was published, the Gottschalks were called at the motel and informed of the child's identity and whereabouts.

The defendants published a second article on 20 July 1984 reporting that the Gottschalks had located the child with the aid of responses to the earlier article. The second article identified the child as Susie Hall and identified her adoptive mother as Mary Hall. The article related the details of a telephone encounter between the Gottschalks and Mrs. Hall and described the emotions of both families.

The plaintiffs alleged that they fled their home in order to avoid public attention resulting from the articles. Each plaintiff

alleged that she sought and received psychiatric care for the emotional and mental distress caused by the incident.

The defendants have contended at all times that the imposition of civil liability for their truthful public disclosure of facts about the plaintiffs would violate the First Amendment to the Constitution of the United States. The defendants have contended in the alternative that this Court should refuse to adopt any tort which imposes liability for such conduct as a part of the common law of this State.

Although the plaintiffs contended before the Court of Appeals that their claims constituted valid claims both for public disclosure of embarrassing private facts and for intrusion upon the plaintiffs' seclusion or solitude or into their private affairs, we agree with the Court of Appeals that the intrusion branch of the invasion of privacy tort is not involved here. *Hall v. Post*, 85 N.C. App. at 615, 355 S.E. 2d at 823-24. Therefore, we strictly limit our consideration in the present case to issues concerning the private facts branch of the invasion of privacy tort. We neither consider nor decide whether any other tort is constitutional or cognizable at law upon facts such as those presented here.

It is well known that the concept of a right of privacy recognizable in law appears to have originated in a law review article by Louis D. Brandeis, later a Justice of the Supreme Court of the United States, and his law partner, Samuel D. Warren. Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). The fact that Brandeis, then only thirty-three years of age, failed to foresee the constitutional problems arising from the views set forth in the article is not very remarkable, since no court in 1890 had held that the First Amendment would be applied to the states through the Fourteenth Amendment. *Cf. Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states). Indeed, the Supreme Court of the United States did not begin to recognize First Amendment incorporation until the end of the first quarter of the twentieth century. *See, e.g., Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 75 L.Ed. 1357 (1931); *Fiske v. Kansas*, 274 U.S. 380, 71 L.Ed. 1108 (1927); *Gitlow v. New York*, 268 U.S. 652, 69 L.Ed. 1138 (1925).

In 1916—twenty-six years after the article on privacy was published—Brandeis became a Justice of the Supreme Court. In a landmark concurring opinion which established his reputation as a constitutional scholar, he fully accepted the doctrine of First Amendment incorporation. *Whitney v. California*, 274 U.S. 357, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

Since the publication of the nineteenth century Warren and Brandeis article in the Harvard Law Review, two different broad categories of privacy rights have evolved. *See generally* Annotation, *Supreme Court's Views As To The Federal Legal Aspects Of The Right Of Privacy*, 43 L.Ed. 2d 871, 875-76 (1975). One is the *constitutional* right of privacy which protects personal privacy from certain types of *governmental* intrusion. *See, e.g., Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 53 L.Ed. 2d 867 (1977); *Roe v. Wade*, 410 U.S. 113, 35 L.Ed. 2d 147 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed. 2d 510 (1965). The other is the general right of privacy, violations of which have been viewed by some as giving rise to a tort composed of four branches, only one of which is of concern in the present case. This Court has recently acknowledged that, as to this general right to privacy:

> A review of the current tort law of all American jurisdictions reveals cases identifying at least four types of invasion of four different interests in privacy: (1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his *private affairs*; (3) public disclosure of *private* facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye. *See* W. Prosser, *Handbook of the Law of Torts* § 117 (4th ed. 1971) (emphasis added).

Renwick v. News and Observer, 310 N.C. 312, 322, 312 S.E. 2d 405, 411, *cert. denied*, 469 U.S. 858, 83 L.Ed. 2d 121 (1984).

In the present case, we consider for the first time that branch of the invasion of privacy tort which is most commonly referred to as the "public disclosure of private facts." The plaintiffs have at all times acknowledged that the facts published about them by the defendants were true and accurate in every respect, but they contend, nevertheless, that they are entitled to recover.

Under the definition of the private facts tort set out in the Restatement (Second) of Torts, liability will be imposed for publi-

cation of "private facts" when "the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D (1977). That definition includes four elements: (1) publicity; (2) private facts; (3) offensiveness; and (4) absence of legitimate public concern. *Id.*, commentary. With regard to what has become known as the "newsworthiness" or "public interest," i.e., "legitimate public concern" standard, the Restatement view is that:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the *community mores*. The line is to be drawn when the publicity ceases to be the giving of information *to which the public is entitled*, and becomes a morbid and sensational prying into private lives for its own sake, with which a *reasonable member* of the public, with *decent* standards, would say that he has no concern.

Id., Comment h (emphasis added).

Since the American Revolution and our independence, the common law has continued to apply in North Carolina. N.C.G.S. § 4-1 (1986). Unless modified or repealed by the General Assembly or this Court, the "common law" to be applied is the common law of England as it existed when North Carolina became a sovereign State in 1776. *Bruton, Attorney General v. Enterprises, Inc.*, 273 N.C. 399, 417, 160 S.E. 2d 482, 494 (1968). *See* N.C.G.S. § 4-1 (1986).

The private facts branch of the invasion of privacy tort was not recognized at common law in 1776 or at the times of adoption of either the Constitution or the Bill of Rights. It has never been recognized in England, Australia, New Zealand, Canada, or other jurisdictions sharing the heritage of the English common law. Davis, *What Do We Mean By "Right To Privacy"?*, 4 S.D.L. Rev. 1, 4 (1959). After an extensive study, the British Committee on Privacy recommended that the invasion of privacy tort not be adopted in Great Britain, because its application would be too difficult and time consuming and would unnecessarily threaten free speech. *See generally* Report of the Committee on Privacy, Cmd. 5, No. 5012 at 206 (1972), *cited with approval in* Zimmerman, *Req-*

uiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort, 68 Cornell L. Rev. 291, 335 n.237 (1983) [hereinafter *Requiem for a Heavyweight*].

Although expressing constitutional and other reservations, this Court has recognized a general right of privacy as a part of the tort law of this State. *See Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) (recognizing the "appropriation" branch of the tort). However, we have not recognized or applied either of the two branches of the tort which, because they arise from publicity, most directly affect First Amendment speech and press rights. Quite to the contrary, we have refused to recognize the branch of the invasion of privacy tort arising from publicity by which the defendant places the plaintiff in a *false* light in the public eye. *Renwick v. News and Observer*, 310 N.C. 312, 312 S.E. 2d 405. We did so because "false light" claims often would duplicate or overlap existing claims for relief. *Id.* at 323, 312 S.E. 2d at 412. Additionally, "recognition of a separate [false light] tort . . . would tend to add to the tension already existing between the First Amendment and the law of torts . . . ." *Id.* For the same reasons, we now hold that claims for invasions of privacy by publication of *true* but "private" facts are not cognizable at law in this State.

The Supreme Court of the United States has specifically declined to "address the broader question whether *truthful* publications *may ever* be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491, 43 L.Ed. 2d 328, 347 (1975) (emphasis added). *But see Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 61 L.Ed. 2d 399 (1979) (statute prohibiting publication of defendant-juvenile's name unconstitutional, because state's interest in protecting juveniles and ensuring their rehabilitation could not overcome defendants' rights of speech and press); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L.Ed. 2d 1 (1978) (same result and reasoning where statute prohibited publishing information regarding confidential proceedings before state judicial review commission). We do not find it necessary to answer that "broader question" here. It is enough for us to decide here, as we did in *Renwick*, that adoption of the tort sought by the plaintiffs would add to the existing tensions between the First Amendment and the law of torts and would be of little practical value to anyone.

This action between two non-governmental parties does not involve "a situation in which two constitutional interests must be balanced in apposition, but rather one in which state [tort] laws protecting privacy are constrained by the federal Constitution. The 'privacy' interest involved is not a constitutionally protected privacy . . . ." Rich & Brilliant, *Defamation-In-Fiction: The Limited Viability Of Alternative Causes Of Action*, 52 Brooklyn L. Rev. 1, 20 n.94 (1986) [hereinafter *Alternative Causes of Action*]. As the constitutional right of privacy is not involved here, a reasonable argument certainly can be made that the First Amendment rights of speech and press control and prohibit recovery in these actions against the defendants for publishing the truth.

Further, the Supreme Court of the United States has consistently held that even *false* statements *which cause actual harm* must be given limited "breathing space." *See Requiem for a Heavyweight*, 68 Cornell L. Rev. at 313 n.105 (citations to eighteen such cases). To do otherwise would unduly limit the rights of free speech and press by causing writers and speakers to cautiously exercise those rights for fear of liability. *Hustler Magazine v. Falwell*, 485 U.S. ---, 99 L.Ed. 2d 41 (1988). This in turn would reduce the vigor and limits of public debate. *Id.* Surely, it would be reasonable to argue that the publication of *true* statements, such as those made by the defendants, are entitled to no less constitutional protection than that guaranteed *false* statements.

In several cases the Supreme Court has extended certain defenses required by the First Amendment in defamation cases to other types of tort actions, when the plaintiff's claim arose as a result of the defendants' writings or speech. *E.g., Hustler Magazine v. Falwell*, 485 U.S. ---, 99 L.Ed. 2d 41 (intentional infliction of emotional distress); *Time, Inc. v. Hill*, 385 U.S. 374, 17 L.Ed. 2d 456 (1967) (false light invasion of privacy). Such decisions may be fairly read as at least implying that the same constitutional protection given true statements in defamation actions must also be given to true statements in all other tort actions, *when the plaintiff's claim arises from the defendant's writings or speech. See Meeropol v. Nizer*, 560 F. 2d 1061, 1066 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013, 54 L.Ed. 2d 756 (1978) ("The same standards of constitutional protection apply to an invasion of privacy and to libel actions."). Indeed, as we pointed out in *Renwick*, at

least one respected scholar seems to have adopted this same view.

> In 1964, the Supreme Court of the United States decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) which held that the First Amendment itself imposes limitations upon state claims for libel or slander. In 1967, the Supreme Court decided *Time, Inc. v. Hill*, 385 U.S. 375 (1967) which extended First Amendment protections *at least* as stringent as those required by *Sullivan* to defendants in cases for false light invasion of privacy. *See* Restatement (Second) of Torts § 652E comment d (1977). "By this decision, and others which followed it, the two branches of invasion of privacy which turn on publicity [public disclosure of embarrassing private facts and false light invasions of privacy] were taken over under the Constitutional Privilege. The other two, however, are pretty clearly not." W. Prosser, *Handbook of the Law of Torts*, § 118 at 827 (4th Ed. 1971).

Renwick v. News and Observer, 310 N.C. at 324-25, 312 S.E. 2d at 412-13.

"[A] cause of action predicated on public disclosure of private facts depends for its success on the truthfulness of the published material." *Alternative Causes of Action*, 52 Brooklyn L. Rev. at 16-17. The Supreme Court of the United States has specifically recognized that "it is here that claims of privacy *most directly confront* the constitutional freedoms of speech and press." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 489, 43 L.Ed. 2d at 346 (emphasis added). Thus, it is obvious here, just as it was obvious in *Renwick*, that the branch of the invasion of privacy tort which the plaintiffs seek to have us adopt is constitutionally suspect and, even if it ultimately manages to survive constitutional review, "would tend to add to the tension already existing between the First Amendment and the law of torts . . . ." *Renwick v. News and Observer*, 310 N.C. at 323, 312 S.E. 2d at 412.

Additionally, just as was the case in *Renwick*, the branch of the tort we are asked to adopt here would "duplicate or overlap" other torts. *Renwick v. News and Observer*, 310 N.C. at 323, 312 S.E. 2d at 412. For example, the private facts tort as defined in the Restatement will, as a practical matter, tend to duplicate or overlap the tort of intentional infliction of emotional distress.

In North Carolina, the tort of intentional infliction of emotional distress,

> consists of (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself.

Dickens v. Puryear, 302 N.C. 437 at 452-53, 276 S.E. 2d 325 at 335 (1981). Although theoretically possible, it is unlikely that a juror would find that a defendant had committed the private facts tort but fail to find that the defendant had intentionally inflicted emotional distress. For example, to find that the defendant publicized a matter "not of legitimate concern to the public" under the definition of the private facts tort, a juror first must find that the defendant publicized it as part of "a morbid and sensational prying into [the plaintiff's private life] . . . for its own sake, with which a reasonable member of the public with decent standards, would say he has no concern." *See* Restatement (Second) of Torts § 652D Comment h (1977).

Further, to find the private facts tort, the juror must find that the material published would be "highly offensive to a reasonable person." *Id.* It seems almost inevitable that a juror having made those findings concerning the private facts tort would also find that the defendant's conduct was "extreme and outrageous" and that the defendant was recklessly indifferent to the likelihood that he would cause severe emotional distress. Therefore, if a reasonable juror believed that the defendant had committed the private facts tort, it seems clear as a practical matter that the juror would also believe that the same conduct amounted to intentional infliction of emotional distress.

Further, a plaintiff seeking to recover under the private facts tort as defined in the Restatement must *always establish* three specific *additional* elements which are not necessary elements of the tort of intentional infliction of emotional distress: (1) publication (2) of private facts (3) which are not "newsworthy," i.e., not of "legitimate concern to the public" or of "public interest." *Id.*

Therefore, in almost every instance in which a North Carolina plaintiff could establish a claim under the private facts tort, the same plaintiff could more easily establish a claim for intentional infliction of emotional distress. Since plaintiffs will only be entitled to recover once, if at all, it would seem that recognition of the private facts tort by this Court would deliver nothing of any real value.

The same two basic concerns which prevented our adoption of the tort of false light invasion of privacy strongly favor our rejecting the tort of invasion of privacy by publishing private facts, as to which not even truth is a defense. First, decisions of the Supreme Court of the United States, scholarly articles and the Restatement make it clear that the private facts branch of the invasion of privacy tort is, at the very best, constitutionally suspect. *E.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328; Restatement (Second) of Torts § 652D special note (1977); M. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 Stan. L. Rev. 789 (1963-64); *Alternative Causes of Action*, 52 Brooklyn L. Rev. 1; *Requiem for a Heavyweight*, 68 Cornell L. Rev. 291; Kalden, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & Contemp. Probs. 326 (1966). Therefore, it would be entirely unrealistic to suggest that adoption of the private facts tort would do other than "add to the tension already existing between the First Amendment and the law of torts." *Renwick v. News and Observer*, 310 N.C. at 323, 312 S.E. 2d at 412. Second, the constitutionally suspect private facts branch of the invasion of privacy tort will almost never provide a plaintiff with any advantage not duplicated or overlapped by the tort of intentional infliction of emotional distress and possibly by other torts such as trespass or intrusive invasion of privacy. We reemphasize here, however, that in this case we do not consider or decide the "broader question" of whether any other tort is constitutional or cognizable at law upon facts such as those presented here. *See generally Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 491, 43 L.Ed. 2d at 347.

We conclude that any possible benefits which might accrue to plaintiffs are entirely insufficient to justify adoption of the constitutionally suspect private facts invasion of privacy tort which punishes defendants for the typically American act of broadly

proclaiming the truth by speech or writing. Accordingly, we reject the notion of a claim for relief for invasion of privacy by public disclosure of true but "private" facts.

For the foregoing reasons, the decision of the Court of Appeals is reversed.

Reversed.

Justice FRYE concurring in result.

The majority holds that summary judgment was appropriately entered for the defendants in these cases in which the plaintiffs sought recovery for tortious invasion of privacy by public disclosure of private but true facts concerning the plaintiffs. I agree that plaintiffs have failed to forecast evidence sufficient to withstand defendants' motions for summary judgment and that summary judgment was appropriately entered against the plaintiffs. I therefore concur in the result reached by the majority.

I do not concur in the reasoning of the majority which leads it to "reject the notion of a claim for relief for invasion of privacy by public disclosure of true but 'private' facts." I do not accept the notion that the tension already existing between the first amendment and the law of torts requires the nonrecognition of a legitimate claim by a nonpublic figure against a media defendant for wrongfully publishing highly offensive private facts which are not of legitimate concern to the public. While public figures give up some of their rights to privacy in the public interest, I do not believe that the media should be given a license to pry into the private lives of ordinary citizens and spread before the public highly offensive but very private facts without any degree of accountability. Such is not required by either the federal or state constitutions.

In this case the trial court entered summary judgment in favor of defendants against both plaintiffs. The Court of Appeals held that summary judgment was improperly granted, and in so holding explicitly found that the publication of private but true facts may give rise to a cause of action for an invasion of the right to privacy. While I agree with the Court of Appeals that this tort is recognizable in this jurisdiction, I would reverse its

decision on the grounds that the published information in this case was of legitimate concern to the public.

On appeal, defendants contend they were entitled to summary judgment because publication of private but true facts is not a recognizable invasion of privacy tort in this State. In the alternative, if this Court recognizes the tort, defendants contend that they were still entitled to summary judgment because the matter they published concerning plaintiffs was neither private nor highly offensive and was of legitimate concern to the public.

Although jurisdictions were slow to recognize invasion of privacy causes, today the tort has been adopted, in one form or another, in virtually all jurisdictions. W. Keeton, *Prosser and Keeton on The Law of Torts* § 117 (5th ed. 1984).

North Carolina first recognized the invasion of privacy tort as a separate cause of action when this Court held that a plaintiff stated a cause of action for invasion of privacy when a defendant newspaper used without authorization a photograph of the plaintiff in an advertisement. *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938) (recognizing the "appropriation" form of invasion of privacy). Recently, however, this Court refused to recognize the "false light" invasion of privacy tort. *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 312 S.E. 2d 405, *cert. denied*, 469 U.S. 858, 83 L.Ed. 2d 121 (1984). The reasoning behind this Court's decision in *Renwick* was a concern that "any right to recover for a false light invasion of privacy will often either duplicate an existing right of recovery for libel or slander or involve a good deal of overlapping with such rights." *Id.* at 323, 312 S.E. 2d at 412. Further, this Court was concerned that "the recognition of a separate tort . . . to the extent it would allow recovery beyond that permitted in actions for libel or slander, would tend to add to the tension already existing between the First Amendment and the law of torts in cases of this nature." *Id.*

Heretofore, we have not been called upon to determine whether North Carolina would recognize a cause of action for the remaining two torts—unreasonable intrusion and unreasonable

publicity of private facts.[1] Although plaintiffs, in their appeal to the Court of Appeals, contended that their claims constituted both an intrusion into their private affairs and an unreasonable disclosure of private facts, I agree with the majority and with the Court of Appeals that the unreasonable intrusion tort is not involved here. *See Hall v. Post*, 85 N.C. App. at 615, 355 S.E. 2d at 823-24. Therefore, I express no opinion as to whether the intrusion tort is cognizable in this jurisdiction.

According to the Restatement, liability is imposed for the unreasonable publication of private facts when "the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Restatement (Second) of Torts § 652D (1977). In the commentary to § 652D, the tort is divided into four distinct elements: (1) publicity; (2) private facts; (3) offensiveness; and (4) lack of legitimate public concern.

The publicity given to a private fact means that the fact is communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement (Second) of Torts § 652D (1977). Thus, publication by the media would satisfy the publicity requirement. *Virgil v. Time, Inc.*, 527 F. 2d 1122, 1126 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 48 L.Ed. 2d 823 (1976).

Next, the matter disclosed must be private. There is no liability for publishing a fact that is already in the public domain, such as publishing facts that are in the public record. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328 (1975). However, merely revealing private facts to family members and close friends does not mean that the fact has become public:

> Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual rela-

1. Although this Court has not had occasion to determine the viability of the "private facts" tort, the Court of Appeals, prior to this case, had on two occasions denied recovery, without expressly deciding whether such cause of action exists. *See Trought v. Richardson*, 78 N.C. App. 758, 338 S.E. 2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986); *Morrow v. Kings Department Stores, Inc.*, 57 N.C. App. 13, 290 S.E. 2d 732, *disc. rev. denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982).

> tions, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget.

Restatement (Second) of Torts § 652D comment b (1977).

Third, the fact published must be highly offensive to a reasonable person. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part." *Id.* comment c.

Finally, even when the fact published is highly offensive to the ordinary person, if the matter is of legitimate concern to the public, the publisher of the fact will incur no liability. *See Bereskey v. Teschner*, 64 Ill. App. 3d 848, 381 N.E. 2d 979 (1978) (fact that man died of drug overdose held newsworthy, as a matter of law).

Since the inception of the private facts tort, courts have struggled with the tension between the freedom of the press, secured by the first amendment, to disseminate information to the public and an individual's right to be left alone. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328; *Gilbert v. Medical Economics Co.*, 665 F. 2d 305 (10th Cir. 1981); *Virgil v. Time, Inc.*, 527 F. 2d 1122; *Briscoe v. Reader's Digest Association*, 93 Cal. Rptr. 866, 483 P. 2d 34 (1971); *Deaton v. Delta Democrat Publishing Co.*, 326 So. 2d 471 (Miss. 1971).

The first amendment encourages robust debate and the gravamen of the first amendment, as recently stated by the Supreme Court, is the "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Hustler Magazine v. Falwell*, 485 U.S. ---, 99 L.Ed. 2d 41, 49 (1988). Furthermore, "the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04, 80 L.Ed. 2d 502, 518 (1984).

Alternatively, the right to be free from unwarranted publicity is premised on the right to keep private facts private. *Rawlins v. Hutchinson Publishing Co.*, 218 Kan. 295, 543 P. 2d 988 (1975). The private facts tort protects one's "ability to make and implement autonomously decisions regarding access to personal and private information." Swan, *Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties With a Developing Tort*, 58 Ore. L. Rev. 483, 488 (1980).

However, neither the constitutional right of freedom of the press nor the right to be free from publicity is absolute. For example, in defamation cases, the Supreme Court has held that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz v. Welch*, 418 U.S. 323, 340, 41 L.Ed. 2d 789, 805 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686 (1964)). Conversely, it has been held that when a private fact is also of legitimate concern to the public, the right to be free from unwarranted publicity must yield to the right of the public to know. *See Beresky v. Teschner*, 64 Ill. App. 3d 848, 381 N.E. 2d 979.

The Supreme Court has specifically left unanswered the "question whether truthful publication of very private matters unrelated to public affairs could be constitutionally proscribed." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491, 43 L.Ed. 2d 328, 347. However, I agree with our Court of Appeals' conclusion that the resolution of the conflicting rights lies in the "application of a 'newsworthiness' or 'public interest' standard in determining what publications are constitutionally privileged and what publications are actionable." *Hall v. Post*, 85 N.C. App. at 616, 355 S.E. 2d at 824. Adopting this standard gives credence to the viewpoint that neither the right to privacy nor the right of freedom of the press is absolute.

At the outset, I recognize the concern voiced by many courts and commentators concerning the possible chilling effect that the recognition of this tort may have on the freedom of the press to publish matters of legitimate public concern. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L.Ed. 2d 328; *Gilbert v. Medical Economics Co.*, 665 F. 2d 305; *Virgil v. Time, Inc.*, 527

F. 2d 1122; *Anderson v. Fisher Broadcasting Co. Inc.*, 300 Ore. 452, 712 P. 2d 803 (1986); Zimmerman, *Requiem For A Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 Cornell L. Rev. 291 (1983); Swan, *Publicity Invasion of Privacy: Constitutional and Doctrinal Difficulties With A Developing Tort*, 48 Ore. L. Rev. 483 (1980). The freedom to publish matters of legitimate public concern is guaranteed by both the federal and state constitutions. *See* U.S. Const. amend. I; N.C. Const. art. I, § 14 (freedom of the press shall never be restrained). However, the chilling effect is minimized if the question of whether the published material is of legitimate concern to the public is initially a question of law for the trial court. This eliminates the fear voiced by the *amici* in their brief filed with this Court that if the question of public concern was one for the jury it would subject every print and broadcast journalist to an *ex post facto* jury of lay censors and would convert every news story about a private citizen into a potential jury issue. Therefore, if the court determines that every reasonable person applying the proper standard would have to conclude that the published matter was of legitimate concern to the public, then the publication would be privileged and the granting of summary judgment would be proper. *See Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976).

In determining whether published information is of legitimate concern to the public, I would adopt the standard set out in the Restatement (Second) of Torts:

> [t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Restatement (Second) of Torts, § 652D comment h. *See also Virgil v. Time, Inc.*, 527 F. 2d 1122.

Thus, if the court determines that there is "no possibility that a juror could conclude that the personal facts were included for any inherent morbid, sensational, or curiosity appeal they might have," *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289, then as a matter of law there would be no cause of action.

In short, I would adopt the private facts tort consisting of the elements as stated in the Restatement (Second) of Torts. I now consider these elements.

1. **Publicity**

The publicity element of this tort was not applied by the Court of Appeals to the facts of this case, apparently because once a matter is published in a newspaper, the publicity element is presumed satisfied. *See Virgil v. Time, Inc.*, 527 F. 2d 1122, 1126.

2. **Offensiveness**

The Court of Appeals stated that it is a jury determination as to whether a challenged publication would be highly offensive to a reasonable person, because, as in negligence cases, a reasonable person standard generally requires a jury determination. *Hall v. Post*, 85 N.C. App. at 623, 355 S.E. 2d at 828. I agree with the Court of Appeals that generally it is a jury determination as to the offensiveness of the publication. Moreover, I agree that summary judgment was improper on this issue because, in applying this standard to the facts of this case, "a jury could properly find that an ordinary reasonable person (adoptive mother or child) would find it highly offensive and distressing to have spread before the public gaze their identities, the fact that the child had been abandoned by carnival workers, or the sensational emotional details of their encounter with the natural mother." *Id.*

3. **Private Facts**

In addressing the question whether the published matter was still private, the Court of Appeals stated the correct standard: (a) No liability attaches when a defendant merely gives further publicity to a fact that is already in the public domain, and (b) A fact may still be private even though an individual has confided the information to family members or close personal friends. *Hall v. Post*, 85 N.C. App. at 621, 355 S.E. 2d at 827.

Defendants contend here, as they did in the Court of Appeals, that they presented evidence that the plaintiffs' story was not private prior to the publications at issue and that plaintiffs failed to come forward with proof sufficient to create a genuine issue of material fact.

In applying the above standard to the facts of this case, the Court of Appeals held that, based on the affidavits, pleadings, and other materials before the court, the trial judge erred in granting defendants' motion for summary judgment. I agree with the Court of Appeals that, "taken in the light most favorable to plaintiffs, these materials raise an issue of fact regarding whether some or all of the facts published about the plaintiffs were publicly known or were, in fact, private prior to publication of the two articles complained of by the plaintiffs." *Hall v. Post*, 85 N.C. App. at 623, 355 S.E. 2d at 828. Thus, defendants are not entitled to summary judgment on the ground that the facts were public, rather than private.

4. Public Concern

The Court of Appeals adopted the public interest, i.e., legitimate concern to the public, standard as set out in the Restatement:

> In determining what is a matter of public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards would say that he has no concern.

Restatement (Second) of Torts § 652D comment h (1977).

While I generally agree with this standard, it must be considered in context with the guarantees granted to the press by the first amendment.

I agree with defendants that the legitimate concerns to the public must be defined in the most liberal and far-reaching terms in order to avoid any chilling effect on the constitutional right of the media to publish information of public interest. I am not unmindful of the wide privilege granted the media for enlightening the public:

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential

> as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

Time, Inc. v. Hill, 385 U.S. 374, 388, 17 L.Ed. 2d 456, 467 (1967) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102, 84 L.Ed. 1093, 1102 (1940)).

I now turn to the application of the legitimate public concern standard to the facts of the case *sub judice*. I do not agree with the Court of Appeals' conclusion that a reasonable juror could conclude that the articles at issue here constituted a "morbid and sensational prying into private lives for its own sake." On the contrary, the article was initiated when the biological mother, Aledith Gottschalk, returned to Salisbury in search of her daughter, whom she had abandoned seventeen years earlier. This was unquestionably a story of matters of public interest and concern. The central focus was on a mother's search for her abandoned daughter, and the events and emotions relating thereto. When defendants reported that Mrs. Gottschalk thought that her daughter might have been left with a Mary Hall, and subsequently that she had located her daughter, defendants were simply reporting the details of a news story that had arisen as a result of Mrs. Gottschalk's return. However much plaintiffs may have wished to keep their personal histories out of public view, they became a legitimate public concern upon Mrs. Gottschalk's return. "There are times when one, whether willingly or not, becomes an actor in an occurrence of public or general interest." *Meetze v. Associated Press*, 230 S.C. 330, 337, 95 S.E. 2d 606, 609 (1956).

I conclude that, taking the Post articles as a whole, no reasonable juror could conclude that the articles constituted a morbid and sensational prying into plaintiffs' private lives for its own

sake. Therefore, I would hold, as a matter of law, that the published information was of legitimate concern to the public. Thus, the trial court correctly entered summary judgment for defendants on the ground that the facts were of legitimate concern to the public.

In summary, I would hold that the private facts tort is cognizable in this jurisdiction but that plaintiffs' forecast of evidence was insufficient to withstand defendants' summary judgment motion. Thus, I concur in the result reached by the majority in this case while disagreeing with the reasons given therefor.

Justice MEYER joins in this concurring opinion.

STATE OF NORTH CAROLINA v. TIMOTHY BAILY HENNIS

No. 499A86

(Filed 6 October 1988)

1. **Homicide § 20.1— photographs of homicide victim**

Properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating a witness's testimony. Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death and to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree.

2. **Homicide § 20.1— photographs of victim's body—effect of gruesomeness**

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.

3. **Homicide § 20.1— prejudicial effect of photographs—discretion of court**

Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each lies within the discretion of the trial court, and 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. N.C.G.S. § 8C-1, Rule 403.

4. **Homicide § 20.1— admission of photographs—factors for consideration by the court**

In determining the illustrative value of photographic evidence and in weighing its use by the State against its tendency to prejudice the jury, the

trial court must consider what the photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, and the scope and clarity of the testimony it accompanies. In addition, the trial court must probe the relevance of the scene depicted and conclude that its irrelevant portions do not obscure those elements that are pertinent to the proffered testimony and must determine that the photograph does not unduly reiterate illustrative evidence already presented.

5. **Homicide § 20.1— excessive and repetitious crime scene and autopsy photographs—manner of presentation—prejudice to defendant**

In a prosecution for first degree murders of a mother and two of her children by stabbing and cutting them, the trial court abused its discretion in the admission for illustrative purposes of nine photographs of the victims' bodies taken at the crime scene and twenty-six photographs of the bodies taken at the autopsy where many photographs with repetitious content were admitted, and where the majority of the twenty-six autopsy photographs added nothing to the State's case as already delineated in the crime scene photographs and their accompanying testimony. Furthermore, the prejudicial effect of the repetitious photographs was compounded by the manner in which the photographs were presented where duplicate slides of the photographs were shown on an unusually large screen on a wall directly over defendant's head such that the jury continually had defendant in its vision as it viewed the slides, and where the thirty-five photographs were slowly and silently distributed to the jury one at a time just before the State rested its case.

Justice MITCHELL dissenting.

Justice MEYER joins in this dissenting opinion.

APPEAL by defendant from judgments sentencing him to death for three convictions of murder in the first degree and to life imprisonment for conviction of rape in the first degree, said judgments imposed by *Johnson, J.*, at the 26 May 1986 session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 14 September 1988.

Lacy H. Thornburg, Attorney General, by William N. Farrell, Jr., and Joan H. Byers, Special Deputy Attorneys General, for the state.

H. Gerald Beaver, William O. Richardson, F. Thomas Holt III, and Ann B. Petersen for the defendant.

MARTIN, Justice.

Among the numerous assignments of error identified and argued before us by defendant, one particularly merits our scrutiny

and discussion: the use of photographs and slides of the victims' bodies to illustrate the testimony of witnesses for the state.

We only find it necessary to summarize the evidence with respect to the dispositive issue on this appeal. Shortly after noon on Sunday, 12 May 1985, neighbors concerned that they had not seen Kathryn Eastburn or her three children since Thursday night fruitlessly rang the doorbell and knocked on several doors to the Eastburn home. The failure of Mrs. Eastburn to come to the door and the sound of what they thought was a baby's cry prompted the neighbors to call the sheriff's department. The deputy sheriff who responded to their call repeated their attempts to arouse inhabitants and, in circling the house to find an open door or window, saw a child inside standing in her crib. He cut the screen on the window and entered the house, passing the child out to a waiting neighbor.

The officer opened the door to the hall and walked through the house to the master bedroom where he discovered the body of three-year-old Erin Eastburn and the naked body of her mother on the floor. The officer noted that there were numerous knife wounds to the chests of both victims and that part of the child's face and chest and Mrs. Eastburn's face were covered with pillows. On the bed in a second bedroom the officer found the body of five-year-old Kara Eastburn, also with numerous knife wounds to her chest and side and a pillow or blanket over her head.

Autopsies of the three victims revealed that the cause of death of all three had been stab wounds and a large cut in the neck of each. The autopsies also revealed bruising and abrasions and "defensive type" wounds to the hands and forearms of one or more of the victims. In addition, Mrs. Eastburn's wrists showed marks consistent with their having been tied, and vaginal swabs revealed the presence of sperm deposited within hours of her death.

Evidence linking defendant to the crime was chiefly circumstantial. Despite the fact that investigators examining the Eastburn home discovered fingerprints and one Caucasian pubic hair that belonged to none of the Eastburn family members, these and the analysis of bloodstains and of the sperm from Mrs. Eastburn's vagina failed to reveal any match with defendant's physical characteristics. The only direct evidence implicating defendant

was the testimony of a neighbor who had been walking by the Eastburn house at 3:30 a.m. on Friday morning, and who saw a man he later identified as defendant walking down the Eastburn's driveway and toting a plastic garbage sack. The tenuousness of this identification was apparent in that the witness revised his impression of the stature and build of the man he said he had seen from one shorter and slighter than himself to one of defendant's build—one considerably taller and heavier than the witness's own.

A second witness testified that she had seen a man who looked like defendant getting into a small light-colored car in the vicinity of the bank where Mrs. Eastburn's bank card had been used Saturday morning, 11 May. This witness's identification of defendant was extremely tentative, however: when asked by investigators in late June or early July whether she had seen anyone near the bank that Saturday morning, she had replied that she "had not seen anyone." It wasn't until the following April that she recalled having seen anyone, and when she picked defendant's photograph out of a lineup, she admitted that she was not sure whether she was identifying him from the newspapers or from seeing him at the bank that morning.

The state made ninety-nine photographs of the crime scene and of the bodies at the autopsy. These were subjected to a pretrial motion filed by defendant requesting that the use of the photographs of the victims be prohibited, or, in the alternative, that it be restricted to one photograph per victim, and that the trial court review the state's intended use of the photographs with an eye to possible excess. Pursuant to the motion, the trial court reviewed the photographs and concluded that thirty-five crime scene and autopsy photographs could be offered at trial.

The state made duplicate slides of the thirty-five acceptable photographs and the trial court subsequently authorized the construction of a screen large enough to project two images 3 feet 10 inches by 5 feet 6 inches side-by-side on the courtroom wall opposite the jury. This design permitted the jury to view the slides projected just above defendant's head.

Nine slides depicting the victims' bodies at the crime scene were used to illustrate the testimony of the deputy sheriff who discovered the bodies and of the paramedic who arrived shortly

afterwards. Despite the fact that defendant had signed stipulations as to the cause of the victims' deaths that tracked the autopsy reports, twenty-six slides of the bodies taken at the autopsy were used by forensic pathologists to illustrate their testimony as to the nature and extent of the wounds.

The thirty-five 8-by-10-inch glossy photographs, the majority of which were in color, were subsequently distributed, one at a time, to the jury. This process took a full hour and was unaccompanied by further testimony. The autopsy photographs generally depicted the head and chest areas of the victims and revealed in potent detail the severity of their wounds, made all the more gruesome by the visible protrusion of organs, caused by process of decomposition. The trial court's charge to the jury shortly before it retired to consider its verdicts included the admonition that the photographs and other illustrative evidence were to be used "for the purpose of illustrating and explaining the testimony of the various witnesses. . . . [and that they were not to] be considered . . . for any other purpose."

Defendant asserts that the state's use of slides and photographs of the victims' bodies addressed and impressed the emotions of the jury more forcefully than its logic and that, because the probative value of such evidence was far outweighed by its prejudicial impact, he was deprived of a fair trial.

[1, 2] The admissibility of evidence, including photographic evidence, is governed by Rule 403 of the North Carolina Rules of Evidence, which states:

> Although relevant, evidence may 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 considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C.G.S. § 8C-1, Rule 403 (1986). "Unfair prejudice" means an undue tendency to suggest a decision on an improper basis, usually an emotional one. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words, *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988), and properly authenticated

photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. *Id.*; *State v. Watson*, 310 N.C. 384, 312 S.E. 2d 448 (1984). Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death, *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978), and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death. *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982). 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. *State v. Murphy*, 321 N.C. 738, 365 S.E. 2d 615 (1988); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

This Court has recognized, however, that when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury. Thus, this Court has concluded that photographs taken in the funeral home of a murder victim's body were "poignant and inflammatory" where the evidence tended to show that the victim had been lying on a bed when shot and when the evidence as to the cause of his death was uncontradicted. *State v. Mercer*, 275 N.C. 108, 121, 165 S.E. 2d 328, 337 (1969), *overruled on other grounds*, *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975).

And this Court has repeatedly warned against the redundant or excessive use of photographs of victims' bodies:

> But where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors.

State v. Mercer, 275 N.C. 108, 120, 165 S.E. 2d 328, 337, *quoted in State v. Johnson*, 298 N.C. 355, 377, 259 S.E. 2d 752, 765 (1979). *See also State v. Sledge*, 297 N.C. 227, 231-32, 254 S.E. 2d 579, 583 (1979) (despite finding no prejudicial error, the Court admonished the state that it "likely could have illustrated the medical testimony fully as well with fewer pictures. Excessive use of photographs is not favored.").

[3] In general, the exclusion of evidence under the balancing test of Rule 403 of the North Carolina Rules of Evidence is within the trial court's sound discretion. *State v. McLaughlin*, 323 N.C. 68, 372 S.E. 2d 49 (1988); *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430. Whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579. 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. *State v. Parker*, 315 N.C. 249, 337 S.E. 2d 497 (1985).

[4] The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great. The trial court's task is rather to examine both the content and the manner in which photographic evidence is used and to scrutinize the totality of circumstances composing that presentation. What a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the state against its tendency to prejudice the jury. *See State v. Banks*, 564 S.W. 2d 947 (Tenn. 1978). In addition, the trial court must probe the relevance of the scene depicted and conclude that its irrelevant portions do not obscure those elements that are pertinent to the proffered testimony. *See, e.g., State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (where there was no evidence that the defendant had mutilated or dismembered the body of the deceased, photographs of the victim's body after its having been ravaged by animals not probative of any material fact at issue); *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (funeral home photographs).

Finally, critical to the trial court's inquiry into the admissibility of a photograph is the determination that it does not unduly reiterate illustrative evidence already presented. When a photograph "add[s] nothing to the State's case," *State v. Temple*, 302 N.C. 1, 14, 273 S.E. 2d 273, 281 (1981), then its probative value is nil, and nothing remains but its tendency to prejudice.

[5] In spite of the trial court's appropriate determination that many of the photographs initially proffered by the state were repetitious and the court's consequential ruling that these could not be admitted into evidence, many other photographs with repetitive content were allowed. The record reflects such repetition even in the testimony of one of the pathologists, who at one point had nothing to say concerning a slide depicting a child's neck wound except to identify it and add, "This looks like the one we saw before." Likewise, the several color images of the same victim's neck wound taken at the autopsy cannot be said to have added anything in the way of probative value to the color images of that same wound taken at the crime scene and projected before the jury in illustration of the previous testimony, even when the witness was testifying to different facts. Although this Court has not disapproved the illustrative use of autopsy photographs, *e.g.*, *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579, the majority of the twenty-six photographs taken at the victims' autopsies here added nothing to the state's case as already delineated in the crime scene slides and their accompanying testimony. Given this absence of additional probative value, these photographs—grotesque and macabre in and of themselves—had potential only for inflaming the jurors. *State v. Murphy*, 321 N.C. 738, 365 S.E. 2d 615.

In addition, the prejudicial effect of photographs used repetitiously in this case was compounded by the manner in which the photographs were presented. The erection of an unusually large screen on a wall directly over defendant's head such that the jury would continually have him in its vision as it viewed the slides was a manner of presentation that in itself quite probably enhanced the prejudicial impact of the slides themselves. Finally, the thirty-five duplicative photographs published to the jury one at a time just before the state rested its case were excessive in both their redundancy and in the slow, silent manner of their presentation. We hold that under the facts of this case, permit-

ting the photographs with redundant content to be admitted into evidence and to be twice published to the jury was error.

Only upon a showing that the trial court erred and that defendant has been prejudiced thereby will defendant be granted a new trial. In *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752, and in *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273, the unnecessary or repetitive use of photographic evidence was held to be harmless where the evidence of defendant's guilt was overwhelming. This is not such a case. Here defendant was linked to the crime through circumstantial evidence and through direct evidence upon which the witnesses' own remarks cast considerable doubt. Overwhelming evidence of his guilt was not presented. He was nonetheless found guilty and sentenced to death. Under N.C.G.S. § 15A-1443(a) (1983), reversible error occurs when the defendant shows "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." *Id.* In view of the verdicts and sentences handed down in defendant's trial, it cannot be said that this error, which tended to inflame the passions of the jury, was not prejudicial. We accordingly hold that defendant is entitled to a new trial. Defendant brings forward and argues many additional assignments of error, both as to the guilt phase and the sentencing phase of this trial. However, in view of our disposition of this appeal, we do not find it necessary to address defendant's remaining assignments of error, confident that such alleged errors are not likely to recur upon retrial.

New trial.

Justice MITCHELL dissenting.

In my view, the majority correctly states in detail the rules of law concerning the admissibility of photographs for illustrative purposes and then proceeds to misapply them. Therefore, I am unable to join in the majority's conclusion that the trial court abused its discretion in permitting the introduction of slides and photographs for illustrative purposes in the present case. Accordingly, I dissent from the majority's decision to award the defendant a new trial.

As I do not find the State's evidence nearly so weak nor the eyewitness identification testimony nearly so "tenuous" as does

the majority, a brief review of what *some* of the evidence for the State tended to show is perhaps in order at the outset. In May 1985, Kathryn Jean Eastburn and her husband Gary Eastburn, a Captain in the United States Air Force, lived in Cumberland County with their three children: five-year-old Kara, three-year-old Erin and twenty-month-old Jana. On the evening of Thursday, 9 May 1985, Mrs. Eastburn left Kara asleep in the home and went to a neighbor's with Erin and Jana to borrow some milk for the children's breakfast. Mrs. Eastburn and the two children left the neighbor's house at approximately 8:00 p.m. and returned home. Mrs. Eastburn, Kara and Erin were not seen again alive.

When Captain Eastburn made his customary Saturday telephone call to his family on the morning of Saturday, 11 May 1985, he received no answer and became alarmed. As a result of further telephone calls by Captain Eastburn, various law enforcement and military personnel went to the home from time to time on Saturday and Sunday, but no one answered the door or responded to a note left for Mrs. Eastburn to call her husband. Law enforcement officers entered the home shortly after noon on Sunday, 12 May 1985, and found Mrs. Eastburn, Kara and Erin dead. Each had been stabbed numerous times and had had her throat cut. The baby Jana was in her crib unharmed. Copies of the local newspaper for Friday, 10 May 1985, Saturday, 11 May 1985, and Sunday, 12 May 1985, were found on the front lawn of the home. The newspaper for Thursday, 9 May 1985, was found inside the home.

At approximately 3:30 a.m. on Friday, 10 May 1985, Patrick Cone was walking past the driveway to the Eastburn home. He saw a man he positively identified as the defendant walking down the driveway from the direction of the home wearing a toboggan cap and black jacket and carrying a plastic garbage bag over his right shoulder. The defendant passed within a few feet of Cone and said to Cone: "leaving a little early this morning."

Later that morning, Cone told his father what he had seen and pointed out the Eastburn house to his father as the two men went to work. When Cone arrived at work, he told others what he had seen.

Cone's father testified that Cone had come home around 4:00 a.m. When they left for work, Cone pointed out the Eastburn house and told his father that it was the house someone had

broken into. He told his father that he had seen a man coming out of the yard with a bag on his shoulder and described the man as "a big white guy." According to information given the police by the defendant at the time of his booking on 16 May 1985, the defendant was six feet four inches tall and weighed 220 pounds.

After arriving at work, Cone told his co-worker Clarence Bricky that someone had broken into a house and that he had come so close to Cone that Cone could shake his hand. Cone described the man's dress and stated that "he was about one big white dude."

Cone also described the incident to his co-worker John D. McCoy. He told McCoy that the man he saw "was a real big white guy; and that he had a plastic bag of some kind on his shoulder."

After the bodies of the victims were found, numerous items were discovered missing from the Eastburn home. The missing items included Mrs. Eastburn's wallet which had contained a twenty-four hour bank card, a metal lockbox which had contained numerous papers including the code for the use of the twenty-four hour bank card, bath towels and bed linens. An empty box of *Glad Bag* plastic trash bags was found on the clothes dryer in the home.

The missing twenty-four hour bank card belonging to Mrs. Eastburn was used twice after Mrs. Eastburn was last seen alive. The first occasion was on the night of Friday, 10 May 1985. The second occasion was on the morning of Saturday, 11 May 1985. One hundred and fifty dollars in cash was obtained from a bank teller machine on each such occasion. The card was not used after the defendant's arrest on 15 May 1985.

Bank records reflected that on one of these occasions Mrs. Lucille Cook used her bank card at the same location within four minutes after Mrs. Eastburn's card had been used there. Mrs. Cook testified that, as she arrived at the teller machine, she observed an unusually tall man in his twenties with blonde hair. He entered a light colored two-door automobile. Mrs. Cook observed him for at least a minute from distances of from six to twenty feet. She identified the defendant as looking like the person she saw at the bank. When asked whether she was positive the defendant was the man she saw, she responded: "If it's not

him, it looks like someone just like him." "It looks like the man I saw at the bank." "If it's not, it looks just like him . . . ."

Other evidence indicated that the defendant drove a white Chevrolet Chevette. Various witnesses testified that they had seen that white Chevette or one like it near the home of the victims late on the evening of Thursday, 9 May 1985. One witness testified that she saw a tall, white, light haired, well-built man walking up the street at about the time she noticed the car. The defendant had been observed sitting in his white Chevette across from the victims' home between 11:15 a.m. and noon on Thursday, 9 May 1985, watching the house.

Other evidence for the State tended to show that about 9:30 a.m. on Saturday, 11 May 1985, the defendant began systematically burning something in a barrel in his backyard. The defendant would pour a flammable liquid in the barrel, and fire would blaze five to six feet high. The defendant at times stirred the fire with a stick. He was seen pouring such flammable liquids and stirring the fire all during that day. Garbage service was regularly provided to the area on a weekly basis, and the defendant's neighbors had never seen him engage in such burning activities previously. When the burned debris in the barrel was examined, several types of material were found and identified as follows: jersey knit material, such as that used in tee shirts; terry cloth material, such as that used in washcloths and towels; woven materials, such as that found in sheets or linens; and various unidentifiable small portions of papers.

The State introduced an abundance of evidence in addition to that I have mentioned. Further discussion of such evidence would serve little purpose here, however, given the issue the majority finds determinative on appeal. I turn, therefore, to the issue of the propriety of the admission into evidence of the slides and photographs to illustrate the testimony of the witnesses—the issue the majority finds determinative.

The trial court conducted a hearing upon the defendant's motion to exclude the photographs of the crime scene and of the bodies at the autopsies. After reviewing the photographs and slides, the trial court excluded sixty-four of the ninety-nine photographs the State intended to offer. The trial court concluded that thirty-five of the photographs could be received in evidence

at trial; nine taken at the scene of the crimes and twenty-six taken during the autopsies.

When considering first the nine photographs taken at the crime scene, it must be borne in mind that the bodies of three mutilated victims were involved in this case, and that they were found in two different rooms in the home. I believe the trial court did not abuse its discretion in allowing three photographs of the body of each victim at the scene to be introduced to illustrate the testimony, because I do not agree with the majority's conclusion that the trial court's ruling in this regard was so manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. When, as here, such photographs are properly authenticated, they may be used to show "the condition of the body when found, its location when found and the surrounding scene at the time the body was found [and] are not rendered incompetent by the portrayal of the gruesome events which the witness testifies they accurately portray." *State v. Elkerson*, 304 N.C. 658, 665, 285 S.E. 2d 784, 789 (1982).

With regard to the twenty-six photographs of the bodies taken during the autopsies, it must again be borne in mind that three bodies were involved and that each bore many wounds in many locations on more than one side of the body. Additionally, each victim's throat had been cut in a manner commonly described as "from ear to ear" and, in at least one instance, almost decapitating the body. The fact that numerous photographs and slides were required to properly illustrate the testimony of the forensic pathologists concerning all of these wounds was a fact established by the murderer when he chose to kill and mutilate the woman and her young children and not the responsibility of the trial court, the State, or the witnesses.

It is true that at least two of the autopsy photographs portrayed matters already portrayed in two others. Although we have cautioned against the use of an excessive number of photographs depicting the same scene, I do not find the repetition here sufficient to justify awarding the defendant a new trial on the ground that the trial court abused its discretion.

The majority is also concerned by the use of the reproduction of the photographs on slides which were then projected in the courtroom on a screen three feet and ten inches in height by five

feet and six inches in width. It must be remembered that this screen was placed on the opposite side of the courtroom from the jury in order that all jurors might see it as the witnesses testified. Had it been much smaller, one may doubt whether all of the jurors would have been able to see the slides used to illustrate the testimony.

The majority also seems to express concern that the photographs and slides were in color and to be of the opinion that this has something to do with the decision whether to admit or exclude such photographs. I do not agree. The victims lived and most certainly died "in color," and I see nothing unfair or untoward about demonstrating the crime scene and the victims' bodies in that light.

In my view, the photographs and slides complained of were properly introduced as illustrative testimony—both for determining the guilt or innocence of the defendant and for sentencing purposes—as each was relevant to illustrate the condition of the bodies or the crime scene. Additionally, they tended to establish the manner and means by which the killings were carried out, including the force used, the dealing of lethal blows after the victims were helpless, the nature and number of the wounds, and the extreme brutality of all of the killings. Therefore, they were relevant as to the elements of first-degree murder as well as to illustrate the "nature of the crime" for sentencing purposes.

The slides and photographs were gory and gruesome and may even have been "macabre" as stated by the majority. However, that fact as well as the number of photographs required to illustrate testimony concerning *all* the wounds inflicted on the victims was the result of the nature of the crimes committed by the murderer who left the bodies of the woman and small children in such a mutilated condition—facts which the State was entitled to establish.

The trial court reviewed all of the photographs taken by the State and excluded most of them. I cannot agree with the majority that the trial court's careful decision to allow the remainder of the photographs to be introduced into evidence was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Therefore, I cannot agree with the majority that the trial court abused its discretion in admitting

the photographs and slides. Accordingly, I dissent from the majority's decision to award the defendant a new trial.

The decision of the majority awarding the defendant a new trial makes it unnecessary to consider or decide the issues raised in the defendant's assignments of error relating to the sentencing proceeding conducted in this case. Without reaching such issues, it suffices here to say that some of them, at least, are substantial in nature. As always, the trial court will be required to exercise extreme caution in conducting the sentencing procedure at a new trial and in instructing the jury with regard to sentencing.

Justice MEYER joins in this dissenting opinion.

LOUISE B. HALL, PAUL B. HALL, LUTHER C. HAMMOND, DOROTHY S. HAMMOND AND THE LATTA ROAD NEIGHBORHOOD ASSOCIATION, INC. v. THE CITY OF DURHAM, LOWE'S INVESTMENT CORPORATION AND B,K,B, INC.

No. 16PA88

(Filed 6 October 1988)

Municipal Corporations § 30.9— rezoning—invalid

The rezoning of defendant's property from R-20 (single family residential) and C-1 (neighborhood commercial) to C-4(D) (heavy commercial with development planned) was invalid where the Durham City Council did not determine that the property was suitable for all uses permitted in the new general use district. When rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a city council must determine that the property is suitable for all uses permitted in the new general use district, even where it had additional authority to consider a development plan in passing upon a rezoning request and to require any submitted site plan to conform therewith. *Chrismon v. Guilford County*, 322 N.C. 611, which involved a rezoning from a general district to a conditional use district, is not applicable; moreover, this was not a case of illegal contract zoning because there was nothing in the record to show that a transaction occurred in which the city council undertook to obligate itself in any way to defendants. N.C.G.S. § 160A-381.

Justice WEBB concurring.

Justice MITCHELL joins in this concurring opinion.

ON defendants' petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 88 N.C. App. 53, 362 S.E. 2d 791 (1987), affirming the order of summary judgment in favor of plaintiffs entered by *Hobgood (Robert H.), J.*, at the 6 November 1986 Civil Session of Superior Court, DURHAM County. Heard in the Supreme Court 13 September 1988.

Maxwell, Martin, Freeman and Beason, P.A., by James B. Maxwell and Alice Neece Moseley, for plaintiff-appellees.

Loflin & Loflin, by Thomas F. Loflin III and Dean A. Shangler, and Charles Darsie for defendant-appellants Lowe's and B,K,B, Inc.; Michaux & Michaux, by Eric Michaux, for defendant-appellant Lowe's; and Barrow & Redwine, by Phillip O. Redwine, for defendant-appellant B,K,B, Inc.

MEYER, Justice.

Plaintiffs filed an action seeking a declaratory judgment concerning the validity of a rezoning amendment adopted by the Durham City Council (hereinafter "the Council"), which rezoned approximately 12.9 acres of land near the intersection of Roxboro and Latta Roads in Durham, North Carolina. Plaintiffs' complaint alleged that the rezoning was invalid because (1) the property was rezoned on a vote of 7 to 6 of the Council when a valid protest petition, filed pursuant to N.C.G.S. § 160A-385 on behalf of the residents of the neighborhood near the rezoned property, made a three-fourths majority vote by the Council necessary for the rezoning amendment's passage; (2) the rezoning was the product of illegal "contract zoning"; and (3) the rezoning violated the Durham 2005 Comprehensive Plan for development.

On 11 April 1986, a Temporary Restraining Order was granted to plaintiffs, which restrained the initiation and continuation of any use or activity inconsistent with the prior zoning on the property. On 16 April, plaintiffs were granted a preliminary injunction. Defendants moved for summary judgment. After a hearing on 3 November 1986, at which the trial court considered the pleadings, interrogatories, depositions, various exhibits and arguments of counsel, it entered summary judgment in favor of plaintiffs, concluding as a matter of law that the rezoning was invalid because the Council had engaged in illegal "contract zoning." However, the trial court ruled in favor of defendants on

the issue of the protest petition's validity. Plaintiffs conceded at the hearing that they could not prevail on their third claim concerning violation of the City's comprehensive development plan and, for that reason, the trial court's judgment did not address that issue.

Defendants Lowe's Investment Corporation (hereinafter "Lowe's") and B,K,B, Inc. appealed. Plaintiffs cross-assigned as error the trial court's determination that the protest petition was invalid. The Court of Appeals unanimously affirmed the trial court's conclusion that the Council had engaged in illegal contract zoning. The Court of Appeals did not reach plaintiffs' cross-assignment of error. We granted both defendants' petition and plaintiffs' cross-petition for discretionary review.

The property at issue, owned by defendant B,K,B, Inc., is an L-shaped piece of land adjacent to the Eno Square Shopping Center with frontage along Roxboro Road extending to within thirty feet of its intersection with Latta Road in Durham, as well as footage on Latta Road itself. The existing zoning of this land consists of a C-1 district (neighborhood commercial) on the approximately 6.3 acres of land fronting on Roxboro Road and an R-20 district (single family residential) on the approximately 6.6 acres fronting on Latta Road. The area surrounding the property at issue consists of residences, neighborhood stores and service establishments.

On 29 January 1986, defendants Lowe's and B,K,B, Inc. filed an application with the Durham City Department of Planning and Community Development to rezone the 12.9-acre tract from R-20 and C-1 to C-4(D) (heavy commercial with development plan). Lowe's proposed to use the land for operation of a "Home Center" consisting of four buildings, an outdoor lumber storage area and a parking lot. With the application Lowe's submitted a development plan showing the proposed physical site layout. The plan included a notation that approximately nine adjacent acres, zoned R-20 and not the subject of the rezoning proposal, would be deeded at the time of the development to the Eno River Association, an organization devoted primarily to the conservation of the Eno River and its environs. This acreage is in a flood plain. In addition, the rezoning application file contained a document entitled "Language to be Placed in Deed to Lowe's Investment Corporation." This

document described a reverter clause to be placed in the deed from B,K,B, Inc. to Lowe's, stating that if Lowe's ceased to use the property for a lumberyard and home center, the title would vest in the Eno River Association, or if the Eno River Association no longer existed, then in the City of Durham.

The Planning and Zoning Commission's Staff Report, which was submitted to the Durham City Council, included a staff recommendation that the rezoning be denied. The "Staff Analysis" section of the Report discussed numerous reasons for the negative recommendation and concluded that the wide range of heavy commercial uses permitted under C-4 zoning would not be compatible with the surrounding residential and community-serving commercial areas. Those uses permitted under C-4 but not under R-20 or C-1 are as follows:

> Adult entertainment
> Building material sales and storage
> Coal and wood lots
> Correctional institutions
> Crematoria
> Drive-in theatres
> Fairgrounds
> Bulk storage of flammable liquids and gases
> Sale, repair, rental, storage of heavy machinery and equipment
> Mini-warehouses
> Mobile home sales lots
> Freight transportation terminals
> Travel trailer and boat sales and service
> Warehouses, storage, sales and services[.]

The Staff Analysis section of the Report noted that Lowe's development plan did not lessen the effect of introducing C-4 zoning to the land in question, because rezoning the property to C-4(D) "would set a precedent for heavy commercial zoning along Roxboro Road and Latta Road that could make it difficult to deny future requests for C-4 zoning." The Report also stated:

> Although the development contains a notation that the adjacent R-20 land will be deeded to the Eno River Association, it is important to note that this property dedication is not a part of the development plan. The notation is for information

only and should not be considered in analysis of the rezoning request.

Despite the staff recommendation of a denial, the Planning and Zoning Commission voted to recommend that the Council approve defendants' rezoning request. The only explanation in the record for the favorable recommendation is contained in the Commission's "Comments" section at the end of the Staff Report, which states in part:

> [The] attorney for Lowe's, told the Commission that he has had two meetings with the neighborhood. As a result of those meetings, Lowe's has added a 30-foot landscaped buffer along Latta Road that will remain zoned R-20. Because the land slopes away from Latta Road, the proposed buildings will be hardly visible from the street. To improve traffic, Lowe's will restrict left turns onto Latta Road. In addition, a restriction would be placed on the deed which would require that the rear tract that [sic] would revert to the Eno River Association if Lowe's ceases to operate.

The Council held a public hearing on 7 April 1986, at which the discussion revealed a large number of residential neighbors opposed to the rezoning. The statements of those in favor of the rezoning related to the proposed development, its preferability to some other development, and Lowe's attempts to accommodate community interests. In highlighting the company's efforts in this direction, Lowe's attorney stated in part:

> We [Lowe's] were also concerned about protecting the crooked creek—the dedicating open space to non-profit groups, working with the landowners and also to immediately upon approval of this rezon[ing] to actually deed over to [sic] the property to Eno River Association (approximately 9 acres). We asked for a C-4(D) plan with unprecedented action by Lowe's Inc. The property used nearest Latta Road—once Lowe's has completed its use on that property, that that [sic] property would in fact go over to the Eno River Association.

Following the public hearing, the Council discussed the matter and voted 7 to 6 to rezone the property.

The Court of Appeals concluded that (1) rezoning may not be based either on assurances that the applicant will make a specific

use of the property, or on any other representations of the applicant, and (2) rezoning must take into consideration whether the land is suitable for all permitted uses under the new classification. Because the Council considered a proposed development plan as well as collateral representations as to the future use of the rezoned site and did not determine the suitability of the land for other C-4 uses, the court held that the challenged rezoning constituted unlawful contract zoning. Although we disagree that the rezoning amounted to contract zoning in this instance, we nevertheless affirm the opinion of the Court of Appeals because of the failure of the City Council to consider whether the land was suitable for all uses permitted in the C-4(D) district.

This Court recently defined illegal contract zoning in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E. 2d 579 (1988):

> Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract. Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267 (1968); D. Mandelker, *Land Use Law* § 6.59 (1982). One commentator provides as illustration the following example:
>
> > A Council enters into an agreement with the landowner and then enacts a zoning amendment. *The agreement, however, includes not merely the promise of the owner to subject his property to deed restrictions; the Council also binds itself to enact the amendment and not to alter the zoning change for a specified period of time.* Most courts will conclude that by agreeing to curtail its legislative power, the Council acted ultra vires. Such contract zoning is illegal and the rezoning is therefore a nullity.
>
> Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267, 269 (1968) (emphasis added).

Id. at 635, 370 S.E. 2d at 593. As defendants point out in their brief, this impermissible type of contract zoning depends upon a finding of a transaction in which both the landowner seeking a rezoning and the zoning authority undertake reciprocal obligations. In short, a "meeting of the minds" must occur; mutual

assurances must be exchanged. A typical example of such reciprocal assurances occurs when the applicant assures the city council that the property will be used only for a specified purpose and no other, and the city council, in consideration of such assurance, agrees to rezone the property in question and not to alter the zoning for a specified period of time thereafter. Defendant Lowe's *did* make representations or offer assurances to the Council—the acreage to be deeded to the Eno River Association upon rezoning and the reverter clause in the deed from B,K,B to Lowe's—but the record is barren of even a hint that the Council made any assurances in return. No meeting of the minds took place here, and no reciprocal assurances were made by the Council. We can discern nothing in the record to show that a transaction occurred in which the City Council undertook to obligate itself in any way to defendants. This is not therefore a case of illegal contract zoning.

In their brief, defendants argue that when a zoning authority, without committing its own power, secures an agreement from a property owner to subject his tract to certain restrictions as a prerequisite to rezoning, this is merely an instance of orthodox conditional zoning. At oral argument before this Court, defendants relied heavily on our recent decision in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E. 2d 579, to bolster this contention. In *Chrismon*, defendant Clapp had been operating a business consisting of storing and selling grain, and selling and distributing agricultural chemicals on a tract of land adjacent to his residence since 1948. In 1964, Guilford County adopted a zoning ordinance which zoned Clapp's tract and an extensive area surrounding it as "A-1 Agricultural." The storage and sale of grain was a permitted use under the new classification, but the sale and distribution of agricultural chemicals was not. Clapp was permitted to continue the sale of agricultural chemicals on the land adjacent to his residence, even though it was a nonconforming use, because the activity preexisted the ordinance, but he could not expand this element of his business. Plaintiffs bought a lot from Clapp next to an additional tract that he owned. In 1980, Clapp expanded his activities onto the land next to plaintiffs' residence. After plaintiffs filed a complaint with the Guilford County Inspections Department, Clapp applied to have both the tracts rezoned to "Conditional Use Industrial District." He also applied for a conditional

use permit, in which he specified that he would use the property as it was then being used and listed the improvements he wished to make in the ensuing years. The Guilford County Planning Board approved Clapp's request. After a public hearing, the Guilford County Board of Commissioners voted to rezone the tracts from Agricultural to Conditional Use Industrial District and to approve the conditional use permit application.

In *Chrismon*, this Court stated that the practice of conditional use zoning is one of several vehicles by which zoning flexibility can be and has been acquired by zoning authorities. We explained that

> [c]onditional use zoning anticipates that when the rezoning of certain property within the general zoning framework . . . would constitute an unacceptably drastic change, such a rezoning could still be accomplished through the addition of certain conditions or use limitations. Specifically, conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning. D. Hagman & J. Juergensmeyer, *Urban Planning and Land Development Control Law* § 5.5 (2d ed. 1986); Shapiro, *The Case for Conditional Rezoning*, 41 Temp. L.Q. 267 (1968).

Chrismon v. Guilford County, 322 N.C. at 618, 370 S.E. 2d at 583-84. We held that the practice of conditional use zoning is an approved practice in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest. *Id.* at 617, 370 S.E. 2d at 583. We approved the conditional use rezoning of Clapp's tracts.

Conditional use zoning authorized by N.C.G.S. § 160A-382 requires the consent of all the property owners within the area to be rezoned, and the only use which can be made of the land which is conditionally rezoned is that which is specified in the conditional use permit. Rezoning from one general use district with listed permitted uses to another general use district does not require the consent of such property owners and does not limit the future use of the property to a specific use, but allows changes

from one permitted use to any other use permitted in the new zone.

Although defendants make a spirited attempt to use *Chrismon* to support their contention that the situation here is a type of conditional use zoning, their reliance on that decision is misplaced. Defendant Lowe's rezoning application requested the Durham City Council to approve a change from an R-20 (single family residential) district and a C-1 (neighborhood commercial) district to a C-4(D) (heavy commercial with development plan) district. R-20, C-1 and C-4 are all distinct *general* zones or districts, with fixed specific permitted uses applicable to each. In *Chrismon*, the Court of Appeals improperly relied upon our decision in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971), in concluding that Guilford County's zoning ordinance was an instance of both illegal "spot zoning" and illegal "contract zoning." We pointed out in our *Chrismon* opinion that *Allred* was a *general* use zoning case, not a conditional use zoning case as *Chrismon* was. Because defendants here sought a rezoning of two distinct *general* zoning districts (R-20 and C-1) to one *general* zoning district (C-4(D)), *Chrismon*, as a case involving rezoning from a general district to a conditional use district, is inapplicable.

Since this case involves a rezoning from two general use zones with fixed permitted uses to another general use zone with fixed permitted uses, the Court of Appeals correctly relied upon *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432, in concluding that the Durham City Council's decision to rezone B,K,B's property was improper. In *Allred*, the City of Raleigh adopted a comprehensive zoning ordinance under which the city was divided into thirteen classes of districts or zones, including five residential districts or zones designated R-4, R-6, R-10, R-20 and R-30. A 9.26-acre tract, zoned as R-4, was conveyed to the corporate defendant in 1965. Large areas lying north, west and southwest and a smaller area lying south of the tract were all zoned R-4. R-4 zones were restricted to single family dwelling units with the exception of townhouse and unit-ownership developments on tracts of fifty or more acres. In 1965, the corporate defendant filed an application to have the property rezoned from R-4 to Shopping Center. This application was denied. In 1967, the defendant filed a second application requesting that the zoning be changed from R-4 to R-10, to accomplish its desire to use the property for

"apartment-type dwellings." R-10 zones permitted, among other things, apartment houses, hospitals, rest homes, rooming houses and clubs operated by civic organizations. Upon the recommendation of the Raleigh Planning Commission, the Raleigh City Council again denied the application. In 1968, the defendant filed a third application, again requesting a rezoning from R-4 to R-10. The City Council and the Planning Commission held a public hearing at which a planning consultant for the corporate defendant presented a development study of the project, showing defendant's plans to build luxury apartments in twin high-rise towers. The Planning Commission studied the presentation, but ultimately recommended denying the application on the grounds that the rezoning would constitute "spot zoning" to the detriment of the surrounding residential areas, even though the Commission had "enthusiasm for such a project." *Id.* at 537, 178 S.E. 2d at 436. The Raleigh City Council held a meeting at which the discussion focused on the proposed luxury type apartments, the undeveloped areas around the property, the traffic that would be generated and the possibility that the corporate defendant would not build the apartments as planned. The defendant's president assured the City Council that he intended to go ahead with the project as this had been a dream of his for a long time. *Id.* at 539, 178 S.E. 2d at 436. The Council voted to rezone defendant's property.

This Court stated that the minutes of the Raleigh Planning Commission and the City Council showed beyond doubt that the Council did not determine that the property and the existing circumstances justified the rezoning so as to permit *all* uses permissible in an R-10 district. On the contrary, the grounds for the City Council's action was its approval of the specific plans to construct the luxury apartments in twin high-rise towers. *Id.* at 544-45, 178 S.E. 2d at 440. The Court reasoned:

> We assume the City Council was fully justified in accepting the assurances of the applicant that the 9.26-acre tract would be developed in accordance with the particular and impressive plans submitted to the Planning Commission and to the City Council. However, "(i)n enacting a zoning ordinance, a municipality is engaged in legislating and not in contracting." *Marren v. Gamble,* [237 N.C. 680] at 684, 75 S.E. 2d [880] at 883, and cases cited [therein]. Without suggesting that the particular applicant would not keep faith with the City Coun-

> cil, if the zoning is changed from R-4 to R-10 the owner of the 9.26-acre tract will be legally entitled to make any use thereof permissible in an R-10 zone.

Id. at 545, 178 S.E. 2d at 440 (citations omitted). *See also Blades v. City of Raleigh*, 280 N.C. 531, 550, 187 S.E. 2d 35, 46 (1972) (amending ordinance adopted solely because applicant convinced City Council that property would be used for construction of townhouses; if ordinance were valid, it would permit use of property for any purpose permitted in particular district).

Allred v. City of Raleigh, 277 N.C. 530, 178 S.E. 2d 432, is directly applicable to the case *sub judice.* Defendants B,K,B, Inc. and Lowe's applied to have the property rezoned from single family residential and neighborhood commercial districts to the heaviest commercial district available. To palliate this request, Lowe's made several assurances to the Durham City Council. The site plan contained a notation that approximately nine acres of land would be gratuitously deeded to the Eno River Association. At the public hearing, counsel for Lowe's drew attention to the thirty-foot buffer on Latta Road which was to be left zoned R-20 and to the reverter clause to be inserted in the deed from B,K,B, Inc. to Lowe's. The minutes of the Council's discussion after the hearing show that at least one Council member was persuaded to vote in favor of the rezoning application by these assurances. The member stated:

> The *key* here is something that I have never heard of before—these people [B,K,B, Inc. and Lowe's] are adding a "covenant" to the deed that says that if Lowe's does anything else other than what they are saying they are going to do with this land tonight, that land *must* go to the Eno River Association or some such group—not "may" go, "MUST" go. Nothing else can be done, as I understand it with this land except exactly what these people say tonight. I will support this tonight.

As we noted under similar circumstances in *Allred*, without suggesting that B,K,B, Inc. and Lowe's would renege on their assurances, if the zoning were legally changed from R-20 and C-1 to C-4, then the owner of the property would be legally entitled to make any use of it consistent with any of the uses permitted in a C-4 zone. The minutes reveal further that several Council

members were more concerned with the validity of the homeowners' protest petition than with a discussion of the full range of uses permitted to Lowe's under a C-4 zone. Some, but not all, of the permitted uses were mentioned only once, almost in passing, as follows:

> If we do, do C-4 zoning down Latta Road, there will be further commercial rezoning requests down Latta Road. Right now that area is residential. This C-4 zoning includes adult entertainment, correctional institutions, mobil [sic] homes, flammable liquids and gases, fairgrounds, etc. We are talking about setting precedents in two very important areas (1) the precedent regarding the tactic of getting around the protest petition and (2) we will be setting a precedent of commercial zoning on this site.

Nothing further appears in the minutes of the Council's meeting concerning the range of uses in a C-4 zone, most of which are incompatible with a single family residential area with its concomitant neighborhood service establishments. The uses were, quite simply, not discussed. In *Allred* we concluded:

> In our view, and we so hold, the zoning of the property may be changed from R-4 to R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for *all* uses in an R-10 district. Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated.

Id. at 545, 178 S.E. 2d at 440-41 (emphasis added). By failing to consider whether the property was suitable for *all* the C-4 uses, the Council's vote to rezone the land was invalid.

Since this Court decided *Allred* and *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35, the legislature has enacted chapter 671, section 92 of the 1975 North Carolina Session Laws, which authorizes the Durham City Council to act as follows:

> *Development Plans and Site Plans.*—In exercising the zoning power granted to municipalities by G.S. 160A-381, the City

> Council may require that a development plan showing the proposed development of property be submitted with any request for rezoning of such property. The City Council may consider such development plan in its deliberations and may require that any site plan subsequently submitted be in conformity with any such approved development plan.

1975 N.C. Sess. Laws ch. 671, § 92. Defendant Lowe's submitted such a plan with its rezoning application. It now argues that the designation C-4(D) (heavy commercial with development plan) is crucial, because the Session Law constitutes enabling legislation which authorizes the Council to consider the developer's specific representation concerning the property without requiring the Council to consider the property's suitability for the other uses permitted in a C-4 district. We disagree. The enabling legislation which authorizes a city to regulate the uses of property is N.C.G.S. § 160A-381, wherein the legislature specified that zoning actions by a city must be "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community." N.C.G.S. § 160A-381 (1987). Chapter 671, section 92 simply permits the Council to consider development plans in its deliberations on zoning decisions. Section 92 specifically refers to the enabling act, N.C.G.S. § 160A-381, and thereby incorporates that statute's limitations on the exercise of zoning power granted to municipalities.

We hold that when rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a city council must determine that the property is suitable for all uses permitted in the new general use district, even where it has additional authority to consider a development plan in passing upon a rezoning request and to require any submitted site plan to conform therewith. This the Durham City Council did not do. The rezoning of defendants' property from R-20 and C-1 to C-4(D) is therefore invalid.

In view of our disposition of this case, we do not address the issue raised by plaintiffs' cross-petition. The decision of the Court of Appeals is

Affirmed.

Justice WEBB concurring.

I concur in the result reached by the majority but I do not agree with its reasoning. I believe the Court of Appeals was correct in its conclusion that the action taken by the City Council in this case was illegal contract zoning under *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972) and *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). The majority in this case and in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E. 2d 579 (1988), quotes from a law review article to the effect that a zoning authority must bind itself not to alter the zoning change for a specified period of time in order to have contract zoning. I have read *Blades* and *Allred* in vain to find any such requirement. I believe the majority in this case and in *Chrismon* have overruled *Blades* and *Allred* without saying so.

I believe *Blades* and *Allred* stand for the proposition that zoning authorities prior to the adoption of N.C.G.S. § 153A-342 and N.C.G.S. § 160A-382 did not have the authority to contract zone. It is hard to imagine a case in which a zoning authority will bind itself not to change a zoning law. In fact it is doubtful a zoning authority has such power. For that reason I believe the majority has eliminated the ban on contract zoning in this state. This is regrettable because it can be a useful tool in protecting property owners from exceptions to the zoning laws which protect their property.

I would hold in this case that the Durham City Council has engaged in illegal contract zoning and the zoning change is void.

Justice MITCHELL joins in this concurring opinion.

STATE OF NORTH CAROLINA v. DENNIS RAY HAYES

No. 210PA87

(Filed 6 October 1988)

1. **Criminal Law § 138.21 — aggravating circumstance — especially heinous burglary — sufficiency of evidence**

There was sufficient competent evidence to support the trial court's finding in aggravation that a first degree burglary was especially heinous, atro-

cious, or cruel where such evidence tended to show that defendant, wrapped in a blanket and armed with a firearm, crashed through the victims' bedroom window, landed on the bed where the female victim was sleeping, and immediately threatened to blow her head off if she screamed; defendant and an accomplice held the female victim helpless in the presence of a beating being administered to her husband by another accomplice; and either defendant or one of his accomplices struck the female victim with a flashlight, causing a five-inch wound. This evidence was available to support the trial court's determination since these acts did not constitute another crime or the gravamen of another crime for which defendant was convicted, they were not used as evidence to prove any other aggravating circumstance, and evidence of the egregious manner in which defendant entered the dwelling and defendant's being armed with a firearm was not used to prove an element of the crime of first degree burglary.

2. **Criminal Law § 138.29— aggravating circumstance—pattern of conduct causing danger to society—sufficiency of evidence**

There was sufficient evidence, apart from acts forming the gravamen of convictions for other joined offenses, to support the trial court's finding as a nonstatutory aggravating circumstance for breaking or entering and larceny convictions that defendant engaged in a pattern of conduct causing a serious danger to society where the State's evidence showed that defendant and his two companions first went to the victims' home on 13 December; when the female victim refused to open the door, the three men left and went to a nightclub; while at the nightclub, they consumed quantities of liquor and got into a fight with several other people; during the course of the evening they armed themselves with a sawed-off shotgun; and defendants, while armed and intoxicated, returned a second time to the victims' home on 14 December.

3. **Criminal Law § 138.42— mitigating circumstance—good prison conduct—finding not required**

The trial court did not abuse its discretion in refusing to find defendant's good prison conduct between his commitment and resentencing as a mitigating factor in determining the sentences for all his convictions where defendant's prison record showed that defendant had once engaged in a fight in violation of prison rules and had been disciplined for his involvement. Although the facts concerning defendant's entire prison record might have supported a finding by the trial court that defendant's prison conduct deserved to be considered as a mitigating factor at sentencing, they did not compel such a finding.

ON state's petition for discretionary review pursuant to N.C.G.S. § 7A-31 from an unpublished decision of the Court of Appeals, 85 N.C. App. 349, 355 S.E. 2d 267 (1987), finding error in defendant's sentences entered by *Rousseau, J.*, at the 16 December 1985 Special Session of the Superior Court of WILKES County and remanding for a new sentencing hearing. Argued in the Supreme Court 10 February 1988.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant appellee.

EXUM, Chief Justice.

This case, here for the second time, presents questions arising under the Fair Sentencing Act, N.C.G.S. § 15A-1340.4 (1983). The first is whether the Court of Appeals correctly decided there was insufficient evidence to support certain aggravating factors found by the trial court. The second is whether the Court of Appeals correctly decided that the trial court erred in not considering as a mitigating factor defendant's good conduct while in prison.

I.

The facts surrounding the crimes committed are fully and accurately set out in Justice Meyer's opinion for the Court on the first appeal. *See State v. Hayes*, 314 N.C. 460, 462-65, 334 S.E. 2d 741, 743-744 (1985). This statement of the facts has been adopted by both the state and the defendant in their respective briefs. We will not repeat the statement of facts as set out in the first appeal *verbatim*, but will instead summarize it as follows, adding some matters that appear in the trial transcript.

On 13 December 1981 defendant, Carlton Roberts and Windell Flowers went to the home of Thomas and Clara Greer in the town of Boomer, Wilkes County, where the Greers had for some 42 years operated a small country store known as Boomer Service and Grocery. Their home was behind the store. One of the men knocked on the door, but Mrs. Greer, age 76, would not let him in because her husband, age 81, was asleep. The three men left and drove to Lenoir, where they obtained a blanket and a sawed-off shotgun. While in Lenoir, they went to a nightclub where they consumed liquor and got into a fight with several others.

They returned to the Greer home on 14 December 1981. Hayes wrapped the blanket over his head and crashed through the Greers' bedroom window. Roberts and Flowers followed defendant through the same window. According to Mrs. Greer's tes-

timony, she was asleep in bed when she heard a crash and felt someone land beside her on the bed. As she lay helpless in the bed, she heard someone say, "If you holler or if you scream I'll blow your head off."

Roberts then grabbed Mr. Greer and began beating him with a blunt object. Roberts demanded that Mr. Greer reveal where his money was hidden. Mrs. Greer testified, "I could hear him a-beating the whole time . . . . I just heard that old beating sound . . . ." Hayes and Flowers grabbed Mrs. Greer, held a pistol to her neck, struck her over the head with a flashlight causing a five-inch wound and demanded that she tell where she and her husband kept their money. While two of the assailants continued to hold Mrs. Greer, the other searched a bedroom where he found a wallet containing between $800.00 and $1,000.00. Mrs. Greer showed Flowers an envelope containing $1,000.00 under a rug in another bedroom.

While Roberts continued to beat Mr. Greer, Mrs. Greer led Hayes and Flowers outside, telling them there might be money hidden in a playhouse in the yard. She attempted to escape, but Hayes caught her and threw her to the ground. Mrs. Greer then led the men to the store where, after tying her, they took a number of items, including two cases of cigarettes, a watch and a .22 caliber Luger pistol. The three men left in a white Chevrolet.

Mrs. Greer was able eventually to free herself and go to her granddaughter's home. Her granddaughter called the sheriff and other family members. The Greers' son-in-law, Clay Bradford, being the first to arrive at the crime scene, found Mr. Greer alive and tied to the foot of his bed, his face beaten so badly that Bradford had difficulty recognizing him.

Hayes returned to his mobile home about 6:30 a.m. He sat on the bed and cried, saying, "I'll not never [sic] go out on another deal as long as I live. You should have seen what we did to that old man last night."

Mr. Greer died on 1 January 1982 from injuries, including extensive brain damage, resulting from the brutal beating inflicted by his assailants.

Mrs. Greer was unable to identify any of the assailants. However, further investigation unearthed evidence, including the

sale of some of the stolen property by Flowers, which led to their arrest and, ultimately, to incriminating statements by Flowers and Hayes.

At the 21 June 1982 Special Criminal Session of Superior Court, Iredell County, Hayes, Flowers and Roberts were tried and convicted of: (1) first degree murder of Mr. Greer upon a felony murder theory, the underlying felony being the armed robbery of Mr. and Mrs. Greer; (2) armed robbery of Mr. and Mrs. Greer; (3) first degree burglary of the Greer dwelling house, the indictment alleging that the dwelling was owned by Mr. Greer and occupied by Mr. and Mrs. Greer and that the felonious intent was to commit armed robbery; (4) second degree kidnapping of Mrs. Greer for the purpose of facilitating the commission of the felonies of breaking or entering and larceny; (5) felonious breaking or entering with intent to commit larceny of the building occupied by Boomer Service and Grocery and owned by Mr. Greer; and (6) felonious larceny from this building of Mr. Greer's personal property.

At sentencing the jury recommended, and the trial judge imposed, a sentence of life imprisonment on the first degree murder convictions. Armed robbery being the underlying felony in these convictions, judgments on the armed robbery convictions were arrested. As to the non-capital crimes, the trial judge found that each was aggravated as being: (1) especially heinous, atrocious, or cruel; (2) against a very old victim; (3) for pecuniary gain; and (4) part of a pattern of conduct posing a serious threat to society. Each defendant received the maximum 50-year sentence for the Class C felony of first degree burglary; the maximum 30-year sentence for the Class E felony of second degree kidnapping; and the maximum 10-year sentence for the Class H felonies, consolidated for judgment, of breaking or entering and larceny. The sentences for the non-capital crimes were ordered to run consecutively to each other but not with the life sentence imposed in the murder case.

Hayes, Flowers and Roberts appealed to this Court. We found no error in the determinations of guilt but remanded all convictions other than the Class A felony of first degree murder for resentencing, holding that the pecuniary gain aggravating factor had been improperly found. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 781.

At the resentencing hearing the trial court found, as to Flowers and Hayes, that: (1) the burglary was especially heinous, atrocious, or cruel; (2) the kidnapping was against a very old victim; and (3) the breaking or entering and larceny were part of a pattern of conduct which was a serious threat to society. The trial court found no mitigating factors and resentenced both defendants to the same consecutive sentences of fifty years for first degree burglary, thirty years for second degree kidnapping, and a consolidated ten-year sentence for breaking or entering and larceny. Again the total of 90 years imprisonment ordered to be served for these crimes was not ordered to run consecutively to the sentence of life imprisonment earlier imposed in the murder case.

Defendant Flowers appealed separately to the Court of Appeals, contending, among other things, that the trial court erred in finding: (1) the burglary was especially heinous, atrocious, or cruel; and (2) the breaking or entering and larceny was part of a pattern of behavior which constituted a serious threat to society. The Court of Appeals concluded the trial court erred in finding both aggravating factors and remanded for a new sentencing hearing. *State v. Flowers*, 83 N.C. App. 696, 354 S.E. 2d 240, *disc. rev. denied*, 319 N.C. 675, 356 S.E. 2d 702 (1987).

Defendant Hayes appealed separately to the Court of Appeals, contending: (1) there was insufficient evidence to support the trial court's finding in aggravation that the burglary was especially heinous, atrocious, or cruel; (2) there was insufficient evidence to support the trial court's finding in aggravation that the breaking or entering and larceny were part of a pattern of conduct which was a serious threat to society; and (3) the trial court erred in failing to find as a mitigating factor that defendant had exhibited good behavior in prison since his commitment in 1982.

The Court of Appeals concluded the first two issues raised by defendant Hayes were identical to those raised by defendant Flowers and, on the basis of *Flowers*, remanded the case for a new sentencing hearing. The Court of Appeals also concluded the trial court erred by "failing to consider whether [Hayes'] conduct in prison between his initial incarceration and resentencing entitled [Hayes] to a nonstatutory" mitigating factor.

We granted the state's petition for discretionary review.

II.

[1] The state contends the Court of Appeals erred in concluding there was insufficient evidence to support the trial court's finding in aggravation that the burglary of the Greer home was especially heinous, atrocious, or cruel pursuant to N.C.G.S. § 15A-1340.4 (a)(1)f. The state asserts the trial judge in making the finding could have properly considered that defendant: (1) hurled himself through the Greers' bedroom window, landing on Mrs. Greer's bed where she was sleeping; (2) wounded Mrs. Greer with a flashlight; and (3) forced Mrs. Greer to witness the brutal beating of her husband. These facts, the state says, are sufficient to support the "especially heinous" aggravating factor. Defendant responds that, as a matter of law, the trial judge could not properly consider this evidence to aggravate the burglary conviction because it was used to prove other joined offenses of which defendant was convicted.

The Fair Sentencing Act and our cases interpreting it establish several rules which determine what evidence a sentencing judge may properly consider in aggravating a crime covered by the Act. First, a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined by or acts which form the gravamen of these convictions. N.C.G.S. § 15A-1340.4(a)(1)o (1983); *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223 (1985); *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). Second, evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of that *same* crime. N.C.G.S. § 15A-1340.4(a)(1)p (1983); *State v. Withers*, 311 N.C. 699, 319 S.E. 2d 211 (1984); *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). Third, "the same item of evidence may not be used to prove more than one factor in aggravation." N.C.G.S. § 15A-1340.4(a)(1)p (1983). Fourth, acts which could have been, but were not, the basis for other joinable criminal convictions may be used to aggravate the conviction for which defendant is being sentenced. *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983). Finally, *evidence* used in proving an element of one crime may also be used to support an aggravating factor of a separate, though joined, crime for which defendant is being sentenced. *State v. Taylor*, 322 N.C. 280, 367 S.E. 2d 664 (1988).

To decide whether there was enough competent evidence to support the trial court's finding of the especially heinous factor, by which it aggravated defendant's burglary conviction, we must first ascertain, under the rules above set out, what evidence the trial court could properly consider. Second, we must determine whether this evidence supports the finding of this factor.

Evidence which the trial court could properly consider in determining whether the burglary was especially heinous, atrocious or cruel is this: Hayes, wrapped in a blanket and armed with a firearm, crashed through the Greers' bedroom window, landed on the bed where Mrs. Greer was sleeping and immediately threatened to blow her head off if she screamed. Hayes and Flowers held Mrs. Greer helpless in the presence of the beating being administered to her husband by Roberts. Mrs. Greer "could hear him a-beating the whole time . . . . I just heard that old beating sound . . . ." Either Hayes or one of his accomplices struck Mrs. Greer with a flashlight, causing a five-inch wound. These acts constitute neither another crime nor the gravamen of another crime for which Hayes was convicted. They were not used as evidence to prove any other aggravating circumstance. With regard to the burglary itself, the state was required to prove that defendant entered the dwelling; but the egregious manner in which the entry occurred and defendant's being armed with a firearm are superfluous to the entry itself. All of the evidence described is, therefore, available to support the trial court's determination.

We think this evidence is enough to support the finding that the burglary was especially heinous, atrocious or cruel. In determining if this aggravating factor is present in a non-capital, Fair Sentencing Act case, "the focus should be on whether the facts of the case disclose . . . *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (emphasis in original). The crime sought to be aggravated by this factor is first degree burglary. This crime is complete upon the breaking and entry into the occupied dwelling house of another in the nighttime with the intent to commit a felony therein, "whether such intent be executed or not." *State v. Beaver*, 291 N.C. 137, 141, 229 S.E. 2d 179, 181 (1976). The kind of suffering, both physical and psychological, that Mrs. Greer endured at the hands of Hayes and his accomplices concomitantly

with the burglary is not ordinarily present when a burglary is committed. The burglary here was excessively brutal. It was proper for the trial court to find that it was especially heinous, atrocious, or cruel.

III.

[2] The state next argues the Court of Appeals erred in concluding there was insufficient evidence to support the trial court's finding in aggravation of the breaking or entering and larceny convictions that defendant "engaged in a pattern of conduct causing serious danger to society," a nonstatutory factor. We agree with the state's contention.

Defendant asserts that, in finding this aggravating factor, the trial court violated the rules set forth in *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223, and *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876. In *Lattimore*, the defendant was convicted of attempted robbery with a firearm and second degree murder. In sentencing defendant for the attempted robbery conviction, the trial court found as an aggravating factor that defendant had killed the victim. Likewise, in sentencing defendant for the second degree murder conviction, the trial court found as an aggravating factor that the murder was committed during the course of the attempted armed robbery. *Lattimore*, 310 N.C. at 300, 311 S.E. 2d at 880. This Court held the trial court erred in finding as nonstatutory aggravating factors for each respective conviction that the defendant *committed*, respectively, the joined offenses. *Id.* at 299, 311 S.E. 2d at 879. In *Westmoreland*, the defendant was convicted of first degree murder, two counts of second degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court aggravated each non-capital offense by finding defendant had been engaged in a course of conduct involving violence against others. In remanding for a new sentencing hearing, this Court stated:

> [W]e hold that a conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense. In the case before us the trial judge did not explicitly use defendant's convictions as aggravating factors. Rather he relied on defendant's murderous course of conduct in committing the offenses that support the convictions. . . . Whatever name is

given to it, the effect of the trial judge's action was to use defendant's contemporaneous convictions of joined offenses as an aggravating factor in violation of the rule of *Lattimore.*

Westmoreland, 314 N.C. at 449, 334 S.E. 2d at 228.

Under the rules set forth in *Westmoreland* and *Lattimore,* a conviction for which defendant is being sentenced may not be aggravated by defendant's acts which form the gravamen of contemporaneous convictions of joined offenses. However, evidence of acts unrelated to the joined convictions may properly be considered. *See, e.g., State v. Avery,* 315 N.C. 1, 337 S.E. 2d 786 (1985) (trial court properly found defendant had engaged in a pattern or course of violent conduct where evidence showed defendant had committed unrelated acts of violence).

Defendant contends there is insufficient evidence, apart from acts forming the gravamen of convictions for other joined offenses, to support the trial court's finding that he engaged in a pattern of conduct which presented a serious threat to society.

We disagree. The state's evidence showed defendant and his companions first went to the Greer home on 13 December 1981. When Mrs. Greer refused to open the door, the three men left and went to a nightclub. While at the nightclub, they consumed quantities of liquor and got into a fight with several other people. During the course of the evening they armed themselves with a sawed-off shotgun. Armed and intoxicated, they returned a second time to the Greer home on 14 December 1981. This evidence, all unrelated to the other crimes for which defendant was convicted, is enough to support the trial court's finding in aggravation that defendant engaged in a pattern of conduct causing serious danger to society.

IV.

[3] In its final argument the state contends the Court of Appeals wrongly concluded that the trial court erred in failing to find defendant's prison conduct to be a mitigating factor in determining what sentences to impose for all his convictions. Again we agree with the state.

A defendant's good behavior while in prison may properly be considered by the trial court as a mitigating factor. *State v. Swimm,* 316 N.C. 24, 340 S.E. 2d 65 (1986). In *Swimm* we stated:

> A defendant's behavior while incarcerated is relevant to a determination of his potential for rehabilitation and is thus a factor 'reasonably related to the purposes of sentencing.' Therefore, we hold that a defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act.

Id. at 31, 340 S.E. 2d at 70.

At the resentencing hearing defense counsel proposed as a mitigating factor that defendant had exhibited good behavior in prison since being committed in 1982. Counsel pointed out that defendant had one infraction in June of 1983 but had been well-behaved since that time and produced, but did not offer into evidence, defendant's entire 450-page prison file. The 1983 infraction, according to counsel's statement, involved a fight with another inmate for which defendant was disciplined with 15 days' segregation and 15 days' loss of good time. Judge Rousseau declined to read the file but stated, "I will take your word for what you say the prison records reveal in behalf of your client, Mr. Gray." He then stated:

> Well, Mr. Gray, you're talking about the mitigating factor of good behavior in prison—of course everybody knows that we have a parole policy in this state, and the better conduct the prisoner has, then the better chance of parole, the better chance that he will make parole earlier. . . . Whether that's his motive, I don't know . . . .

Later, when actually imposing sentences for the various convictions, Judge Rousseau said, "After considering the request . . . for a mitigating factor of a confession at an early stage and a good prison record, I decline to find those two mitigating factors. . . . After considering the request for mitigating factors, the Court *in its discretion* declines to find either the confession at an early stage or good prison record. . . . I decline to find any mitigating factors requested by the Defendant." (Emphasis supplied.)

The Court of Appeals believed that Judge Rousseau determined as a matter of law that good conduct in prison could never

be a mitigating factor because it might be entirely motivated by the inmate's self-serving desire for early release. The Court of Appeals concluded that, under *Swimm*, this was a misapprehension of applicable law and remanded for a new sentencing hearing at which the sentencing court could determine in its discretion whether this mitigating factor ought to be found.

We disagree with the Court of Appeals' interpretation of the record at sentencing. It seems to us that Judge Rousseau did not reject out of hand and as a matter of law defendant's prison conduct as a mitigating factor. Rather he determined, in his discretion, not to find it. We find no reversible error in this determination.

The standard of review on appeal of the sentencing court's failure to find a nonstatutory mitigating factor is whether the court abused its discretion. *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985). Failure to find a nonstatutory mitigating factor "will not be disturbed on appeal absent a showing of abuse of discretion." *Id.* at 323, 333 S.E. 2d at 244. A ruling committed to the trial court's discretion will be upset on appeal only when defendant shows that the ruling could not have been the result of a reasoned decision. *State v. Cameron*, 314 N.C. 516, 335 S.E. 2d 9 (1985).

While the facts concerning defendant's prison record were not in dispute, they did not show a record devoid of bad behavior. Instead they showed that defendant, in violation of prison rules, had once engaged in a fight and had been disciplined for his involvement. The facts concerning defendant's entire prison record might have supported a finding by the trial court that defendant's prison conduct deserved to be considered as a mitigating factor at sentencing, but they do not compel such a finding. The trial court's rejection of the factor was not without rational basis in the record. It was not, therefore, an abuse of discretion.

The decision of the Court of Appeals vacating the sentences imposed and remanding for a new sentencing hearing is reversed and the sentences imposed by the trial court are reinstated.

Reversed.

STATE OF NORTH CAROLINA v. JON LEE BENSON

No. 124A86

(Filed 6 October 1988)

1. **Criminal Law § 76.10— attack on confession—theory not used at trial**

The issue of illegal arrest was not timely raised in a first degree murder prosecution where defendant did not rely upon unlawful arrest as a basis for his motion at trial to suppress his confession, it was not mentioned or argued to the trial judge, and the trial judge's order is based upon the voluntariness theory without mention of the illegality of defendant's arrest; defendant may not swap horses after trial in order to obtain a thoroughbred on appeal.

2. **Jury § 7.11— ambivalence toward death penalty—juror challenged for cause—no error**

The trial judge did not err in allowing the State to challenge a juror for cause in a first degree murder prosecution where the juror's responses may have demonstrated an ambivalence toward the death penalty but also clearly indicated that she was unwilling or unable to follow the law and her oath.

3. **Jury § 7.10— juror familiar with witnesses—denial of challenge for cause—no error**

The trial court did not err in a prosecution for first degree murder by denying defendant's challenge for cause of a juror who knew four of the police officers who were prospective witnesses for the State where, although defendant searched diligently during voir dire to discover some indication that the juror would be partial to those witnesses, the juror unequivocally stated repeatedly that his acquaintance with the officers would not affect his verdict in any way, and there was no evidence to the contrary.

4. **Criminal Law § 102.6— opening argument—no intervention ex mero motu—no error**

The trial court did not err in a first degree murder prosecution by not intervening *ex mero motu* in the prosecutor's opening argument where the argument was a shorthand statement of the sentencing procedure in a capital case and was basically accurate, although incomplete.

5. **Criminal Law § 135.9— nonstatutory mitigating factors—Pinch test abandoned—failure to submit nonstatutory mitigating factors—no error**

In order for a defendant to succeed upon an assignment of error as to the failure to submit nonstatutory mitigating factors, the defendant must establish that the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value and that there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury; the failure by the trial judge to submit such nonstatutory mitigating circumstance raises federal constitutional issues and the burden is upon the State to prove that such violation was harmless beyond a reasonable doubt. *State v. Pinch*, 306 N.C. 1, is overruled to the extent that it is in conflict with this standard. The trial court here did not err by failing to submit nonstatutory mitigating

factors because the evidence did not support the factors or the factor was subsumed in mitigating circumstances which were submitted.

6. Criminal Law § 102.6— first degree murder—prosecutor's closing argument—no intervention ex mero motu

The prosecutor's closing argument in a prosecution for first degree murder was not so grossly egregious that the trial judge was required to interrupt the counsel absent an appropriate objection.

7. Criminal Law § 101.4— jury's request for transcript—denied—no abuse of discretion

The trial judge did not abuse its discretion in a first degree murder prosecution by denying the jury's request for portions of the transcript. N.C.G.S. § 15A-1233.

8. Criminal Law §§ 135.7, 135.8— first degree murder—preservation of issues regarding aggravating circumstances

The Supreme Court in a first degree murder prosecution declined to abandon its prior holdings on the constitutionality of pecuniary gain as an aggravating circumstance; the denial of defendant's motion for a bill of particulars requesting the State to specify aggravating circumstances upon which it intended to rely; and the denial of defendant's request to instruct the jury that defendant would receive life if the jury was unable to agree.

9. Criminal Law § 126; Jury §§ 7.1, 7.8— first degree murder—preservation of jury issues

The Supreme Court in a first degree murder prosecution declined to abandon its prior holdings on unanimity of jury verdict, form, and weighing of issues; lack of a cross section of the community on the trial jury; and the State's challenge to a juror because she was not a citizen.

10. Criminal Law §§ 135, 135.9— first degree murder—preservation of issues

The Supreme Court, in a first degree murder prosecution, declined to abandon its prior holdings regarding the constitutionality of N.C.G.S. § 15A-2000 and on requiring defendant to prove the existence of mitigating circumstances.

11. Criminal Law § 135.9— first degree murder—mitigating circumstances—Mills argument rejected

Defendant's argument as to the requirement of unanimity of the jury in finding mitigating circumstances in a murder prosecution was rejected.

12. Criminal Law § 135.10— first degree murder—death sentence—disproportionate

Although the recommendation of the death sentence in a first degree murder prosecution was not arbitrary or capricious, it was disproportionate where the conviction was based solely on the felony murder theory; there was only one aggravating factor, pecuniary gain; the jury found as mitigating factors that defendant had no significant history of prior criminal activity, that defendant was under the influence of mental or emotional disturbance, that defendant confessed and cooperated upon arrest, that he voluntarily consented to a search of his motel room, car, home, and storage bin, and that he was aban-

doned by his natural mother at an early age; and defendant pled guilty during the trial and acknowledged his wrongdoing to the jury. N.C.G.S. § 15A-2000(d)(2).

Justice FRYE concurring in the result.

Chief Justice EXUM joins in this concurring opinion.

APPEAL by defendant from judgment of death on his plea of guilty of murder in the first degree, imposed by *Watts, J.*, at the 6 January 1986 session of Superior Court, ONSLOW County. Heard in the Supreme Court 16 March 1988 and 22 August 1988.

Lacy H. Thornburg, Attorney General, Christopher P. Brewer, Special Deputy Attorney General, William P. Hart, Assistant Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, and Barry S. McNeill, Assistant Attorney General, for the state.

Geoffrey C. Mangum, Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, Assistant Appellate Defender, for defendant.

E. Ann Christian and Robert E. Zaytoun, for The North Carolina Academy of Trial Lawyers, and John A. Dusenbury, Jr., for the North Carolina Association of Black Lawyers, amici curiae.

MARTIN, Justice.

Defendant entered pleas of guilty to armed robbery and to murder in the first degree based upon the felony murder doctrine. After a sentencing hearing, defendant was sentenced to death on the murder charge, and judgment was arrested on the armed robbery charge. We determine the sentence of death to be disproportionate and therefore sentence defendant to life imprisonment.

The evidence, stated in summary, showed that on 20 August 1985, Melvin Richard LaVecchia worked as the kitchen manager at Po' Folks Restaurant in Jacksonville. He was required to make the night deposit of the day's receipts at Peoples Bank on Western Boulevard in Jacksonville. Defendant was acquainted with the routine followed by Mr. LaVecchia in making the nightly deposits.

Armed with a shotgun, defendant went to the Peoples Bank to await the arrival of Mr. LaVecchia. He hid in the bushes at the bank for about two hours and then drove to the restaurant to determine whether Mr. LaVecchia was still there. Upon seeing Mr. LaVecchia's car, defendant returned to his hiding place at the bank. Thereafter, about 1:25 a.m., Mr. LaVecchia arrived at the bank. He left his car and proceeded toward the night deposit box where he was accosted by defendant who demanded the moneybag. When Mr. LaVecchia hesitated, defendant fired the shotgun, striking him in the upper portion of both legs. As he fell, defendant grabbed the moneybag and ran to his car. Shortly thereafter, a police officer discovered Mr. LaVecchia and had him removed to the hospital, where he later died of cardiac arrest caused by the loss of blood from the shotgun wounds.

About 9:00 p.m. on 21 August, defendant was arrested on a warrant charging him with felonious breaking and entering of an automobile. After being properly advised as to his constitutional rights, defendant confessed to the murder and consented to a search of his motel room, where the shotgun was seized.

[1] Defendant first argues that the trial judge erred in denying his motion to suppress his confession and other evidence, on the ground that it was obtained as a result of an unlawful arrest and thereby is the "fruit of the poisonous tree" under *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979). This alleged error is based upon a written pretrial motion to suppress. Defendant did not rely upon unlawful arrest as a basis for his motion. It was not mentioned or argued to the trial judge. The motion to suppress specifically states the grounds for the motion, and unlawful arrest is not one of them.

During the voir dire hearing on the motion to suppress, reference to the arrest warrant was repeatedly made, and defendant never objected or gave any indication that the legality of the arrest would be challenged upon appeal. The trial judge's order is based upon the voluntariness theory, without mention of the legality of defendant's arrest.

Now, on appeal, defendant for the first time attempts to raise the issue of his arrest as a basis to overturn the ruling of the trial judge. This he cannot do. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). What we said in *Hunter* controls this case:

> The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. . . .
>
> . . . .
>
> . . . In order to clarify any misunderstanding about the duty of counsel in these matters, we specifically hold that when there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence.

Id. at 112, 286 S.E. 2d at 539.

Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal. *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836 (1934). The issue of illegal arrest was not timely raised in this case.

[2] Defendant next argues that the trial judge erred in allowing the state's challenge for cause of juror Taylor. There is no merit in defendant's argument. A portion of the voir dire of Mrs. Taylor follows:

> MR. HUDSON: Okay. Then I assume by your answer that if you are selected to serve as a juror in this case and we do get to the second phase, which is the penalty phase, if we do get into that and you go back in the Jury Room to deliberate after you have heard the evidence, the arguments from the attorneys, the instructions from the Judge, you could go back into the Jury Room to deliberate the second phase and you are convinced beyond a reasonable doubt that the appropriate penalty is the death penalty, could you come back in here and bring such a verdict?
>
> MRS. TAYLOR: No, I don't think so.
>
> . . . .
>
> MR. HUDSON: Mrs. Taylor, let me see if I understand you. You're saying that in this case, based on your beliefs, that

under no circumstances you could return a verdict meaning the imposition of the death penalty?

MRS. TAYLOR: (Indicates negative response.) No.

. . . .

MR. HUDSON: You indicated earlier that you could not—when I asked you, you said you could not come back in the courtroom with a verdict of death.

MRS. TAYLOR: I did say that. I still feel that way. I just—

. . . .

THE COURT: Mrs. Taylor, if we were to reach the punishment stage of the trial; that is, after the defendant had been found guilty of first degree murder; if the jury so found it, the question is can and will you follow the law of North Carolina as to the sentence recommendations as I instruct you upon? Do you think you'll be able to follow my instructions?

MRS. TAYLOR: No, sir.

THE COURT: And that is because of your personal belief with regard to the death penalty. Is that correct?

MRS. TAYLOR: Unh-hunh.

THE COURT: Motion for cause is allowed. Objection is overruled.

The above portion of the voir dire is sufficient to sustain the trial judge's excusal of the juror for cause. *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985); *State v. Brown*, 315 N.C. 40, 337 S.E. 2d 808 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986). Mrs. Taylor's responses to the trial judge clearly indicate that she was unwilling or unable to follow the law and her oath. Although her testimony may also have demonstrated an ambivalence toward the death penalty, she was properly excused because her testimony clearly showed her inability to follow the law. *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987).

[3] Likewise, defendant's contention that the trial judge erred in denying his challenge for cause to juror Marshburn is without merit. This juror knew four of the police officers who were pro-

spective witnesses for the state. Although the defendant searched diligently during voir dire to discover some indication that the juror would be partial to these witnesses, the juror unequivocally stated repeatedly that his acquaintance with them would not affect his verdict in any way. There was no evidence to the contrary. There being no showing of prejudice on the part of juror Marshburn, we hold that his mere acquaintance with the officers is insufficient to find the trial judge's ruling erroneous. *See State v. Whitfield*, 310 N.C. 608, 313 S.E. 2d 790 (1984).

[4] Upon review of the prosecutor's opening statement, we find no prejudicial error. Before the opening statements commenced, the trial judge cautioned the jury that the statements were only forecasts of what counsel intended to prove and were not evidence and should not be considered as evidence by the jury.

Although defendant did not object to any of the prosecutor's opening statement, he now contends that in four respects it was so grossly egregious that the trial judge should have interrupted counsel ex mero motu. We cannot agree.

The challenged statement reads:

> Under the law, before a death penalty can be imposed, our Legislature and our court has said there must be the presence of at least one aggravating factor among several that is set out in our statutes. If there is one aggravating factor that is present that is set out in our statute, then our court and our Legislature says that that is sufficient to justify a death sentence. Of course, there are a number of things set out. The aggravating factor that the State's evidence will show is present in this case is the factor that the offense was committed for pecuniary gain, and the Judge will give you some more instructions on it, but that this act was committed for pecuniary gain. That is, it was committed for the purpose of getting robbery—getting money. His reason for committing this was to get money. I am sure you can understand why the Legislature sets that out.
>
> I mean, obviously, if you have got a killing in a Saturday night barroom brawl, that might not be something that would justify the death penalty or if somebody shot somebody in self-defense, that might not be something that would justify

the death penalty. But the court has said, and our Legislature has said, that if a killing occurs; for example, a lot of times it's in a bank robbery. For example, you shoot somebody. You're a store clerk; you shoot somebody, or in this case where Mr. LaVecchia went to make this night deposit and he shot him and he was killed, that that can be sufficient to justify the death penalty.

We do not find the statement to be so egregious as to require the judge on his own motion to interrupt counsel. The statement was a shorthand statement of the sentencing procedure in a capital case and was basically accurate, although certainly incomplete. One aggravating circumstance can be sufficient to support a recommendation of the death sentence. *State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987). The statement that the state's evidence would show that the crime was committed for pecuniary gain was an accurate contention of the state. The reference to killings in barroom brawls and in self-defense, although not pertinent to this case, does not rise to the level that requires the trial judge to address them absent an objection. Last, the reference to armed robbery cases supporting the death penalty is not incorrect. *See State v. Gardner*, 311 N.C. 489, 319 S.E. 2d 591 (1984), *cert. denied*, 469 U.S. 1230, 84 L.Ed. 2d 369 (1985). Defendant's assignment of error is overruled.

[5] Defendant requested that several nonstatutory mitigating circumstances be submitted to the jury and argues that the denial of his requests was error. We are not persuaded. In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury.[1] Upon such showing by the defendant, the failure by the trial judge to submit such nonstatutory mitigating circumstance to the jury for its determination raises federal constitutional issues. *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978). *See State v. Wilson*, 322 N.C. 117, 367 S.E. 2d

1. This Court abandoned the *Pinch* test with respect to *statutory* mitigating circumstances because due process constitutional issues are involved and, as to constitutional issues, the *Pinch* test impermissibly shifts the burden of proof to the defendant. *State v. Wilson*, 322 N.C. 117, 367 S.E. 2d 589 (1988).

589 (1988). Whether a violation of a defendant's federal constitutional rights is prejudicial is controlled by N.C.G.S. § 15A-1443(b). Such violation is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1983). The burden is upon the state to so prove. *State v. Wilson*, 322 N.C. 117, 367 S.E. 2d 589. Insofar as *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983), is in conflict with the standard we adopt today for the review of the failure of the trial judge to submit nonstatutory mitigating circumstances, it is overruled.

In applying this standard to defendant's request, we find no error. Briefly, the record shows that the evidence did not support the circumstance that defendant had no prior history of assaultive behavior. To the contrary, it disclosed that defendant had been engaged in prior assaultive actions. With respect to the circumstance of no violence toward others since his arrest, defendant failed to produce sufficient evidence to support this circumstance. Defendant's witness Dr. Stack only testified as to defendant's behavior during his four visits with defendant in jail. Defendant was in jail for about five months.

Defendant failed to produce any evidence that he had not fired a gun at anyone prior to the murder. Defendant's evidence was that he was "very gentle," had "no meanness in him," and was never involved in fights (there was contra evidence). One who is "very gentle," "has no meanness," and never fights could still discharge a firearm at another person under any number of varying circumstances.

The trial judge properly refused to submit as a mitigating circumstance that the crime was out of character for defendant. The evidence that might support this circumstance did not include defendant's character and behavior between 1980, when he joined the Marines, and 1985, when the offenses occurred.

The trial judge properly refused to submit the mitigating circumstance that defendant had adjusted well to jail life. The trial judge noted that there was no evidence to support the proposed circumstance and called upon defendant's counsel to point out the evidence supporting it. Defendant's counsel replied that he did not want to be heard.

The refusal of the trial judge to submit as a mitigating circumstance that defendant did not resist arrest was not error. The trial judge submitted as mitigating circumstances that defendant cooperated with the police upon his arrest, that he voluntarily confessed, and that he voluntarily agreed to searches of his car, motel room, home, and storage bin. The proposed circumstance was subsumed in these mitigating circumstances.

[6] Next, defendant argues that the prosecutor's closing argument was improper. Defendant made no objection to this argument. We have carefully examined the challenged argument, and especially the five specific portions raised in defendant's brief, and do not find that the argument was so grossly egregious that the trial judge was required to interrupt counsel absent an appropriate objection. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

[7] Defendant's argument that the trial judge failed to exercise his discretion in denying the jury's request for portions of the transcript is without merit. The transcript reveals that three times the trial judge stated he was denying the request in the exercise of his discretion. He even referred to the appropriate statute, N.C.G.S. § 15A-1233. *See State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980).

[8, 9, 10] Defendant also raises for "preservation" the following nine issues: (1) constitutionality of pecuniary gain as an aggravating circumstance, (2) unanimity of jury verdict, form and weighing of issues, (3) constitutionality of N.C.G.S. § 15A-2000, (4) denial of defendant's motion for bill of particulars requesting state to specify aggravating circumstances it intends to rely upon, (5) lack of cross-section of community on trial jury, (6) state's challenge to juror because she was not a citizen, (7) denial of defendant's request to instruct jury that defendant will receive life if jury is unable to agree, (8) requiring defendant to prove existence of mitigating circumstances, and (9) requirement of unanimity of the jury in finding mitigating circumstances. Defendant concedes that each of these issues has been resolved by this Court contrary to defendant's arguments. Defendant has failed to persuade us that we should abandon our prior holdings as to the first eight of these issues and further discussion of them is not required.

[11] However, as to the requirement of unanimity of the jury in finding mitigating circumstances, defendant contends that the recent decision of the United States Supreme Court in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), entitles him to at least a new sentencing hearing. This Court, in conference, determined that there should be additional briefing and argument in this case and all other cases presently before this Court with respect to the issues raised by *Mills v. Maryland*. Oral argument was heard on 22 August 1988. For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we reject defendant's argument based upon *Mills v. Maryland*.

[12] While we find that the recommendation of the death sentence by the jury was not arbitrary or capricious, we do conclude the death sentence to be disproportionate under all the facts and circumstances of this case. The process that this Court follows in carrying out its statutorily mandated duty on proportionality review is now well settled in the law and it would serve no useful purpose to repeat it here. *See generally State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985); *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983); *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983).

The murder in this case does not rise to the level of those murder cases in which we have approved the death sentence upon proportionality review. This case is distinguished by the following: the conviction is based solely upon the felony murder theory; it has only one aggravating circumstance, pecuniary gain, N.C.G.S. § 15A-2000(e)(6); the jury found as mitigating circumstances that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1), that defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000 (f)(2), that he confessed and cooperated upon arrest, that he voluntarily consented to a search of his motel room, car, home, and storage bin, and that he was abandoned by his natural mother at an early age. Defendant also pleaded guilty during the trial and acknowledged his wrongdoing before the jury.

Approximately fifty-one robbery-murder cases are in the pool. Of these, life sentences have been imposed in forty-four

cases and death sentences in seven. In five of these robbery-murder cases, the only aggravating circumstance was pecuniary gain. Life sentences were imposed in four of the five. The fifth case, *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703, is the single case, other than the present appeal, in which the jury returned a death recommendation where the *only* aggravating circumstance was pecuniary gain. On appeal that death sentence was found to be disproportionate. Here, the mitigating circumstances are stronger than in *Jackson*, where only "no significant history of prior criminal activity" was found.

In the robbery-murder cases where the death sentence has been upheld, all but two involved multiple killings. Of those two, one involved the shooting of a second victim and one involved the kidnapping of the female victim. The case at issue cannot be equated with the robbery-murder convictions where the death sentence was upheld. From the evidence it appears that Benson intended only to rob; he fired at Mr. LaVecchia's legs rather than a more vital part of his body.

Certainly, this murder for profit was an outrageous crime, but when compared to the other similar cases in the proportionality pool, we cannot say that this death sentence is not disproportionate. We therefore hold as a matter of law that the death sentence imposed in this case is disproportionate within the meaning of N.C.G.S. § 15A-2000(d)(2). Upon this holding, the statute requires that this Court sentence defendant to life imprisonment in lieu of the death sentence. The language of the statute is mandatory. This Court has no discretion in determining whether a death sentence should be vacated. *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703. The death sentence is vacated and defendant is hereby sentenced to imprisonment in the state's prison for the remainder of his natural life. The defendant is entitled to credit for days spent in confinement prior to the date of this opinion. The Clerk of the Superior Court of Onslow County shall issue a commitment accordingly.

Death sentence vacated and sentence of life imprisonment imposed.

Justice FRYE concurring in result.

The Court rejects defendant's argument based upon *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), for the reasons expressed by the majority of this Court in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988). I did not join the Court's decision in *McKoy* and I believe that it was wrongly decided. I therefore do not agree with the majority's rejection of defendant's argument based on the *Mills* issues for "the reasons expressed in *State v. McKoy*." I do agree with the Court's conclusion that this case does not rise to the level of those murder cases in which we have approved the death sentence upon proportionality review. Therefore, I concur with the majority in vacating the death sentence and sentencing defendant to life imprisonment.

Chief Justice EXUM joins in this concurring opinion.

MARION BASCUM MERRITT, FRANCES M. SMITH, HENRY C. MERRITT, ELEANOR M. JORDAN AND HENRY C. MERRITT IN HIS CAPACITY AS GUARDIAN FOR WILLIAM P. MERRITT v. EDWARDS RIDGE, A GENERAL PARTNERSHIP, JOHN W. COFFEY, PHILIP E. WALKER AND PAMELA A. MCCULLOUGH, INDIVIDUALLY AND AS PARTNERS

No. 12PA88

(Filed 6 October 1988)

1. **Mortgages and Deeds of Trust § 32.1— purchase money deed of trust—anti-deficiency statute—recovery of foreclosure expenses and attorneys' fees prohibited**

The anti-deficiency statute, N.C.G.S. § 45-21.38, bars the holder of a purchase money promissory note given by a buyer of real property to the seller and secured by a purchase money deed of trust embracing the property from recovering the expenses of foreclosure and related attorneys' fees even though the buyer expressly agrees in the purchase money notes and the deed of trust to pay these expenses.

2. **Mortgages and Deeds of Trust § 32.1— default by purchase money debtor—creditor limited to property conveyed**

When a purchase money debtor defaults, the purchase money creditor is limited strictly to the property conveyed in all cases in which the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

3. **Mortgages and Deeds of Trust § 32.1; Attorneys at Law § 7.4— anti-deficiency statute—no waiver of protection by attorneys' fees provision in note**

A purchase money debtor cannot waive the protection of the anti-deficiency statute; therefore, agreements by the debtors in a purchase money note concerning attorneys' fees could not amount to a waiver of the requirement that purchase money creditors be strictly limited to the property conveyed.

4. **Mortgages and Deeds of Trust § 32.1; Attorneys at Law § 7.4— foreclosure of purchase money deed of trust—attorneys' fees not permitted by statute**

N.C.G.S. § 6-21.2 does not permit a purchase money creditor to recover from the purchase money debtor attorneys' fees incurred in connection with foreclosure of the purchase money deed of trust since the anti-deficiency statute deals with this particular situation in detail and controls over N.C.G.S. § 6-21.2, which deals with this situation only in general and comprehensive terms.

Justice WHICHARD dissenting.

ON discretionary review of the decision of the Court of Appeals, 88 N.C. App. 132, 362 S.E. 2d 610 (1988), affirming an order granting summary judgment in favor of the plaintiffs entered by *Hobgood (Robert H.), J.*, on 2 March 1987 in Superior Court, ORANGE County. Heard in the Supreme Court on 12 September 1988.

Bayliss, Hudson & Merritt, by Ronald W. Merritt, for the plaintiff appellees.

Northern, Blue, Little, Rooks, Thibaut & Anderson, by J. William Blue, Jr., for the defendant appellants.

MITCHELL, Justice.

[1] The controlling issue in this case is whether the anti-deficiency statute, N.C.G.S. § 45-21.38[1], bars the holder of a purchase

1. N.C.G.S. § 45-21.38 states:

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for

money promissory note given by a buyer of real property to the seller and secured by a purchase money deed of trust embracing the property from recovering the costs of foreclosure of the deed of trust and sale of the property and related attorneys' fees. We conclude that the statute precludes such recovery. Accordingly, we reverse the decision of the Court of Appeals.

The facts are largely undisputed in this case. The record reveals that, on 26 January 1982, the plaintiff-appellees sold an 80.55-acre tract of land in Chatham County to the defendant-appellants. The plaintiffs accepted two purchase money promissory notes, for the total sum of $200,000.00, secured by a purchase money deed of trust on the property. Each of the notes provided that upon default the maker would pay the holder fifteen percent of the outstanding balance for reasonable attorneys' fees and pay all other reasonable expenses incurred by the holder in the exercise of any of the holder's rights and remedies upon default. These provisions were expressly incorporated by reference into the deed of trust.

After making several payments, the defendants defaulted. The plaintiffs caused the trustee to initiate foreclosure proceedings. On 14 July 1986, the trustee conducted a foreclosure sale. He subsequently filed a Report of Sale indicating that a bid on the property was made on behalf of the plaintiffs in the amount of $115,143.30. All expenses of the sale and *ad valorem* taxes were paid. The trustee filed a Final Report and Account of Foreclosure Sale, indicating total expenses of $6,301.67 attendant to the sale. This amount included the trustee's commission of $5,757.17.

The plaintiffs thereafter initiated this civil action on 6 October 1986 seeking recovery of $24,297.55 from the defendants. The plaintiffs' claims under the provisions of the purchase money notes included $7,202.69 for taxes on the property and the expenses of the foreclosure sale and $17,094.36 for attorneys' fees.

---

real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

After a hearing, the trial court entered an order granting summary judgment for the plaintiffs in the amount sought. The Court of Appeals affirmed the order of the trial court. On 6 April 1988, we allowed the defendants' petition for discretionary review.

The defendants contend that the trial court erred in awarding the plaintiffs attorneys' fees and expenses arising out of the default on the purchase money notes and foreclosure of the purchase money deed of trust and argue that such claims are barred by the provisions of N.C.G.S. § 45-21.38. The defendants rely chiefly on *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1980).[2]

In contrast, the plaintiffs argue that the trial court properly awarded them summary judgment for attorneys' fees and expenses incurred as a result of foreclosure, because the defendants expressly agreed in the purchase money notes and the deed of trust to pay these expenses. The plaintiffs contend that since these expenses are not part of the unpaid balance of the purchase price secured by the purchase money deed of trust, their claims are not barred by the anti-deficiency statute.

To support their position, the plaintiffs point to *Reavis v. Ecological Development, Inc.*, 53 N.C. App. 496, 281 S.E. 2d 78 (1981). In *Reavis*, as in this case, the purchase money creditor brought suit, after foreclosure, to recover attorneys' fees and expenses as expressly provided for in a promissory note. The Court of Appeals concluded that the anti-deficiency statute was intended merely to protect purchasers of real property from losing the property in times of economic distress and, thereafter, "having to pay for the property's depreciated value." *Id.* at 498, 281 S.E. 2d at 79. Therefore, the Court of Appeals concluded that the intent of the legislature was to limit the purchase money creditor to recovery of the property conveyed, but that the limitation applied only to the extent that the purchase money creditor was seeking to recover the outstanding balance of the purchase price. *Id.* As the attorneys' fees and expenses associated with foreclosure did not represent a part of the unpaid balance of the purchase price for the property, the Court of Appeals held in *Reavis* that the

2. Referred to as *Ross* and cited as *Ross Realty Co. v. First Citizens Bank & Trust Co.* in the opinion of the Court of Appeals.

purchase money creditor could recover them in a separate suit instituted after foreclosure. The Court of Appeals reasoned that this would not amount to holding the purchase money debtor

> liable for a decline in the property value representing a deficiency; rather . . . [the debtor], as the party in default, is paying the agreed upon costs of plaintiffs in recovering the depreciated property. The defendant agreed to this arrangement, and should not now be permitted to escape liability. Our Anti-Deficiency Judgment statute does not control recovery in this case.

Id. at 499, 281 S.E. 2d at 80. Therefore, the plaintiffs in *Reavis* were allowed to recover foreclosure expenses and attorneys' fees.

In the instant case, the Court of Appeals relied upon *Reavis* and affirmed summary judgment for the plaintiffs. We reverse.

Here, as in *Barnaby v. Boardman*—a case decided after the decision of the Court of Appeals in *Reavis*—we conclude that:

> the interpretation of the statute advanced by the defendants and accepted by the Court of Appeals [is] too mechanically literal and restrictive. In *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), we pointed out that the intent of the 1933 General Assembly in enacting the [anti-deficiency] statute was "to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees." 296 N.C. at 371, 250 S.E. 2d 274.

Barnaby v. Boardman, 313 N.C. 565, 568, 330 S.E. 2d 600, 602 (1985). We have also pointed out that:

> "[T]he legislature was concerned about the situation in which the vendor finances the sale, and was particularly concerned for the protection of the purchaser in that situation . . . . [L]egislatures do not always see the whole problem, and are not always astute to close all the loopholes . . . . [T]he policy was one of protecting the purchaser where the vendor did the financing; the North Carolina legislature simply did not do an efficient job of ensuring the effectiveness of the policy."

Realty Co. v. Trust Co., 296 N.C. at 371, 250 S.E. 2d at 274 (quoting Currie and Lieberman, *Purchase-Money Mortgages and*

State Lines: A Study in Conflict-of-Laws Method, 1960 Duke Law Journal 1, 11-12).

We conclude that the decision of the Court of Appeals in the present case fails to give proper weight to the intent of the General Assembly as construed by this Court in *Realty Co.* and, more recently, in *Barnaby*. It is true that in each of those cases we dealt with situations in which the plaintiffs were attempting to sue on the note to recover the unpaid balance of the purchase price. It is equally true, as the Court of Appeals noted, that the plaintiffs in the present case seek recovery of attorneys' fees and expenses associated with the foreclosure of the deed of trust and that those fees and expenses are not a part of the unpaid balance of the purchase price. Contrary to the view of the Court of Appeals, however, we conclude that this distinction did not justify summary judgment for the plaintiffs in the present case.

[2] As we stated in *Realty Co.* and reemphasized in *Barnaby*, our anti-deficiency statute was *inartfully* drawn by a legislature acting against a background of severe economic stress and wholesale foreclosures, but

> the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Realty Co. v. Trust Co., 296 N.C. at 370, 250 S.E. 2d at 273, *quoted with approval in Barnaby v. Boardman*, 313 N.C. at 569, 330 S.E. 2d at 602. We did not restrict this construction of the statute to cases in which the purchase money creditor was suing on the note or was seeking only to recover the unpaid balance of the purchase price. Given our prior construction of our anti-deficiency statute in *Realty Co.*, and more recently in *Barnaby*, we now hold that when the purchase money debtor defaults, the purchase money creditor is limited strictly to the property conveyed in all cases in which the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

As a general rule, proceeds of a foreclosure sale are, constructively at least, real property and stand in place of the land.

See In Re Castillian Apts., Inc., 281 N.C. 709, 190 S.E. 2d 161 (1972). As the purchase money creditor is strictly limited to the property conveyed in cases such as this, he is limited upon foreclosure and sale to the proceeds which stand in place of the land. Before the purchase money creditor is entitled to receive any of such proceeds, however, N.C.G.S. § 45-21.31(a) requires that the trustee apply the proceeds of the foreclosure sale to the payment of the costs and expenses of the sale, including the trustee's commission, and then to satisfy other obligations as provided by statute. N.C.G.S. § 45-21.31(a) (1984). Only after such payments have been made may the trustee use any remaining proceeds of the foreclosure sale to satisfy the obligation secured by the deed of trust. *Id.* Payment of the costs and expenses required by N.C.G.S. § 45-21.31(a) is not the obligation of the purchase money debtor whose deed of trust is being foreclosed. Nor is it, strictly speaking, the obligation of the buyer at the foreclosure sale. Instead, these statutory costs and expenses, including the trustee's commission, are simply obligations arising from the foreclosure sale which must be paid by the trustee before the remainder of the proceeds may be distributed. *Id.* As the plaintiffs' *entire* right to recovery as purchase money creditors is limited to the property they conveyed to the defendants, they are entitled in the present case to recover only the balance of the proceeds of the foreclosure sale remaining after the trustee paid all costs, expenses and other obligations as required by N.C.G.S. § 45-21.31.

[3] The plaintiffs next argue that they are entitled to attorneys' fees because the defendants contracted in the purchase money note to pay such fees. The decision of the Court of Appeals in *Reavis* supports the plaintiffs' argument. After the decision in *Reavis*, however, this Court rendered its decision in *Barnaby*, where we said that the purchase money debtor cannot waive the protection of the anti-deficiency statute. *Barnaby v. Boardman*, 313 N.C. at 568, 330 S.E. 2d at 602. Consequently, the defendants' agreements in the note concerning attorneys' fees could not amount to a waiver of the requirement that purchase money creditors be strictly limited to the property conveyed.

[4] We also reject the plaintiffs' argument that recovery of their attorneys' fees is specifically authorized by N.C.G.S. § 6-21.2. That statute provides in pertinent part that:

> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectable as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity . . . .

N.C.G.S. § 6-21.2 (1986). The plaintiffs argue that the express terms of this statute control and, therefore, the anti-deficiency statute, N.C.G.S. § 45-21.38, does not prevent their recovering their attorneys' fees incurred in connection with the foreclosure of the purchase money deed of trust in the present case. We do not agree.

N.C.G.S. § 6-21.2 deals in general and comprehensive terms with the propriety of attorneys' fees arising from the collection of indebtedness. The anti-deficiency statute, on the other hand, deals in detail with a particular situation such as that presented in the present case in which a seller of real property has accepted a purchase money note secured by a purchase money deed of trust from his buyer and, therefore, recovery is sought upon default. Where, as here, one statute deals with a particular situation in detail, while another statute deals with it in general and comprehensive terms, the particular statute will be construed as controlling absent a clear legislative intent to the contrary. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). No such clear legislative intent to the contrary appearing, we conclude that the anti-deficiency statute controls here, as its terms deal with the particular situation presented in which the notes and deed of trust were executed to the seller of the real estate by the buyer and the securing instruments state they are for the purpose of securing the balance of the purchase price. Therefore, any recovery by the plaintiffs in the present case must be strictly limited to the property conveyed, and they are not entitled to recover attorneys' fees.

For the foregoing reasons, the trial court erred in granting summary judgment for the plaintiffs and, instead, should have granted summary judgment for the defendants. The decision of the Court of Appeals is reversed. This action is remanded to the Court of Appeals for further remand to the Superior Court, Or-

ange County, with instructions to vacate the summary judgment for the plaintiffs and enter summary judgment for the defendants.

Reversed and remanded.

Justice WHICHARD dissenting.

By a pure judicial gloss on the anti-deficiency judgment statute, N.C.G.S. § 45-21.38 (1984), the majority today deprives the plaintiffs of the benefits of a bargain, fairly and properly entered, which violates no established public policy. Neither the express terms of the statute nor its underlying policy requires this result.

As a member of the Court of Appeals, I concurred in the opinion in *Reavis v. Ecological Development, Inc.*, 53 N.C. App. 496, 281 S.E. 2d 78 (1981), which the majority today overrules. In *Reavis*, a unanimous panel resolved, in favor of the plaintiffs, the identical issue presented here, reasoning as follows:

> A deficiency under G.S. 45-21.38 refers to an indebtedness which represents the balance of the original purchase price for the real estate not recovered through foreclosure. The attorneys' fees and expenses . . . do not represent the unrecovered "balance of purchase money for [the] real estate," G.S. 45-21.38; the fees represent the costs of foreclosing on the property. Moreover, defendant[s] . . . negotiated with plaintiffs for the purchase of the land and *agreed* to the provisions in the promissory note providing for the payment of attorneys' fees and expenses upon default. The defendant[s] [are] not being held liable for a decline in the property value representing a deficiency; rather, defendant[s], as the part[ies] in default, [are] paying the agreed upon costs of plaintiffs in recovering the depreciated property. The defendant[s] agreed to this arrangement, and should not now be permitted to escape liability.

Id. at 499, 281 S.E. 2d at 80.

I continue to adhere to the result and reasoning in *Reavis*. I therefore respectfully dissent.

STATE OF NORTH CAROLINA v. DAVID JAMES MASH

No. 728A86

(Filed 6 October 1988)

1. **Homicide § 8.1— first degree murder—defense of intoxication—erroneous instruction**

The trial court erred in a first degree murder prosecution in its instructions on defendant's voluntary intoxication because the instructions imposed on the jury the standard applicable to defendant's burden of production at trial rather than the standard applicable to the jury's consideration of the intoxication evidence, and the manner in which the language was inserted into the instructions could have led a rational jury to believe that defendant bore the burden of persuading the jury that he was so intoxicated as to be unable to form a deliberate and premeditated intent to kill.

2. **Homicide § 8.1— first degree murder—defense of intoxication—sufficiency of evidence**

The evidence in a first degree murder prosecution was sufficient to support an instruction on voluntary intoxication where defendant had been seen drinking periodically from around 4:00 p.m. until 11:00 p.m. on the date of the murder; during the afternoon defendant appeared "high" while drinking more beer with another friend; by early evening he was drinking a mixture of 190 proof grain alcohol and punch; witnesses described defendant as "definitely drunk" and "pretty high" by 9:30 p.m.; defendant swerved while driving his automobile to obtain more beer; after stopping at a package store parking lot to meet some friends, defendant left by himself for thirty or forty minutes and, upon returning, he appeared "changed all the way around" and "drunker, wilder and out of control"; defendant's eyes were dilated, his complexion had changed, he was sweating and had difficulty speaking or walking; unprovoked, he had inexplicably and viciously assaulted a girlfriend and several strangers; the fatal assault was likewise unprovoked and, except for defendant's reference to the victim's having guarded defendant's brother, inexplicable; and the manner of the assault and defendant's actions immediately before and after were themselves equivocal on the question of whether the defendant actually deliberated and premeditated. Moreover, the district attorney, counsel for defendant and the trial judge all seemed to view the evidence as sufficient to require the voluntary intoxication instruction.

3. **Homicide § 32.1— first degree murder—defense of intoxication—erroneous instruction—prejudicial**

The trial court's error in its instruction on voluntary intoxication in a first degree murder trial was prejudicial where, although there was little question that defendant had committed a homicide, the case was relatively close on the degree of culpability and the issue of whether defendant should be found guilty of first or second degree murder hinged largely on how the jury would consider the evidence of defendant's intoxication. N.C.G.S. § 15A-1443.

APPEAL pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the death sentence entered at the 17 November 1986 Criminal Session of Superior Court, WILKES County, *Washington, J.*, presiding. By order dated 19 December 1986 this Court stayed execution pending defendant's appeal. Heard in the Supreme Court on 10 May 1988.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, and John H. Watters, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Louis D. Bilionis, Assistant Appellate Defender, for defendant appellant.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for North Carolina Civil Liberties Union Legal Foundation, Inc., amicus curiae.

EXUM, Chief Justice.

The sole issue dispositive of this appeal is whether the trial court erroneously instructed the jury on the issue of defendant's voluntary intoxication to defendant's prejudice. We conclude it did and order a new trial.

I.

The defendant and the state agree that in a period of minutes around 11 p.m. on 5 June 1986, the defendant beat Randall Cupp to death with a car jack. State's evidence in the guilt phase of the trial tended to show the following:

Defendant's friends first saw him drinking beer in the driveway of his mother's house around 4 p.m. on 5 June. They saw him shortly thereafter at the home of a neighbor, Betty Melton, where he was also drinking beer. Sometime after this, defendant was seen in the parking lot of Royal's Package Store, again drinking beer. From there, defendant drove to a neighborhood gathering place, "The Forks," where he stayed about fifteen minutes. Defendant then drove to the home of Danny Schneider, where around 8 p.m., he and others were drinking an alcoholic beverage consisting of a mixture of grain alcohol and fruit punch. Around 9:30 p.m., defendant decided to make a "beer run." Driving his own car and taking some of his friends with him, he left

Danny Schneider's house. He stopped for the second time that evening in the parking lot of Royal's Package Store, where a crowd of people had gathered. The store had closed for the evening, but the events leading to the murder of Randall Cupp took place in the store parking lot.

None of the witnesses testified as to how much alcohol the defendant consumed on 5 June, but several described how he acted and appeared during the evening. In the opinion of one witness, defendant was quiet and polite when sober but became profane, loud, boisterous and crazy when drunk. Witness Dean Long, a friend of the defendant, said that on 5 June, defendant was already "high" around 4 p.m. before drinking beer at his mother's house. Long testified defendant was definitely drunk at Danny Schneider's house and continued to drink on the "beer run." Another of defendant's friends testified that defendant swerved as he drove and was "pretty high." Another witness recalled that defendant drove slowly but swerved.

Shortly after arriving at Royal's Package Store for the second time, defendant drove away alone in a friend's car and was gone about 30 minutes. His friends testified that upon returning, he drove the car up and down the road in front of the store, "spinning doughnuts." One of his friends testified that after defendant got out of the car, his eyes were red and he was staggering. Another friend testified that defendant's appearance and behavior were changed in that he was "drunker, wilder and out of control." His eyes were dilated, his face was red and he was sweating. His tongue was so tight he could hardly talk. He staggered and seemed dazed. Another witness described the defendant at this time as, "pretty darn [sic] drunk." Defendant continued to drink beer in the parking lot.

At this point, some other young men drove up in a car. Defendant threw a beer bottle against a wall. When one of his friends criticized this act, he responded by hitting her once in the mouth, drawing blood. Defendant then asked the newly arrived men what they were looking at. The testimony of the witnesses varied as to what happened next, but defendant engaged in fights with either one or two of the men. One witness said defendant fought with a man in the car, trying to pull him out of the vehicle. Another witness said defendant chased and caught one of the men

and was on the ground on top of the man, beating him. Another friend testified defendant had to be pulled off because he was too rough on the victim. According to uncontradicted testimony, as defendant's friends pulled defendant away, he tried to shake them off and struck one of them four times in the back. The friend did not respond or retaliate because he thought this would make defendant even more angry.

Randall and Faye Cupp lived across the road from Royal's Package Store. Mr. Cupp was a correctional officer at the Alexander County Prison Unit, where defendant's brother had been incarcerated. Mr. Cupp had come home from work around 10:30 that evening and he and his wife had retired for the night. Two of defendant's friends rang the Cupps' doorbell around 11 p.m., while defendant was driving up and down in front of Royal's, and asked the Cupps not to call law enforcement officers. The Cupps looked out their window and saw defendant's car, but they took no action. About ten minutes later, the doorbell rang again. This time defendant's friends asked for help. They told the Cupps how defendant had struck one of them in the mouth and how he was fighting, so Cupp decided to go over to the store.

Randall Cupp, wearing trousers and shoes, but no shirt, went to the parking lot. One witness testified defendant did not seem to recognize Cupp, and two other witnesses heard defendant say Cupp had a gun. Defendant went to the trunk of his car and opened it. He took out a jack, left the trunk lid open, and approached Mr. Cupp, who had bent down as if to tie his shoe. Two witnesses testified defendant said, "You guarded my brother, now see if you can guard me." Three witnesses said defendant struck the first blow, hitting Mr. Cupp with the jack. Although Mr. Cupp tried to ward off the blow and to hit defendant with a karate chop on the back of the neck, he was unsuccessful. Defendant quickly struck the victim again and continued to strike him as he lay upon the ground. When one of the bystanders screamed for him to stop, he stopped, walked toward her and began to cry.

Medical evidence indicated the six blows to the head suffered by the victim rendered him unconscious "immediately" and death followed a few minutes thereafter. The victim's brain injuries included bleeding into the subdural spaces and herniation or swelling. The swelling caused cardiac and respiratory arrest; pul-

monary edema followed. Defendant's friend, Dean Long, testified that he and defendant together carried the victim across the road. Mr. Long performed cardiopulmonary resuscitation techniques on the victim and asked defendant to help. When defendant said he did not know how, Mr. Long showed him what to do.

Deputy Thomas Eller of the Wilkes County Sheriff's Department answered a call placed by Mrs. Cupp and arrived while Mr. Long and the defendant were trying to revive the victim. Detective Chris Shew of the Wilkes County Sheriff's Department arrived about 12:15 a.m. Defendant knew Detective Shew, called him by name, and conversed with him. He told Detective Shew that he had been passing by and stopped to see if he could help. He offered to let Detective Shew search his car and, in Detective Shew's opinion, walked normally and talked clearly. Shew looked in the car and saw the jack on the floor behind the driver's seat. Later Deputy Eller took the jack from the car at Shew's instruction.

Defendant offered no evidence.

II.

[1] Defendant contends the trial judge incorrectly instructed the jury concerning defendant's voluntary intoxication. We agree.

In *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972), this Court held the following instructions properly stated the law regarding a jury's consideration of evidence pertaining to a defendant's voluntary intoxication:

> There is evidence in this case which tends to show that the defendant was intoxicated at the time of the acts alleged in this case. Generally, voluntary intoxication is not a legal excuse for crime. However, if you find that the defendant was intoxicated, you should consider whether this condition affected his ability to formulate the specific intent which is required for conviction of first degree murder.
>
> In order for you to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual, specific intent to kill formed after premeditation and deliberation.

> If as a result of intoxication the defendant did not have the specific intent to kill the deceased . . . formed after premeditation and deliberation, he is not guilty of first degree murder.
>
> Therefore, I charge you that if upon considering the evidence with respect to the defendant's intoxication you have a reasonable doubt as to whether the defendant formulated the specific intent required for a conviction of first degree murder, you will not return a verdict of first degree murder. You will then consider whether or not he would be guilty of second degree murder.

Id. at 681, 187 S.E. 2d at 26. This instruction was not only held to be proper in *Wilson*, but it is also the language recommended to our trial judges in North Carolina's *Pattern Jury Instructions for Criminal Cases. See* N.C.P.I. Crim. 305.11.

Defendant requested this instruction at trial. The district attorney requested instructions that in effect negated the specific intent element only if defendant's intoxication was

> so great that his mind and reason were so completely overthrown as to render him utterly incapable to form a deliberate and premeditated purpose to kill. Mere intoxication cannot serve as an excuse for the defendant. It must be intoxication to the extent that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he temporarily, at least, lost the capacity to think and plan.

The trial judge relied in large part upon defendant's requested instruction; but he also inserted the district attorney's request and instructed the jury as follows:

> The defendant contends that he should be excused because he was drunk. You may find there is evidence which tends to show that the defendant was drunk or intoxicated at the time the acts alleged in this case. Generally voluntary intoxication is not a legal excuse for crime. The law does not permit a person who commits a crime in the state of intoxication to use his own vice or weakness as a shelter against the normal legal consequences of his conduct. However, if you find that the defendant was intoxicated, you should consider whether

this condition affected his ability to formulate specific intent which is required for conviction of first degree murder. In order to find the defendant guilty of first degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill formed after premediation [sic] and deliberation. If, as a result of intoxication, the defendant did not have the specific intent to kill the deceased formed after premediation [sic] and deliberation, then he would not be guilty of first degree murder. *However, the intoxication must be so great that his mind and reason were so completely overthrown so as to render him utterly incapable to form a deliberate and premediated [sic] purpose to kill. Mere intoxication cannot serve as an excuse for the defendant. It must be intoxication to the extent that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan.* The law does not require any specific intent for the defendant to be guilty of the crimes of second degree murder or voluntary manslaughter. Thus, the defendant's intoxication can have no bearing upon your determination of his guilt or innocence of these crimes or lesser included offenses of the crime of first degree murder. Therefore, upon the charge of first degree murder, I charge you that upon considering the evidence with respect to the defendant's intoxication, you have a reasonable doubt as to whether the defendant formulated this specific intent required for conviction of first degree murder you would not return a verdict of guilty of first degree murder. (Emphasis supplied.)

While most of these instructions are correct, the italicized portions place a substantially heavier burden on defendant than the law requires him to bear.

On the element of a deliberate and premeditated specific intent to kill in a first degree murder case defendant has no burden of persuasion at all; the burden of persuasion on the existence of this element remains throughout the trial on the state. The state must persuade the jury beyond a reasonable doubt that every essential element of a homicide exists. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508 (1975); *State v. Hankerson*, 288 N.C. 632, 220

S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306 (1977).

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 state, 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.

> The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913). In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975).

State v. Strickland, 321 N.C. 31, 41, 361 S.E. 2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E. 2d 374, 377 (1978)).

Once evidence of this quality has been produced in the trial, the jury must be instructed on the issue of defendant's deliberate and premeditated intent in light of this evidence. The burden of persuading the jury on this issue resting always with the state, the state must satisfy the jury beyond a reasonable doubt that, despite evidence of defendant's intoxication, defendant did form a deliberate and premeditated intent to kill. For the jury, evidence of defendant's intoxication need only raise a reasonable doubt as to whether defendant formed the requisite intent to kill required for conviction of first degree murder in order for defendant to prevail on this issue. *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22; N.C.P.I. Crim. 305.11.

The vice in the instructions complained of is twofold: First, the instructions impose on the jury the standard applicable to defendant's burden of production at trial, a burden defendant must meet before being entitled to voluntary intoxication instruc-

tions at all. While meeting such a standard is a prerequisite to defendant's entitlement to voluntary intoxication instructions, the standard is inapplicable to the jury's consideration of the intoxication evidence. The jury must decide, in light of the intoxication evidence as well as other evidence in the case, whether there is a reasonable doubt that defendant formed a deliberate and premeditated intent to kill, not whether his intoxication was "so great . . . as to render him utterly incapable" of forming such an intent. In other words, to find for defendant on the intoxication issue, the jury does not have to conclude that his intoxication rendered defendant "utterly incapable" of forming the necessary intent; it need only conclude that because of his intoxication either defendant did not form the requisite intent or there is at least a reasonable doubt about it.

Second, the manner in which this complained of language was inserted into the instructions could have led a rational jury to believe that defendant bore the burden of persuading the jury that he was so intoxicated as to be unable to form a deliberate and premeditated intent to kill. So understood, the instructions would impermissibly and unconstitutionally shift the burden of persuasion on essential elements of the crime of first degree murder from the state to the defendant. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508; *State v. Hankerson*, 228 N.C. 632, 220 S.E. 2d 525.

III.

[2] The state argues that any error in the instruction on voluntary intoxication was harmless because the evidence is insufficient to require such an instruction. The trial court, the state says, erred in favor of defendant in giving such an instruction at all.

In certain instances voluntary drunkenness, while not an excuse for a criminal act, may be sufficient to negate the requisite intent element. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). However, "[n]o inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law." *State v. Murphy*, 157 N.C. 614, 619, 72 S.E. 1075, 1077 (1911). "[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree." *State v. Hamby*, 276

N.C. 674, 678, 174 S.E. 2d 385, 387 (1970) (quoting *State v. Thompson*, 110 Utah 113, 123, 170 P. 2d 153, 158 (1946)). Even though a person's blood alcohol content is such that driving would violate the motor vehicle laws, this alone does not entitle the person to an instruction on voluntary intoxication. *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978). As we have already noted, in order for an instruction on voluntary intoxication to be required the evidence must be that defendant's intoxication rendered him "utterly incapable" of forming a deliberate and premeditated intent to kill. *State v. Strickland*, 321 N.C. at 41, 361 S.E. 2d at 888.

When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant. *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985); *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979); *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979); *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750 (1973); *State v. Finch*, 177 N.C. 599, 99 S.E. 409 (1919); *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E. 2d 751 (1984).

While there is some evidence to the contrary, when viewed in the light most favorable to defendant, the evidence of defendant's state of intoxication is enough to require the voluntary intoxication instruction. Defendant had been seen drinking periodically from around 4 p.m. until 11 p.m. on the day of the murder. During that afternoon defendant appeared "high" while drinking more beer with another friend, and by early evening he was drinking a mixture of 190 proof grain alcohol and punch. Witnesses described defendant as "definitely drunk" and "pretty high" by 9:30 p.m. He swerved while driving his automobile to obtain more beer. After stopping at a package store parking lot to meet some friends, defendant left by himself for thirty or forty minutes. Upon returning, he appeared "changed all the way around" and "drunker, wilder and out of control." Defendant's eyes were dilated, his complexion had changed, he was sweating and had difficulty speaking or walking. Unprovoked, he inexplicably and viciously assaulted a girlfriend and several strangers. The fatal assault on Cupp was likewise unprovoked and, except for defendant's reference to Cupp's having guarded defendant's brother, inexplicable. The manner of the assault on Cupp and defendant's actions immediately before and after it were, themselves,

equivocal on the question of whether defendant actually deliberated and premeditated his intent to kill Cupp. Certainly a jury could have found that he did. A jury could also have concluded, under proper instructions, that defendant was so impaired by alcohol that he formed no such intent but was simply thrashing wildly at anyone he perceived as a threat.

We note the district attorney, counsel for defendant, and the trial judge, who heard the evidence, all seemed to view it as sufficient to require the voluntary intoxication instruction. We agree with their assessment.

IV.

[3] The remaining question is whether the error in the instruction requires a new trial. The standards are found at N.C.G.S. § 15A-1443:

> (a) 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 upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.
>
> (b) 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. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

Although there is little question that defendant committed a homicide, the case is relatively close on the degree of his culpability. The closeness is due to both the substantial evidence of defendant's intoxication at the time he committed the crime and, as we have noted, the manner of the fatal assault and defendant's actions immediately before and after it. The central issue for the jury in light of the evidence adduced was whether defendant should be found guilty of first or second degree murder; and this issue hinged largely on how the jury would consider the evidence of defendant's intoxication. For these reasons, insofar as the error

committed is not one of constitutional dimension, defendant has met his burden of satisfying us that had the error in the instructions on intoxication not been made, there is a reasonable possibility that a different result would have obtained at trial. Insofar as the error is one of constitutional dimension, the state has not satisfied us beyond a reasonable doubt that the error was harmless.

Accordingly, defendant must be given a

New trial.

STATE OF NORTH CAROLINA v. CHARLES LEE SCOTT

No. 233A88

(Filed 6 October 1988)

Rape and Allied Offenses § 5— second degree rape—evidence of force—sufficient

The trial judge in a prosecution for second degree rape correctly denied the defendant's motions to dismiss where the evidence disclosed actual physical force used by the defendant to overcome the resistance of the victim in accomplishing the sexual intercourse; the facts of this case are not similar to *State v. Alston*, 310 N.C. 399.

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 89 N.C. App. 680, 367 S.E. 2d 1 (1988), reversing the judgment of *Lewis (Robert D.), J.*, at the 25 March 1987 session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 14 September 1988.

Lacy H. Thornburg, Attorney General, by D. David Steinbock, Assistant Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

The state appeals of right the decision of the Court of Appeals and presents to this Court the question of whether the trial court erred in denying defendant's motions to dismiss the state's

case for insufficiency of the evidence. N.C.G.S. § 15A-1227 (1983). We find no error in the trial court's rulings and reverse the Court of Appeals.

The evidence, viewed in the light most favorable to the state, showed that on 18 September 1986, the victim, who had turned sixteen less than one week before, was living with her mother and younger brother in an Asheville mobile home park. Defendant and his wife, like the victim and her family, had lived in the trailer park for about ten years, and the victim's mother was a very close friend of defendant's wife. The victim did not know the defendant well, although he had provided her family with food for about two years during the time of her mother's divorce. Although she had been involuntarily committed to a psychiatric hospital for a short time the previous May, the victim both attended school and had a job in September of 1986, when the following events transpired.

On 18 September, after her mother had gone to work, the victim sent her brother to defendant's trailer to ask defendant to loan her a couple of cigarettes. Defendant sent two cigarettes to her by the brother, and soon thereafter she telephoned defendant and asked him to bring her a pack of cigarettes if he was out that day and she would pay him for them. Defendant agreed to do so. The victim had requested and received her mother's approval of the cigarette transactions with defendant. Subsequent to these transactions the victim had a telephone conversation with defendant about a car she wanted to buy. During that conversation defendant said he wanted her to go with him the next day to look at the car and that she should not tell her mother about it so they could go alone. She declined this invitation, telling defendant that she could not go anywhere without telling her mother.

Around 10:30 that morning the victim was washing dishes at the kitchen sink when defendant entered her home without knocking. She just turned around and there he was in the room. He said that he had brought the cigarettes, which she accepted. She offered him a dollar in payment, but defendant refused it, saying that it was not necessary that she pay for them. Defendant stayed and talked for a while until she told him that she had to get back to work as she had to finish cleaning the house before she left for school. Defendant responded that the dishes could

wait, and when the victim turned around defendant had her "pinned up against the sink" with an arm on each side of her. She begged him to leave, but he did not leave and told her "it would just take a minute." Defendant began moving his hands over her body and moving his hips against her. Despite her repeated demands that he leave, defendant refused and insisted that he "just wanted to get off."

Although the victim pushed at defendant, "he wouldn't let go" and started angling her toward the back of the trailer. He continued to have her "pinned" with one arm on each side of her. She was able to avoid being maneuvered into the bedroom and fell or stumbled into the bathroom, with defendant right behind her.

In the bathroom, the victim's back was to the bathroom sink. Defendant began to fondle her and attempted to remove her blouse and pants. Defendant was able to get the victim's pants unbuttoned and put her on the bathroom sink, but she got back down. A second time she was able to avoid being positioned on the sink, but on his third effort defendant was able to keep her on the sink. Then defendant unzipped his pants and removed the victim's pants and underpants. In a final effort to avoid defendant, the victim told him that she was "on her period," whereupon defendant pulled out her tampon. Defendant tried to penetrate her vagina with his penis but was unable to do so. After defendant applied vaseline to his penis, he did penetrate her vagina, and after climaxing, pulled out of her and wiped himself with a towel. Defendant warned her not to tell her mother or his wife what he had done, zipped his pants, and left.

The victim went into the living room and saw defendant's cigarettes and a cigar that he had left. After crying for some time, she was able to call the Rape Crisis Center. Two female officers and a male officer soon arrived. The victim described to them what had happened, and the officers took the towel defendant had used into custody. The victim was then taken to the hospital to be examined, and a rape kit, including vaginal swabbing and washes, was prepared.

The manager of the trailer park testified that he had been cutting the grass that morning and saw defendant go into the victim's trailer. After defendant had left the trailer, the manager asked the victim if he could use the bathroom in her trailer. As

he entered and left the trailer, he noticed that she was crying, but she told him that he could not help her. Shortly after he left the trailer, the officers arrived.

The forensic serologist from the SBI testified that he had examined the vaginal smear, the victim's panties, and the towel defendant had used. The serologist found spermatozoa present in each of the objects tested. The sperm were consistent with defendant's blood type, group A secretor. The vaseline jar was not tested for fingerprints. Other witnesses for the state corroborated the victim's testimony.

Upon motion for nonsuit, all the evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the state. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). The state is entitled to every reasonable inference thereon. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). The evidence for the state considered in the light most favorable to it is deemed to be true, and inconsistencies or contradictions therein are disregarded. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971). The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977). The motion for dismissal presents to the court the questions of whether there is substantial evidence of each essential element of the crime charged or of a lesser included offense and whether the defendant was the perpetrator of the crime. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If there is such substantial evidence, the motion for dismissal should be denied. If, however, the evidence is sufficient to raise only a suspicion as to whether the offense was in fact committed or whether the accused committed the offense, the motion should be allowed. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983).

The battleground in this case is whether there was sufficient evidence of the essential element of force to support the conviction of rape in the second degree. N.C.G.S. § 14-27.3 requires that for a conviction of rape in the second degree it must be shown that the defendant engaged in vaginal intercourse with another person by force and against the will of the other person. In the case before us, the defendant makes no contention that the evi-

dence is insufficient to show that the vaginal intercourse was against the will of the victim. Defendant insists rather that the intercourse was not accomplished by the use of force. The statutory phrase, "by force and against the will of the other person," means the same as it did at common law. *State v. Booher*, 305 N.C. 554, 290 S.E. 2d 561 (1982). The requisite force may be established either by actual physical force or by constructive force in the form of fear, fright, or coercion. *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673 (1987). "Physical force" means force applied to the body. Black's Law Dictionary 1032 (5th ed. 1979).

Defendant relies upon *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984). This reliance is misplaced. *Alston* does not apply to the facts in this case: (1) In *Alston* there was a prior consensual sexual history between the parties. This is not true in the instant case. (2) The victim in *Alston* had several clear opportunities to walk away and did not do so. The victim in the case before us was trapped inside a mobile home and could not escape, being subjected to a continuing sequence of physical pressure. (3) The victim in *Alston* was an adult. The victim here was a child, barely sixteen years of age. (4) From the standpoint of the victim, the defendant occupied a position of authority, both because he was a fifty-year-old man and because he was the husband of her mother's best friend. This was not true in *Alston*. (5) The victim in *Alston* walked voluntarily to the location of the rape. Here the victim was trapped in her own trailer by the defendant. (6) This victim had a recent history of psychiatric problems. The victim in *Alston* did not. Again we state, as we did in *State v. Strickland*, 318 N.C. 653, 351 S.E. 2d 281 (1987), and reaffirmed in *State v. Etheridge*, 319 N.C. 34, 352 S.E. 2d 673, that *Alston* is only of precedential value in cases factually similar to *Alston*. The facts in the instant case are not.

Here the evidence discloses actual physical force used by the defendant to overcome the resistance of the victim in accomplishing the sexual intercourse. Actual physical force is shown by the evidence in this case that (1) defendant pinned the victim against the sink in the kitchen with one of his arms on each side of her body so that she could not move away; (2) despite the victim's repeated begging that he leave, defendant continued to restrain her; (3) even though the victim pushed defendant, he would not let her go; (4) the defendant, keeping his victim pinned, angled

her down the hall and into the bathroom; (5) the defendant repeatedly placed the victim upon the bathroom sink so that he could accomplish the act of sexual intercourse, even though she was able to remove herself from the sink two times; (6) the defendant forcibly unbuttoned the victim's blouse and forcibly removed her pants and panties; (7) after learning that the victim was having her period and had a tampon inserted in her vagina for that purpose, defendant forcibly removed the tampon; (8) the defendant pushed his penis against the victim's vagina but was unable to achieve penetration; (9) after applying vaseline to his penis, defendant was able to insert it in the victim's vagina; (10) the defendant, by not letting go of his victim and keeping her pinned until he was successful in getting her into the bathroom, kept her within his physical power during the entire sexual episode.

In applying the rules for deciding the question of whether the evidence was sufficient to carry the state's case to the jury, we hold that the evidence was sufficient and that the trial court did not err in denying defendant's motions for dismissal. The evidence in this case is well within that of *State v. Strickland*, 318 N.C. 653, 351 S.E. 2d 281. In *Strickland*, the parties had no prior sexual relationship and defendant, after learning that the victim was not feeling well, refused to leave her premises, broke the latch from her screen door and forced his way into the home, grabbing her from behind and putting his hand over her mouth. He pulled her into the bedroom by her arm, pushed her on the bed, removed her panties, and had sexual relations with her. The victim did not fight with him and did not scream or holler. This Court held in *Strickland* that the above-summarized evidence was sufficient to fulfill the element of force required for rape in the second degree. *See also State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969).

We hold that the trial judge was correct in denying the defendant's motions to dismiss and accordingly reverse the decision of the Court of Appeals.

Reversed.

STATE OF NORTH CAROLINA v. JAMES CURTIS DARDEN

No. 46A87

(Filed 6 October 1988)

1. **Criminal Law § 135.4— capital case—denial of mistrial at sentencing phase—life sentence—absence of prejudice**

Defendant could not have been prejudiced by the trial court's failure to grant a motion for mistrial directed only to the sentencing phase of a first degree murder case since defendant could have been sentenced only to death or life imprisonment, and defendant received the less severe sentence of life imprisonment.

2. **Criminal Law § 86.5— cross-examination of defendant—prior violent conduct—door opened—discretion of court**

When defendant testified that he had not robbed or injured the victim "or anyone else," he opened the door to cross-examination about specific instances of prior violent conduct designed to rebut this assertion. Moreover, the accuracy of defendant's assertion that he had not injured anyone else was probative of his truthfulness or untruthfulness, and the trial court could, in its discretion, allow cross-examination regarding the assertion. N.C.G.S. § 8C-1, Rule 608(b) (1986).

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-27 (a) (1987) from a judgment entered by *Pope, J.*, on 10 October 1986 in Superior Court, WAYNE County, imposing a life sentence upon defendant's conviction of first degree murder. On 31 December 1987 we allowed defendant's petition to bypass the Court of Appeals as to a judgment imposing a forty year sentence of imprisonment upon defendant's conviction for armed robbery. Heard in the Supreme Court 13 September 1988.

Lacy H. Thornburg, Attorney General, by Elizabeth G. McCrodden, Associate Attorney General, for the State.

Geoffrey C. Mangum for defendant-appellant.

WHICHARD, Justice.

A detailed recitation of the facts is unnecessary to the resolution of the issues presented in this appeal. Defendant was charged with first degree murder and armed robbery. The State's evidence tended to establish that on the night of 13-14 August 1985 defendant entered a store in Wayne County, inflicted stab wounds on an employee resulting in the employee's death, and

stole several hundred dollars in currency and coins. Defendant offered evidence tending to implicate another as the perpetrator of the crimes charged.

In a capital trial the jury returned a verdict of guilty on the first degree murder charge and recommended a sentence of life imprisonment. The trial court sentenced defendant accordingly. The jury also found defendant guilty of armed robbery. The trial court sentenced defendant to forty years imprisonment on the armed robbery charge, to run consecutively to the life sentence entered on the first degree murder conviction. We find no error.

Defendant first contends that the trial court erred in denying his motion for a mistrial based on the denial of his right to an impartial jury. The factual basis for the motion was defendant's assertion that following the guilt phase of the trial, he discovered that a juror had known him in the past and had been aware that he previously had killed a man whom the juror had known.

The record does not contain a motion for mistrial. However, the order from which defendant appeals denies "the defendant's motion for a mistrial." It also recites that "[t]he defendant is moving for a mistrial *in the sentencing phase of this trial.*" (Emphasis added.) Defendant does not except to this recitation. Further, statements of defense counsel at a voir dire hearing, which occurred between the guilt and sentencing phases of the trial, support the recitation that any motion for mistrial was directed only to the sentencing phase. At the commencement of the voir dire hearing, one of defendant's attorneys stated that "the State intends to put on evidence *in this sentencing trial* showing that the defendant was convicted of involuntary manslaughter on the death of Thurman Blackmon." (Emphasis added.) Defendant's other attorney stated that this "is a very important aggravating circumstance," obviously referring to the "prior violent felony" aggravating circumstance, N.C.G.S. § 15A-2000(e)(3) (1983), which could have served as a basis for a sentence of death. N.C.G.S. § 15A-2000(c)(1) (1983). At the conclusion of the voir dire hearing, one of defendant's attorneys argued:

> [H]e [the juror] would already have a preconceived notion about at least the sentencing phase if he didn't have it in the first phase but at least now he would, he would have it . . . in the sentencing phase and very well may impart that to

other jury members. We are going to be arguing very strenuously that . . . this first conviction [defendant's prior conviction for involuntary manslaughter] is the result of an unintentional act . . ., and he very well may think otherwise and we feel it [is] just . . . a logical, everyday conclusion. I mean that he [the juror] would have to know something about the events surrounding the death of Thurman Blackmon.

. . . .

. . . I don't think there is any other conclusion but that he . . . should not be allowed to participate *in a sentencing hearing* against a man in a capital case . . . that he already had knowledge of the circumstances surrounding his previous conviction.

. . . .

. . . [W]e are serious about the motion . . . and we feel that there is . . . too much prejudice from [the juror] for him *to be able to pass on the death or life of* [the defendant].

(Emphasis added.)

[1] Upon defendant's conviction of first degree murder, he could only be sentenced to death or life imprisonment. N.C.G.S. §§ 14-1.1 (1986); 15A-2000 (1983). He received a life sentence, the less severe of the permissible options. He thus could not have been prejudiced by the failure to grant a motion for mistrial directed only to the sentencing phase. These assignments of error are therefore overruled.

[2] Defendant further contends that the trial court erred in allowing the State to cross-examine him about specific instances of prior violent conduct. Defendant had testified on direct examination:

Q. . . . [d]id you rob or injure [the victim] in any way?

A. I have not robbed or injured [the victim] *or anyone else.*

(Emphasis added.) The State was then allowed, over objection, to cross-examine defendant regarding the statement that he had not injured "anyone else." This produced evidence of prior instances

of violent conduct on the part of defendant that resulted in injury to others.

By testifying that he had not robbed or injured the victim *or anyone else*, defendant "opened the door" to cross-examination designed to rebut his assertion. *State v. Bullard*, 312 N.C. 129, 158, 322 S.E. 2d 370, 386 (1984). "Evidence which might not otherwise be admissible against a defendant may become admissible to explain *or rebut* other evidence put in by the defendant himself." *State v. Small*, 301 N.C. 407, 436, 272 S.E. 2d 128, 145-46 (1980) (emphasis added). The accuracy of defendant's assertion that he had not injured anyone else was probative of his truthfulness or untruthfulness, and the trial court thus could, in its discretion, allow cross-examination regarding the assertion. N.C.G.S. § 8C-1, Rule 608(b) (1986). We find no abuse of discretion in the cross-examination allowed. We likewise find no abuse of discretion in the refusal to prohibit the cross-examination on the ground that the probative value of the evidence produced thereby was outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1986); *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986).

No error.

STATE OF NORTH CAROLINA v. EDDIE SMITH

No. 528A87

(Filed 6 October 1988)

1. **Criminal Law § 134.4— sentences concurrent with life sentence—youthful offender statute inapplicable**

A defendant serving a sentence or sentences of less than life imprisonment concurrently with a mandatory life sentence is not entitled to the benefit of the youthful offender statute, Art. 3B of G.S. Ch. 148.

2. **Criminal Law § 134.4— youthful offender—sentence consecutive to life sentence—failure to make no benefit finding—absence of prejudice**

A seventeen-year-old defendant was not prejudiced by failure of the trial court to determine whether he would benefit from serving a two-year sentence for intimidation of a witness as a committed youthful offender where this sentence is to be served consecutively to a life sentence, defendant must serve twenty years of his life sentence before he can be eligible for parole, and at

that time he would be thirty-seven years of age and ineligible to serve a sentence as a committed youthful offender.

DEFENDANT appealed from judgments of imprisonment imposed by *Griffin (William C.), J.*, at the 22 June 1987 session of Superior Court, NEW HANOVER County. Submitted to the Supreme Court on 14 September 1988 for decision pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Lacy H. Thornburg, Attorney General, by Henry T. Rosser, Special Deputy Attorney General, for the state.

Leland Q. Towns for defendant.

MARTIN, Justice.

On 24 June 1987, defendant was convicted of first-degree sexual offense, crime against nature, two charges of simple assault, and intimidation of a witness. Defendant was sentenced to mandatory life imprisonment on the sexual offense charge, three years' imprisonment on the crime against nature charge, and thirty days' imprisonment on each of the assault charges. All of these sentences were to be served concurrently. On the charge of intimidation of a witness, defendant was sentenced to two years' imprisonment to be served consecutive to the life sentence.

Defendant gave notice of appeal of each of the convictions to the Court of Appeals. On 14 December 1987 this Court allowed defendant's motion to bypass the Court of Appeals on all of the non-life cases. N.C.G.S. § 7A-31 (1986); N.C.R. App. P. 15. No motion or petition was made regarding the first-degree sexual offense case. Defendant did not give notice of appeal to this Court of his conviction of first-degree sexual offense, nor does he set forth or argue any assignments of error with respect to that conviction. This Court does not have jurisdiction over the first-degree sexual offense case.

As to each of the cases before this Court, defendant contends that he is entitled to a new sentencing hearing because the trial judge failed to determine whether defendant would benefit from being sentenced as a committed youthful offender pursuant to article 3B of chapter 148 of the General Statutes of North Carolina. At the time of sentencing defendant did not request a determina-

tion of whether he would benefit from being sentenced as a committed youthful offender in any of his sentences, nor did he object to any of the sentences imposed. We reject defendant's contention and overrule this assignment of error.

[1] Defendant was seventeen years old at the time of sentencing and would have been subject to being considered for sentencing as a committed youthful offender in an appropriate case. However, here all of defendant's sentences (except the two-year sentence for intimidation of a witness discussed below) run concurrently with defendant's mandatory life sentence. This Court has held that article 3B of chapter 148 does not apply to youthful offenders convicted of crimes for which a life sentence is mandatory. *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977). This defendant was convicted of first-degree sexual offense, requiring a life sentence. N.C.G.S. § 14-27.4(b) (1986); N.C.G.S. § 14-1.1(a)(2) (1986). It follows, therefore, and we so hold, that a defendant serving a sentence or sentences of less than life imprisonment concurrently with a mandatory life sentence is not entitled to the benefit of article 3B of chapter 148 of the General Statutes. As Chief Justice Sharp wrote in *Niccum*, the provisions of the youthful offender statute cannot be logically related to youthful offenders serving mandatory life sentences. This is true whether the defendant is serving only a single mandatory life sentence or one concurrently with one or more sentences for a term of years. In either case the defendant cannot receive the benefit of the purposes of the youthful offender statute. N.C.G.S. § 148-49.10 (1987). Therefore, it would be an exercise in futility to require the trial judge under such circumstances to determine whether a defendant would benefit by sentencing as a committed youthful offender.

[2] Defendant was sentenced to two years' imprisonment on the intimidation of a witness conviction, to be served at the expiration of defendant's life sentence. Assuming arguendo that it was error for the trial judge to fail to determine whether defendant would benefit from serving this sentence as a committed youthful offender, defendant has failed to show prejudice. N.C.G.S. § 15A-1443(a) (1983). Defendant must serve twenty years of his life sentence before he can be eligible for parole. N.C.G.S. § 15A-1371(a1) (1983). At that time he would be thirty-seven years of age and would be ineligible to serve a sentence as a committed youthful offender. Therefore, defendant cannot receive the bene-

fits of serving his two-year sentence as a committed youthful offender. Defendant has not demonstrated that the remote possibility of executive commutation or pardon would realistically allow him to serve this sentence while he is eligible to do so as a committed youthful offender. Defendant's argument with regard to this sentence is without merit.

No error.

JESSE R. SIMPSON, RICHARD D. MOORE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E. T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA

No. 2A88

(Filed 6 October 1988)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(1) from a decision of the Court of Appeals, 88 N.C. App. 218, 363 S.E. 2d 90 (1987), which reversed summary judgment for defendants entered at the 6 October 1986 Session of Superior Court, WAKE County, *Farmer, J.*, presiding, and remanded for further proceedings consistent with the opinion. Heard in the Supreme Court on 13 September 1988.

Anderson, Schiller & Rutherford, P.A., by Marvin Schiller, for plaintiff appellees.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Assistant Attorney General, for defendant appellants.

PER CURIAM.

Affirmed.

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

ADARON GROUP, INC. v. INDUSTRIAL INNOVATORS, INC.

No. 396P88.

Case below: 90 N.C. App. 758.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

BLACK-DEK ENTERPRISES v. APPLE COMPUTER

No. 327P88.

Case below: 90 N.C. App. 411.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

BROWN v. LUMBERMENS MUT. CASUALTY CO.

No. 337P88.

Case below: 90 N.C. App. 464.

Petitions by plaintiffs and by defendant (General Motors Corp.) for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

BROWN v. LUMBERMENS MUT. CASUALTY CO.

No. 337PA88.

Case below: 90 N.C. App. 464.

Petition by defendant (Lumbermens Mutual Casualty) for discretionary review pursuant to G.S. 7A-31 allowed 6 October 1988, review limited to the single question presented in the petition.

CHESNUTT v. PRIVATE INVESTMENT CORP.

No. 320P88.

Case below: 90 N.C. App. 411.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

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

CRIST v. ROYAL

No. 376P88.

Case below: 90 N.C. App. 611.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

DRISCOLL v. U.S. LIABILITY INS. CO.

No. 387P88.

Case below: 90 N.C. App. 569.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

DUKE POWER CO. v. CITY OF MORGANTON

No. 386P88.

Case below: 90 N.C. App. 755.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

ELITE CONSTRUCTION CO. v. CENTRAL BUILDERS, INC.

No. 353P88.

Case below: 90 N.C. App. 611.

Petition by defendants and third-party defendants for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

GRIFFIN ROOFING CO. v. GRIFFIN BLDRS., INC.

No. 315P88.

Case below: 90 N.C. App. 411.

Petition by defendants (Miller) for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

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

HINSON v. SMITH

No. 181P88.

Case below: 89 N.C. App. 127.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

IN RE SALMONS

No. 419P88.

Case below: 79 N.C. App. 369.

Petition by Mae Salmons for writ of certiorari to the North Carolina Court of Appeals denied 6 October 1988.

KEN-MAR FINANCE v. HARVEY

No. 306P88.

Case below: 90 N.C. App. 362.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

MAHMOUD v. FOXX

No. 316P88.

Case below: 90 N.C. App. 411.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

MITCHELL v. LOWERY

No. 284P88.

Case below: 90 N.C. App. 177.

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

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

PARRISH v. GRAIN DEALERS MUTUAL INS. CO.

No. 363PA88.

Case below: 90 N.C. App. 646.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 October 1988.

PEELE v. PROVIDENT MUT. LIFE INS. CO.

No. 326P88.

Case below: 90 N.C. App. 447.

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 6 October 1988. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

POLLARD v. SMITH

No. 311PA88.

Case below: 90 N.C. App. 585.

Motion by plaintiff to dismiss appeal by Department of Crime Control for lack of substantial constitutional question denied 6 October 1988. Petition by Department of Crime Control for discretionary review pursuant to G.S. 7A-31 allowed 6 October 1988. Petition by Department of Crime Control for writ of supersedeas allowed 6 October 1988.

ROGERS v. ROGERS

No. 351P88.

Case below: 90 N.C. App. 408.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

SMITH v. SCHRAFFENBERGER

No. 336P88.

Case below: 90 N.C. App. 589.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

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

STATE v. BENFIELD

No. 454P88.

Case below: 91 N.C. App. 228.

Petition by Attorney General for temporary stay allowed 28 September 1988.

STATE v. BRUCE

No. 347P88.

Case below: 90 N.C. App. 547.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE v. CAMPBELL

No. 352P88.

Case below: 90 N.C. App. 761.

Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 6 October 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE v. DAY

No. 392P88.

Case below: 90 N.C. App. 711.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 October 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE v. FERGUSON

No. 344P88.

Case below: 90 N.C. App. 513.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988. Appeal by Attorney General pursuant to G.S. 7A-30 dismissed 6 October 1988.

STATE v. HILDRETH

No. 348P88.

Case below: 90 N.C. App. 612.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE v. HUTCHENS

No. 379P88.

Case below: 91 N.C. App. 169.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE v. MESSICK

No. 358P88.

Case below: 88 N.C. App. 428.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 October 1988.

STATE v. NARCISSE

No. 328P88.

Case below: 90 N.C. App. 414.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE v. SPRUILL

No. 414P88.

Case below: 90 N.C. App. 580.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 October 1988.

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

STATE v. STURKIE

No. 439P88.

Case below: 91 N.C. App. 249.

Petition by Attorney General for temporary stay allowed 23 September 1988 pending consideration and determination of the Attorney General's notice of appeal and petition for discretionary review.

STATE v. WILLIAMS

No. 378P88.

Case below: 90 N.C. App. 614.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE EX REL. BRYANT v. STOREY

No. 374P88.

Case below: 90 N.C. App. 770.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

STATE FARM MUTUAL AUTO. INS. CO. v. HOLLAND

No. 391PA88.

Case below: 90 N.C. App. 730.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 October 1988.

STROTHER v. N.C. FARM BUREAU MUT. INS. CO.

No. 398P88.

Case below: 90 N.C. App. 734.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

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

TAY v. FLAHERTY

No. 349P88.

Case below: 90 N.C. App. 346.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

WALKER v. GOODSON FARMS, INC.

No. 346P88.

Case below: 90 N.C. App. 478.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

WILLIAMS v. ODELL

No. 399P88.

Case below: 90 N.C. App. 699.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

PETITION TO REHEAR

BOOE v. SHADRICK

No. 221A87.

Case below: 322 N.C. 567.

Petition by defendants to rehear denied 6 October 1988.

STATE OF NORTH CAROLINA v. MICHAEL LEE FULLWOOD

No. 37A86

(Filed 3 November 1988)

1. **Criminal Law § 98.2— Rule 615 motion to sequester witnesses—discretion of court**

A motion to sequester witnesses made pursuant to N.C.G.S. § 8C-1, Rule 615, like a motion under N.C.G.S. § 15A-1225, rests in the discretion of the trial judge.

2. **Criminal Law § 98.2— refusal to sequester witnesses—no abuse of discretion**

The trial court did not abuse its discretion in the denial of defendant's Rule 615 motion to sequester witnesses where the record indicates that the court carefully considered defendant's motion and denied it only after hearing and weighing the concerns expressed by both defendant and the State, and where the court determined that there were no eyewitnesses to the crimes and that defendant had copies of the pre-trial statements of the witnesses to use in cross-examination. N.C.G.S. § 8C-1, Rule 615.

3. **Criminal Law § 135.3; Jury § 7.14— capital punishment views—peremptory challenges**

Both the prosecutor and defense counsel may exercise peremptory challenges to exclude jurors based upon their voir dire testimony regarding their attitude toward capital punishment.

4. **Constitutional Law § 61; Criminal Law § 135.3; Jury § 7.11— death penalty views of jurors—fair cross-section principle inapplicable**

The fair cross-section of the community principle does not extend to petit juries. Even if fair cross-section analysis were so extended, jurors equivocal as to the death penalty do not qualify as a distinctive group for fair cross-section purposes.

5. **Criminal Law § 82.2— physician-patient privilege—waiver by trial court—no illegal search**

The trial court did not abuse its discretion in ruling that the physician-patient privilege should be waived and that a surgeon's testimony concerning defendant's wounds should be allowed into evidence even though investigators obtained information from the surgeon before the trial court compelled his testimony. Moreover, evidence voluntarily given by the surgeon to the police during a criminal investigation was not the product of an illegal search. Assuming error *arguendo* in the admission of the surgeon's testimony, such error was clearly harmless where two other doctors testified to essentially the same facts and opinions stated by the surgeon.

6. **Criminal Law § 53— expert medical testimony—use of "guess"**

A pathologist's use of the word "guess" did not render inadmissible his opinion as to the length of time between the victim's injuries and her death.

7. Criminal Law § 53— medical testimony—objection not request for underlying facts

The trial court was not required to recognize defendant's objection to a pathologist's opinion testimony as a request under N.C.G.S. § 8C-1, Rule 705 for disclosure of the facts and data underlying the opinion where defendant made no specific request pursuant to Rule 705.

8. Criminal Law § 169— exclusion of testimony—relevance not obvious—failure to make offer of proof

The exclusion of testimony will not be held prejudicial where the relevance of the proffered testimony is not obvious from the record and defendant did not make an offer of proof showing the substance of what the witness would have testified. N.C.G.S. § 8C-1, Rule 402 (1988).

9. Criminal Law § 73.4— statement in emergency room—refusal to admit as excited utterance

The trial court in a first degree murder case did not err in refusing to admit defendant's emergency room statement that his girlfriend (the victim) had stabbed him as an excited utterance under N.C.G.S. § 8C-1, Rule 803(2) where defendant made the statement over an hour after the murder was discovered, and the trial court could properly conclude that defendant had time to manufacture the statement and did not make it spontaneously.

10. Criminal Law § 33— exclusion of relevant evidence—waste of time

The trial court in a first degree murder case did not err in refusing to admit the entire packet of defendant's medical records on the ground that it would be a waste of time where the jury heard plenary testimony concerning wounds received by defendant, and the significance to the case of the excluded portions of defendant's records was not established. N.C.G.S. § 8C-1, Rule 403 (1988).

11. Criminal Law § 102.6; Homicide § 4.3— first degree murder—jury argument—cold state of blood—act in passion immaterial

The prosecutor's jury argument in a first degree murder case that the State has to prove that defendant formed the intent to kill the victim in a cold state of mind or blood but whether he was in passion when he killed her is immaterial was a correct statement of the law and properly permitted by the trial court.

12. Homicide § 25.2— first degree murder—instructions on intent to kill

While the trial court's instructions on premeditation and deliberation were in form different from those requested by defendant, they were the same in substance where the requested instructions stressed that the intent to kill must have been formed in a "cold state of blood," and the instructions given emphasized this by stating that the intent to kill must have been formed "in a cool state of mind" and not "during some suddenly aroused violent passion." Furthermore, the instructions given were a correct statement of the law.

13. Homicide § 25.2— premeditation and deliberation—lethal blows after victim felled—supporting evidence

The trial court's instruction that premeditation and deliberation may be proved by the infliction of lethal blows after the victim was felled did not permit the jury to infer premeditation and deliberation from factors not supported by the evidence where there was evidence supporting the State's theory that defendant slashed the victim as she attempted to escape from him, chased her into the living room where she fell to the floor, and then stabbed her to death.

14. Constitutional Law § 63— death qualification of jury—constitutionality

Death qualification of the jury in a first degree murder case did not violate defendant's constitutional rights to due process and to a jury representing a cross-section of the community.

15. Criminal Law § 135.9— mitigating circumstance—extenuating relationship—refusal to submit—mental or emotional disturbance submitted

The trial court in a first degree murder case did not err in refusing to submit defendant's proposed nonstatutory mitigating circumstance of an extenuating relationship between defendant and the victim where the trial court gave a peremptory instruction on the submitted circumstance that defendant committed the murder while under the influence of mental or emotional disturbance arising out of the state of his relationship with the victim.

16. Criminal Law § 135.9— mitigating circumstance—no significant criminal history—submission not required

The trial court did not err in refusing to submit as a mitigating circumstance for first degree murder that defendant did not have a significant history of prior criminal activity where neither defendant nor the State introduced evidence to show such mitigating circumstance.

17. Criminal Law § 135.9— mitigating circumstances—jury's failure to answer all "yes" or "no"

The fact that the jury did not answer all mitigating circumstances submitted for a first degree murder with either a "yes" or a "no," but put a dash following one statutory mitigating circumstance and left blank the catch-all provision for mitigating circumstances, did not render the verdict form constitutionally defective.

18. Criminal Law § 135.9— nonstatutory mitigating circumstances—determination of mitigating value

The trial court did not err in refusing to instruct the jury that if it found any nonstatutory mitigating circumstances, it must give them some mitigating value, since it is for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value.

19. Criminal Law § 102.12— capital case—argument that sentence not discretionary

The district attorney properly stated the law in his sentencing argument in a first degree murder case when he argued that the sentence was not pure-

ly a matter for the jury's discretion but must be determined "under the instructions of the Court."

20. Criminal Law § 102.12— jury argument—Biblical references to death for murderer

The trial court did not abuse its discretion by not intervening *ex mero motu* when, during the sentencing argument in a first degree murder case, the prosecutor read verses from the Bible which say that a murderer shall be put to death.

21. Criminal Law § 135.8— especially heinous aggravating circumstance—constitutionality

The "especially heinous, atrocious, or cruel" aggravating circumstance of N.C.G.S. § 15A-2000(e)(9) is not unconstitutionally subjective and arbitrary where the jury is instructed that it applies only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim."

22. Criminal Law § 135.7— capital case—instructions on aggravating and mitigating circumstances

The N.C. Pattern Jury Instruction does not unconstitutionally impose on the jury a duty to return a recommendation of death if it finds that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty.

23. Criminal Law § 135.9— mitigating circumstances—requirement of unanimity

The trial court did not err in instructing the jury that they must be unanimous before they could find the existence of a mitigating circumstance.

24. Criminal Law § 135.10— death penalty not disproportionate

A sentence of death imposed on defendant for first degree murder was not excessive or disproportionate to the penalty imposed in similar cases where the jury found that the murder was especially heinous, atrocious or cruel, and where the evidence showed that defendant brutally and repeatedly slashed and stabbed the victim in front of several small children, and that the victim suffered great physical and psychological pain before death.

Chief Justice EXUM concurring.

Justice FRYE dissenting as to sentence.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) (1986) from a judgment imposing the sentence of death entered by *Snepp, J.*, at the 3 December 1985 Criminal Session of Superior Court, BUNCOMBE County. On 13 November 1986 we allowed defendant's petition to bypass the Court of Appeals in an appeal from a conviction of felonious breaking or entering. Heard in the Supreme Court 8 February 1988; additional arguments heard 22 August 1988.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, for the State (original brief and argument); Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, G. Patrick Murphy, Assistant Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State (supplemental brief and argument).

Malcolm Ray Hunter, Jr., Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for defendant-appellant (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, for defendant-appellant (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

WHICHARD, Justice.

Defendant was convicted of first degree murder and felonious breaking or entering. The jury recommended the death sentence for the murder, and the trial court sentenced accordingly. It also sentenced defendant to ten years in prison for the breaking or entering. We find no error.

The State's evidence, in pertinent summary, showed the following:

Defendant and Deidre Waters had dated for approximately three and one-half years. They had a child, Michelle, born on 14 April 1984, and moved into an apartment together in August 1984. In early March 1985, defendant and Deidre had an argument, after which defendant left town for three weeks. While he was gone, defendant made several collect calls to Deidre at her apartment and at her workplace. Deidre tried to get the locks on the apartment changed. On 24 March 1985, defendant returned to town, broke into the apartment, and stayed there for a few days.

On 28 March, Deidre went to work as a day care teacher at the home of Michael and Camille Hawks. She called her grandmother and asked if she could spend the next several nights with

her. After work, Deidre went to defendant's mother's house, picked up Michelle, and went to her mother's home. Later that evening she drove her mother's beige car to the Buncombe County Courthouse and went to the magistrate's office. Magistrate James Maney testified that Deidre asked for a communicating threats warrant against defendant. Deidre told Maney that defendant had threatened to cut her head off and to cut her heart out and take it to her mother or grandmother. She told the magistrate she was planning to stay with her grandmother, and she requested a police escort to get clothes from her apartment.

Due to transportation problems, Deidre spent that night at her mother's house. She told her mother, Elaine Mills, that she was tired of defendant's threats and that she had taken out a warrant on him. Defendant called Ms. Mills five or six times during the night trying to find Deidre. At Deidre's request, Ms. Mills told defendant that she had not seen Deidre.

On the morning of 29 March, defendant again phoned Ms. Mills' home, but Deidre did not talk to him. At 7:45 a.m. defendant went to the home of an acquaintance, Betty Holloway, and asked if he could watch out her kitchen window for a beige car which would take him to work. Ms. Mills' home could be seen from Ms. Holloway's home. Defendant left the Holloway residence around 8:00 a.m.

At about the same time, Ms. Mills and Deidre left the Mills' home. A neighbor testified that he saw Deidre and Ms. Mills get into their car and drive away and that he then saw defendant jog down the hill in the direction of the car.

At 8:20 a.m. Ms. Mills dropped Deidre off at the Hawks' residence. While Ms. Hawks was still at home, Deidre received calls from defendant's mother and from defendant. Deidre told defendant's mother that she had taken out the warrant because she was tired of defendant threatening to cut her head off and to cut her heart out. Ms. Hawks left her home around 8:30 a.m.

At 9:30 a.m. Robin Ferrell arrived at the Hawks' home to leave her child at the day care center. She went to the front door, found the door locked, and began knocking. When there was no answer, she went to the front window. The window was broken. She saw blood in the house and heard the children crying. Ms.

Ferrell phoned Mr. Hawks from a neighbor's house; she then returned to the Hawks' home, coaxed the children to the window, and lifted them out. The children told her that Deidre was sleeping on the floor and that a man was sleeping on the floor with her.

When Mr. Hawks arrived, he and Ms. Ferrell went into the house. They found Deidre on the living room floor with her head against the base of the couch. She had no pulse and her eyes were open, dilated and glassy. Her neck was "severely cut," and her chest was "completely covered with blood." Defendant lay across her legs with his head near her lap. When Mr. Hawks pulled defendant off Deidre, defendant moaned and moved around. Mr. Hawks moved a knife, which was near defendant, to the foyer. He and Ms. Ferrell went outside to wait for the police.

At 10:00 a.m. medical personnel arrived and attempted to give first aid to defendant, who had a wound in his stomach and wounds on his neck and arms. Defendant fought with them. When they got him on the stretcher, he said, "Don't stab me anymore, don't stab me anymore." The paramedic who put defendant in the ambulance expressed the opinion that defendant was not in shock at that time.

Sergeant Ted Lambert and Detective Walt Roberson of the Asheville Police Department arrived at the scene at 10:10 a.m. Sergeant Lambert noticed the broken window and blood on the floor in the foyer. They found the bloody knife which Mr. Hawks had moved lying in the foyer. Deidre was lying on the living room floor with blood on her clothing, underneath her and throughout the living room. The paramedics were treating defendant. They found blood in the sitting room, on the outside of the first floor bathroom door and on the walls, mirror and commode in the bathroom. The bathroom door appeared to have been forced open. In the dining room they found defendant's grey jacket, pieces of the broken window glass, and the plastic from the window covering. The cord of the dining room telephone had been pulled from the jack, and the receiver lay on the floor. There was blood on the jacket, the window glass and plastic, the phone receiver, the walls and the floor.

In the kitchen they found blood on the floor, the counter, and the refrigerator. A bloody butcher knife with defendant's palm print on it lay on the kitchen counter, and a steak knife with

traces of blood on it lay under the high chair. There was also blood on the stairway and on the upstairs phone.

Lieutenant William Gibson of the Asheville Police Department took blood scrapings from many areas in the house. The tests revealed that the blood on the butcher knife was consistent with that of defendant and Deidre, the blood on the knife in the foyer was defendant's, and the steak knife did not have enough blood on it that the source of the blood could be traced. The blood throughout the house was consistent with that of either defendant or Deidre.

The autopsy on Deidre's body disclosed twenty-four significant wounds, most of which were slash wounds. Two of the wounds were capable of causing death: a deep slashing wound on her neck which cut her carotid artery, and a penetrating wound on her anterior chest which went into her right lung. Dr. George Lacy, the pathologist, testified that Deidre could have survived from fifteen to forty-five minutes after receiving the fatal wounds. The Chief Medical Examiner, Dr. Page Hudson, testified that, in his opinion, she died within a few minutes after receiving these wounds.

Dr. Frank Edwards, an emergency room doctor, testified that defendant was in shock when he was admitted to the hospital. Dr. Joseph Noto, the surgeon who treated defendant, testified that defendant had a series of parallel superficial cuts on his wrists and neck. He had a stab wound in his abdomen. Dr. Noto opined that because the wounds were straight and precise, the neck, wrist and abdomen wounds were all self-inflicted. Dr. Hudson agreed that the wrist and neck wounds were self-inflicted and said that it was "more likely than not" that the abdominal wound was self-inflicted, although "it could have been inflicted by someone else."

Grover Matthews, a police detective, testified that while defendant was in the emergency room he said that his girlfriend had stabbed him. The trial court did not allow this statement into evidence.

From the circumstantial evidence, the State developed the theory that defendant broke the dining room window and came into the house. Deidre, who was trying to phone for help, tried to keep him out. Defendant went to the kitchen and got the butcher knife. Deidre ran to the bathroom and locked herself in, but de-

fendant forced the door open and began stabbing her. She managed to get away and ran into the living room, where he caught her and inflicted the fatal wounds. He then selected a smaller knife from the kitchen and inflicted wounds upon himself.

The defense conceded that defendant had killed Deidre and asked for a verdict of guilty of second degree murder. Defense counsel argued that defendant was in an emotional turmoil, was stabbed in the stomach by Deidre, and did not premeditate or deliberate regarding the killing. Defense counsel presented several character witnesses for defendant. A clinical correctional psychologist testified to defendant's low IQ and opined that defendant's relationships with Deidre and Michelle were "the foundation of his life" and that he could not deal with his perception that Deidre was leaving him and taking Michelle with her.

On the murder charge, the jury considered possible verdicts of first degree murder on the basis of premeditation and deliberation and second degree murder. It returned a verdict of guilty of first degree murder. Following a capital sentencing hearing, the jury found as an aggravating circumstance that the murder was especially heinous, atrocious and cruel.[1] The defense asserted ten factors as mitigating circumstances. The jury found seven: (1) the murder was committed while defendant was under the influence of a mental or emotional disturbance; (2) defendant's immaturity or limited mental capacity at the time of the commission of the offense; (3) defendant sought the assistance of vocational rehabilitation to prepare himself for better employment; (4) defendant sought the assistance of the Human Resources Development Program of a technical college to prepare himself for better employment; (5) defendant has tried to maintain employment despite limited abilities; (6) defendant expressed remorse and sorrow for what he had done; and (7) the offense was committed by means of a weapon or weapons acquired at the Hawks' residence and not taken there by defendant. Of the three remaining mitigating circumstances submitted, the jury answered "no" to two and did not answer the other one. It also did not answer the "[a]ny other circumstance or circumstances arising from the evidence which you,

1. The statutory language for this aggravating circumstance is "heinous, atrocious, *or* cruel." N.C.G.S. § 15A-2000(e)(9) (1988) (emphasis added). The language submitted here was "heinous, atrocious *and* cruel." (Emphasis added.)

the jury, deem to have mitigating value" provision. N.C.G.S. § 15A-2000(f)(9) (1988). Upon a finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstance, and that the aggravating circumstance was sufficiently substantial to call for the death penalty, the jury recommended a sentence of death.

GUILT PHASE

Defendant first contends that the trial court improperly denied his motion to sequester witnesses. He argues that several of the witnesses testified regarding threats that he allegedly made and that allowing them to hear one another's testimony created an atmosphere in which inconsistencies in the testimony "could have become undetectable." He also argues that because some of the witnesses were related, their simultaneous presence led to "a highly emotional situation."

[1] A ruling on a motion to sequester witnesses is reviewable only upon a showing of abuse of discretion. *State v. Holden*, 321 N.C. 125, 136, 362 S.E. 2d 513, 522 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *State v. Young*, 312 N.C. 669, 677, 325 S.E. 2d 181, 186 (1985). Defendant made his motion pursuant to N.C.G.S. § 8C-1, Rule 615, and he argues that under this rule, unlike under N.C.G.S. § 15A-1225, a motion to sequester witnesses is not discretionary. We disagree.

The rule reads, in relevant part: "At the request of a party the court *may* order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ." N.C.G.S. § 8C-1, Rule 615 (1988) (emphasis added). The commentary states: "The use of '*may* order witnesses excluded' rather than 'shall,' as in the federal rule, is intended to preserve discretion in the trial judge . . . ." N.C.G.S. § 8C-1, Rule 615 commentary (1988). We conclude that the trial court retains discretion under the rule. *See State v. Russell*, 84 N.C. App. 383, 390, 352 S.E. 2d 922, 926 (1987), *appeal dismissed and disc. rev. denied*, 319 N.C. 677, 356 S.E. 2d 784, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 363 (1987).

[2] "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. Barts*, 316 N.C. 666, 679, 343 S.E. 2d 828, 839 (1986). The record indicates

that the trial court carefully considered defendant's motion and denied it only after hearing and weighing the concerns expressed by both defendant and the State. Before denying the motion, the court determined that there were no eyewitnesses to the crimes and that defendant had copies of the pretrial statements of the witnesses to use in cross-examination. We thus conclude that defendant has failed to establish an abuse of discretion in the denial of his motion to sequester witnesses.

[3] Defendant next contends that the prosecutor's use of peremptory challenges denied defendant's constitutional right to a trial by an impartial jury. He argues that of the jurors qualified to serve under the death qualification standard of *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968), the prosecutor used his peremptory challenges to eliminate all jurors not otherwise excused who expressed equivocal sentiments about the death penalty.

Peremptory challenges are established by statute. N.C.G.S. § 15A-1217 (1988). They may be exercised without a stated reason and without being subject to the control of the court. *State v. Jenkins*, 311 N.C. 194, 204, 317 S.E. 2d 345, 351 (1984). The sole exception is that upon a prima facie showing that the prosecutor used peremptories in a racially discriminatory manner, the prosecutor has the burden of establishing racially neutral reasons for exercising the peremptories. *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed. 2d 69 (1986). Defendant argues that the same rationale should apply to prevent the State from striking jurors because they have expressed equivocal sentiments about the death penalty.

Batson addressed only the specific problem of discrimination based on race.

> That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact. . . . Outside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike a juror without giving any reason applies.

Brown v. North Carolina, 479 U.S. 940, 941-42, 93 L.Ed. 2d 373, 374 (1987) (O'Conner, J., concurring). Nothing in *Batson* or its

progeny compels further erosion of the unfettered use of peremptory challenges. " '*Batson* does not touch, indeed, it clearly reaffirms . . . the ordinary rule that a prosecutor may exercise his peremptory strikes for any reason at all.' . . . [P]rosecutors may '*take into account the concerns expressed about capital punishment by prospective jurors*, or any other factor, in exercising peremptory challenges . . . .' " *State v. Robbins*, 319 N.C. 465, 494, 356 S.E. 2d 279, 296-97 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1988) (quoting *Brown v. North Carolina*, 479 U.S. at 941, 93 L.Ed. 2d at 374 (O'Conner, J., concurring) (emphasis added)). A juror's views on capital punishment, unlike his or her race, are directly related to potential performance on a capital jury. Thus, both the prosecutor and defense counsel may exercise peremptory challenges to exclude jurors based upon their voir dire testimony regarding their attitude toward capital punishment. *See State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988).

[4] Defendant argues that by allowing the prosecutor to systematically exclude persons equivocal about capital punishment from the petit jury, the court denied him the right to an impartial jury composed of a fair cross-section of the community. This Court has not extended fair cross-section analysis to petit juries and adheres to the position taken by the United States Supreme Court. "We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." *Lockhart v. McCree*, 476 U.S. 162, 173, 90 L.Ed. 2d 137, 147-48 (1986), *quoted in State v. Jackson*, 317 N.C. 1, 21, 343 S.E. 2d 814, 826 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L.Ed. 2d 133 (1987); *see also State v. Evangelista*, 319 N.C. 152, 166, 353 S.E. 2d 375, 385 (1987).

Even if fair cross-section analysis were so extended, "jurors equivocal as to the death penalty" do not qualify as a distinctive group for fair cross-section purposes. In *Lockhart*, the United States Supreme Court found that persons who were not qualified to sit on capital juries were not a distinctive group. "[G]roups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the '*Witherspoon*-excludables'

. . ., are not 'distinctive groups' for fair-cross-section purposes." *Lockhart*, 476 U.S. at 174, 90 L.Ed. 2d at 148.

Here, as in *Lockhart*, the group is defined solely by shared ideas or values. Its members share no physical characteristics and belong to no common organization. The mere fact that they share similar feelings about capital punishment is insufficient to label them a distinctive group for purposes of fair cross-section analysis.

[5] Defendant next contends that the trial court erred in breaching the physician-patient privilege by allowing Dr. Joseph Noto to testify about defendant's wounds. We disagree.

The physician-patient privilege has no common law predecessor and is entirely a creature of statute. *State v. Martin*, 182 N.C. 846, 849, 109 S.E. 74, 76 (1921); 1 Brandis, *North Carolina Evidence* § 63, at 305 (3rd ed. 1988). The statute reads, in relevant part:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character. . . . *Any resident or presiding judge in the district, either at the trial or prior thereto, . . . may, subject to G.S. § 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.*

N.C.G.S. § 8-53 (1986) (emphasis added). The privilege thus "is not absolute; it is qualified by the statute itself." *Capps v. Lynch*, 253 N.C. 18, 22, 116 S.E. 2d 137, 141 (1960). Whether the privilege should be breached is a matter for the discretion of the trial court. *Id.* Defendant has failed to show an abuse of discretion in the trial court's ruling that Dr. Noto's testimony was "necessary to a proper administration of justice."

Defendant argues that because investigators obtained information from Dr. Noto before the trial court compelled his testimony, the privilege was breached prior to the court's inquiry, and the evidence thus should have been excluded. We find the contention without merit. The trial court received evidence and heard arguments before ruling that the privilege should be waived and the testimony allowed into evidence. The record does not establish that this ruling could not have been the result of a

reasoned decision. *See State v. Barts*, 316 N.C. at 679, 343 S.E. 2d at 839.

Defendant further asserts that by questioning Dr. Noto prior to obtaining a waiver of the physician-patient privilege, the investigators violated defendant's federal and state constitutional rights by subjecting him to an unreasonable search and seizure. We find no merit in this argument. Dr. Noto voluntarily gave the information to the police upon request. Evidence voluntarily given to police during a criminal investigation is not the product of an illegal search. "[W]hen evidence is delivered to a police officer upon request and without compulsion or coercion, the constitutional provisions prohibiting unreasonable search and seizure are not violated." *State v. Small*, 293 N.C. 646, 656, 239 S.E. 2d 429, 436 (1977); *see also State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74 (1971); *United States v. Pate*, 324 F. 2d 934 (7th Cir. 1963), *cert. denied*, 377 U.S. 937, 12 L.Ed. 2d 299 (1964).

Finally, assuming error, *arguendo*, the error was clearly harmless. Dr. Noto testified about defendant's wounds and his condition upon admission to the emergency room. He expressed the opinion that the wounds were self-inflicted. Two other doctors testified to essentially the same facts and opinions. Dr. Edwards, the emergency room physician, also testified to defendant's condition on admission and also opined that the wounds were possibly self-inflicted. Dr. Hudson, the Chief Medical Examiner, testified that he had examined defendant's medical records and photographs of defendant's wounds and that in his opinion the wounds were self-inflicted. Where improperly admitted evidence merely corroborates testimony from other witnesses, we have found the error harmless. *State v. Payne*, 312 N.C. 647, 656-59, 325 S.E. 2d 205, 211-13 (1985). We perceive no reasonable possibility that the jury would have reached a different result absent Dr. Noto's testimony. *See* N.C.G.S. § 15A-1443(a) (1988); *State v. Maynard*, 311 N.C. 1, 17, 316 S.E. 2d 197, 206 (1984).

[6] Defendant next contends that the trial court erred in allowing the pathologist who performed the autopsy on the victim to state his opinion as to the length of time between the victim's injuries and her death. The testimony at issue is as follows:

Q. Dr. Lacy, do you have an opinion as to how long Deidre Waters would have lived after receiving the two fatal wounds that you testified to?

A. I have an opinion, but it's more or less a guess, and that's that she could have survived anywhere from—

MR. BELSER: Objection, to a guess, your Honor.

COURT: Overruled.

—from fifteen minutes to forty-five minutes.

Defendant argues that use of the word "guess" makes this opinion mere speculation and therefore inadmissible.

Use of the word "guess" does not render an opinion inadmissible. "The term 'guess' is not regarded as being a mere conjecture or speculation but as a colloquial way of expressing an estimate or opinion. . . . [I]t is commonly used as meaning the expression of a judgment with the implication of uncertainty." *State v. Clayton*, 272 N.C. 377, 382-83, 158 S.E. 2d 557, 561 (1968); *see also Aarhus v. Wake Forest University*, 57 N.C. App. 405, 409, 291 S.E. 2d 837, 840 (1982). Expert witnesses are allowed to testify on a wide range of facts, the existence or nonexistence of which is ultimately to be determined by the trier of fact. *State v. Wilkerson*, 295 N.C. 559, 568, 247 S.E. 2d 905, 910 (1978). The words chosen by the witness go to the weight of the evidence, not its admissibility. *State v. Holden*, 321 N.C. 125, 144, 362 S.E. 2d 513, 526, *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988); *Aarhus v. Wake Forest University*, 57 N.C. App. at 409, 291 S.E. 2d at 840. Nothing in the Rules of Evidence, N.C.G.S. § 8C-1, alters these well established principles. Thus, use of the word "guess" did not render Dr. Lacy's testimony inadmissible.

[7] Defendant further argues that the trial court should have recognized his objection to this testimony as a request under Rule 705 for disclosure of the facts and data underlying the opinion. This rule provides: "The expert may testify in terms of opinion . . . without prior disclosure of the underlying facts or data, *unless an adverse party requests otherwise* . . . . The expert may in any event be required to disclose the underlying facts or data on cross-examination . . . ." N.C.G.S. § 8C-1, Rule 705 (1988) (emphasis added). Defendant made no specific request pursuant to this rule. We thus find this contention without merit.

[8] Defendant next contends that the trial court erred by refusing to admit evidence concerning his relationship with his daughter Michelle. The following exchange occurred on direct examination of defendant's mother by defense counsel:

Q. Can you describe [defendant's] relationship with the baby?

MR. BROWN: Objection.

COURT: Objection sustained.

Q. Did [defendant] care for the baby?

A. Yes.

MR. BROWN: Objection.

COURT: Objection is sustained. I don't know what relevance that has.

MR. BELSER: I think that will come clear, your Honor.

COURT: Let's get to it, then.

Q. Now, in the early part of March, about three weeks before Deidre was killed, did Michael and Deidre have some arguments over the baby?

A. They did.

Q. Was [defendant] afraid that the baby would be taken from him?

MR. BROWN: Objection to the leading.

COURT: Objection sustained.

Q. Had he talked to you about his fear that the baby would be taken from him?

MR. BROWN: Objection; self-serving.

COURT: Just answer "yes" or "no."

A. No, he did not.

Q. Do you know whether or not he had such a feeling?

MR. BROWN: Objection.

COURT: Objection sustained.

Evidence which is not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402 (1988). "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E. 2d 53, 60 (1985). *See also* N.C.G.S. § 8C-1, Rule 103 (1988); N.C.G.S. § 15A-1446(a) (1988). The relevance of the proffered evidence is not "obvious from the record," and defendant did not make an offer of proof showing the substance of what the witness would have testified. Where evidence is excluded, the record must show "the essential content or substance of the witness's testimony" before we can determine whether exclusion of the evidence was prejudicial. *State v. Satterfield*, 300 N.C. 621, 628, 268 S.E. 2d 510, 515-16 (1980).

Defendant argues that his mother's testimony would have explained his state of mind. Nothing in the record establishes this, however. Indeed, when asked whether defendant had talked to her about his fear that Michelle would be taken from him, his mother responded that he had not. We thus hold that this question is not before us for review.

[9] Defendant next contends that the trial court erred in refusing to admit defendant's statement in the emergency room that his girlfriend had stabbed him. He argues that although hearsay, the statement was admissible as an excited utterance under N.C.G.S. § 8C-1, Rule 803(2).

We have held that "to fall within this hearsay 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. Smith*, 315 N.C. 76, 86, 337 S.E. 2d 833, 841 (1985). Here, Ms. Ferrell discovered the homicide at 9:30 a.m. At 10:00 a.m. medical personnel arrived and attempted to treat defendant. At 10:30 a.m. defendant went to the hospital. Sometime thereafter he told a police officer in the emergency room that his girlfriend had stabbed him. He thus made this statement over an hour after the crime was discovered, and the trial court properly could conclude that he had time to manufacture the statement and did not make it spontaneously.

[10] Defendant next contends that the trial court erred in refusing to admit the entire packet of defendant's medical records. The exclusion of relevant evidence is proper "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 (1988). The trial court excluded these records on the ground that to admit them would be a waste of time. This decision was within its sound discretion. *State v. Mason*, 315 N.C. 724, 731, 340 S.E. 2d 430, 435 (1986). We find no abuse of that discretion. The records included large amounts of material which did not directly concern defendant's wounds, and the jury heard plenary testimony concerning those wounds. The significance to the case of the excluded portions of defendant's records was not established, and it was not error or an abuse of discretion to exclude them.

[11] Defendant next contends that the trial court erred by allowing the prosecutor, over objection, to argue to the jury:

> Mr. Belser said the State has to prove to you that when [defendant] killed her he didn't act in passion. Well, the State doesn't have to prove that. The State has to prove that he formed this intent to kill her in a cold state of mind or blood at that point, but whether or not he was in passion when he killed her is immaterial.

Defendant asserts that this argument is an incorrect statement of the law.

We have stated: "If the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect." *State v. Misenheimer*, 304 N.C. 108, 113-14, 282 S.E. 2d 791, 795 (1981) (quoting *State v. Faust*, 254 N.C. 101, 108, 118 S.E. 2d 769, 773, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49 (1961)). The argument thus correctly states the law. Counsel may argue the relevant law to the jury. *State v. Brown*, 320 N.C. 179, 194, 358 S.E. 2d 1, 12, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987); *State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E. 2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985). The court thus properly allowed this argument.

[12] Defendant next contends that the trial court erred by refusing his request for the following instruction on premeditation and deliberation:

> An intent to kill may exist in other degrees of unjustifiable homicide, but only in first degree murder is that intent formed into a fixed purpose by deliberation and premeditation. This intent is defined as a steadfast resolve and deep-rooted purpose, or a design formed after carefully considering the consequences. The fixed resolve to kill, which belongs to murder in the first degree, is something different from the minor quality of intention, which lacks the marked and distinguished characteristics or cold premeditation. The state of mind is described as a "cold state of blood."

See State v. Thomas, 118 N.C. 1113, 24 S.E. 431 (1896). The court instead gave the following instructions:

> Fourth, the State must satisfy you beyond a reasonable doubt that the defendant acted with premeditation. That is, that he formed the intent to kill the victim over some period of time, however short, before he acted.
>
> Fifth, the State must satisfy you beyond a reasonable doubt that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. Now, this does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excitement when the intent was carried into effect. However, if the intent to kill was formed and executed during some suddenly aroused violent passion, then the intent would not have been formed in a cool state of mind.
>
> Now, neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as a lack of provocation by the victim, the conduct of the defendant before, during and after the killing, any threats and declarations of the defendant, any use of grossly excessive force or the infliction of lethal wounds after the victim was felled, or

> brutal or vicious circumstances of the killing, or the manner in which or the means by which the killing was done.

If a party requests an instruction which is a correct statement of the law and is supported by the evidence, the court must give the instruction at least in substance. *State v. Corn*, 307 N.C. 79, 86, 296 S.E. 2d 261, 266 (1982). It need not give the instruction exactly as the party requests, however. *State v. Silhan*, 302 N.C. 223, 253, 275 S.E. 2d 450, 472 (1981). Defendant's requested instruction stressed that the intent to kill must be formed in a "cold state of blood." The instructions given emphasized this by stating that the intent to kill must have been formed "in a cool state of mind" and not "during some suddenly aroused passion." While different in form from those requested, they were, in substance, the same.

Defendant argues that the instructions were improper because they led the jurors to believe that they could only find that he did not have the intent necessary for first degree murder if they found that he had formed and carried out the intent to kill while under the influence of "some suddenly aroused violent passion." This instruction undermined his defense, he contends, because the evidence showed that his state of passion had existed for several days before the murder and was not one which was "suddenly aroused."

We have held that

> [d]eliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a *violent passion suddenly aroused* by sufficient provocation. . . . "[A]lthough there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, . . . the murder is not deliberate and premeditated."

State v. Misenheimer, 304 N.C. at 113-14, 282 S.E. 2d at 795 (citations omitted) (emphasis added) (quoting *State v. Faust*, 254 N.C. at 108, 118 S.E. 2d at 773, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49 (1961)); *see also State v. Forrest*, 321 N.C. 186, 195, 362 S.E. 2d 252, 257 (1987). The court's instructions thus correctly stated the law.

[13] Defendant also argues that the instructions permitted the jury to infer premeditation and deliberation from factors not supported by the evidence, asserting that there was no evidence to support "the infliction of lethal wounds after the victim was felled." We disagree.

The evidence showed that there was blood throughout the house, that the victim was found against the base of the couch, and that she had many slash wounds on her body, including two deep wounds capable of causing death. Viewed in the light most favorable to the State, this evidence supports the State's theory that defendant slashed the victim as she attempted to escape from him, chased her into the living room where she fell to the floor, and then stabbed her to death. The trial court, therefore, did not err in instructing that premeditation and deliberation may be proved by "the infliction of lethal blows after the victim was felled." *Cf. State v. Huffstetler*, 312 N.C. at 109-10, 322 S.E. 2d at 121 (submission of first degree murder to the jury proper because of evidence supporting premeditation and deliberation, including evidence that deceased died as a result of numerous wounds inflicted over period of time "from which it is reasonable to infer that many of the blows were inflicted after the deceased had been felled and rendered helpless").

[14] Defendant finally contends that the trial court erred by allowing the jury to be "death qualified" before the guilt-innocence phase of his trial. He argues that this violated his constitutional rights to due process and to a jury representing a cross-section of the community because the resulting jury was biased in favor of the prosecution on the issue of guilt, thus depriving him of a fair trial. This argument is without merit. *Lockhart v. McCree*, 476 U.S. 162, 90 L.Ed. 2d 137 (1986); *State v. Evangelista*, 319 N.C. 152, 166, 353 S.E. 2d 375, 385 (1987); *State v. Johnson*, 317 N.C. 343, 375-76, 346 S.E. 2d 596, 614 (1986).

We conclude that the guilt phase of defendant's trial was fair and free of prejudicial error.

SENTENCING PHASE

[15] Defendant first contends that the trial court erred by refusing to submit his proposed nonstatutory mitigating circumstance that the relationship between him and the victim was extenuat-

ing. Defendant argues that the court thereby unconstitutionally precluded the jury from considering this aspect of his history as a mitigating circumstance. We hold that the court did not err.

The United States Supreme Court has held that "the [capital] sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma*, 455 U.S. 104, 110, 71 L.Ed. 2d 1, 8 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L.Ed. 2d 973, 990 (1978) (emphasis in original). Here, however, the jury was not precluded from considering defendant's relationship with the victim as a mitigating circumstance.

During the sentencing phase, defense counsel offered the testimony of Dr. Brad Fisher, a clinical correctional psychologist. Dr. Fisher testified, in part:

> [Defendant's] family life has not been particularly rich. He was given that fullness, he was given that richness with his girlfriend, Deidre, and his daughter. That was critical to him; it was central to him; it was the foundation of his life. . . . He has low self-esteem. He doesn't have much sense of self-identification. He found that and felt it in his core through his attachment to Deidre and to Michelle. These were central to his life.
>
> [I]t was his perception, his reality, that [Deidre] was leaving and that Michelle was leaving with her, and that . . . he could not tolerate. He did not have the ability to deal with that.

Dr. Fisher also testified that defendant had been "desperately anxious" over the "deteriorating" relationship between him and Deidre and that in the few days before the murder "[defendant's] desperation was growing more intense."

At the instructions conference, defense counsel requested that the court submit to the jury the mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2) (1988). The court agreed to submit this circumstance "because of the love-affair angle attached with this." Later, the court con-

sidered another of defense counsel's requested mitigating circumstances, that the relationship between defendant and the victim was extenuating. Defense counsel stated that this circumstance was talking about the "love angle" to which the court had referred, and that "[i]n the terms of the capital statute, a mitigating factor which extenuates, this is a relationship between parties that deteriorated, resulting in psychological damage to the defendant." The court refused to submit the mitigating circumstance of an extenuating relationship. However, the court agreed to give a peremptory instruction on the circumstance that the defendant committed the murder while under the influence of mental or emotional disturbance, stating: "all the evidence is that [defendant] was upset about the relationship, and that's an emotional disturbance."

When instructing the jury on the mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, the court stated:

> A person is under such influence if he was in any way affected or influenced by mental or emotional disturbance at the time he killed. This is a mitigating circumstance which is prescribed by statute. Now, I instruct you, ladies and gentlemen, that all of the evidence tends to show that at the time of the killing the defendant was under the influence of a mental or emotional disturbance *arising out of the state of his relationship with the victim.* I therefore instruct you that you will answer "yes" as to the existence of the circumstance, and will consider it in mitigation.

(Emphasis added.) The court also instructed the jury to consider "any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value." The court's instructions thus clearly allowed—indeed, required—the jury to consider defendant's relationship with the victim in determining defendant's sentence. Therefore, the court did not err in refusing to submit defendant's requested nonstatutory mitigating circumstance of an extenuating relationship between defendant and the victim. *See State v. Lloyd,* 321 N.C. 301, 313-14, 364 S.E. 2d 316, 323, *vacated and remanded for reconsideration on other grounds,* --- U.S. ---, 102 L.Ed. 2d 18 (1988) (court did not err in refusing to submit two nonstatutory mitigating circumstances regarding defendant's criminal record where a submitted statu-

tory mitigating circumstance allowed the jury to consider defendant's criminal record as a whole).

[16] Defendant next contends that the trial court erred by refusing to submit as a mitigating circumstance that he did not have a significant history of prior criminal activity. At the instructions conference, the court announced that it would submit as a mitigating circumstance that defendant had no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1) (1988). The district attorney replied that defendant did have a criminal record, but that it would have been error for the prosecution to have introduced that record at trial. The court then decided not to submit the circumstance.

In *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981), the defendant argued that the trial court erred in not submitting the mitigating circumstance that the defendant had no significant history of prior criminal activity. There, neither the defendant nor the State had put on any evidence of the presence or absence of prior criminal activity. We held that "[i]t is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury" and that "[s]ince defendant did not go forward with evidence in this regard, nor was there any evidence introduced by the state on this point, the trial court was not obligated to instruct the jury on this mitigating circumstance . . . ." *Id.* at 356, 279 S.E. 2d at 809. *Cf. State v. Wilson*, 322 N.C. 117, 367 S.E. 2d 589 (1988) (where State offered evidence showing that defendant had a prior felony conviction); *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (where both defendant and State offered evidence of defendant's prior convictions).

Here, as in *Hutchins*, neither defendant nor the State introduced evidence to show that defendant had no significant history of prior criminal activity. Therefore, the court did not err in refusing to instruct the jury on this mitigating circumstance.

[17] Defendant next contends that the verdict form on which the jury recommended the death sentence was constitutionally defective. The second section on the verdict form asked, "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" The submitted mitigating circumstances then followed, each with a blank for the jury's answer. Of the eleven mitigating circumstances submitted, the jury answered "yes" to seven and "no" to two. The jury put a

dash in the blank following the statutory mitigating circumstance that defendant's ability to appreciate the criminality of his conduct was impaired. N.C.G.S. § 15A-2000(f)(6) (1988). Finally, the jury left blank the "[a]ny other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value" statutory provision. N.C.G.S. § 15A-2000(f)(9) (1988). Defendant argues that the dash and blank answers are ambiguous and could indicate that the jury ignored evidence of those circumstances.[2]

Although it is the better practice for a jury to specify on the verdict form which mitigating circumstances it finds and which it does not find, there is no constitutional or statutory requirement that it do so. *State v. Pinch*, 306 N.C. 1, 32, 292 S.E. 2d 203, 226, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 231, 283 S.E. 2d 732, 751 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982). In *State v. McLaughlin*, 323 N.C. 68, 372 S.E. 2d 49 (1988), we held that the trial court properly instructed the jury that it must write an answer in all of the aggravating circumstance blanks, but that it could leave the blank after a mitigating circumstance empty if it did not find the circumstance by a preponderance of the evidence. *Id.* at 107-08, 372 S.E. 2d at 74. The fact that the jury here did not answer all the circumstances with a "yes" or "no" does not, therefore, render the verdict form constitutionally defective.

[18] Defendant next contends that the trial court erred by refusing to instruct the jury that if it found any nonstatutory mitigating circumstances, it must give them some mitigating value. Defendant argues that to allow the jury to conclude that a mitigating circumstance exists, but to refuse to give it value because the jury does not unanimously deem it to have mitigating weight, violates *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978).

Lockett holds that "the sentencer . . . [may] not be precluded from considering *as a mitigating factor*" any evidence which the

2. Defendant contends that the jury also left blank the nonstatutory circumstance that "defendant has tried to maintain employment despite his limited abilities." The printed record does show a blank below this circumstance. However, the transcript indicates the trial court stated that the jury had answered this circumstance "yes." We therefore have checked the original issues for sentencing form in the Buncombe County Clerk's office, and the original form shows that the jury answered this issue "yes."

defendant proffers as a basis for a sentence less than death. *Id.* at 604, 57 L.Ed. 2d at 990 (emphasis in original). Neither may a sentencer *refuse* to consider any relevant mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. at 114, 71 L.Ed. 2d at 11. However, neither *Lockett* nor *Eddings* requires that the sentencer must determine that the submitted mitigating circumstance has mitigating value. *See Raulerson v. Wainwright*, 732 F. 2d 803, 806-07 (11th Cir.), *cert. denied*, 469 U.S. 966, 83 L.Ed. 2d 302 (1984).

We have held that if a jury determines that a statutory mitigating circumstance exists, it is not free to refuse to consider the circumstance in its final sentence determination, although "[t]he weight any circumstance may be given is a decision entirely for the jury." *State v. Kirkley*, 308 N.C. 196, 220-21, 302 S.E. 2d 144, 157-58 (1983), *overruled on other grounds, State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988). By including specific mitigating circumstances in the death penalty statute, the legislature has determined that those circumstances have mitigating value. *See State v. Pinch*, 306 N.C. at 27, 292 S.E. 2d at 223 (statutory mitigating circumstance presumed to be one which the jury reasonably could deem to have mitigating value). If the jury finds the existence of a statutory mitigating circumstance, it has "found" that circumstance and cannot determine that it does not have mitigating value.

It is, however, for the jury to determine whether submitted nonstatutory mitigating circumstances have mitigating value. The "catch-all" provision for mitigating circumstances includes those circumstances which are not listed as statutory mitigating circumstances—"[a]ny other circumstance[s] arising from the evidence *which the jury deems to have mitigating value.*" N.C.G.S. § 15A-2000(f)(9) (1988) (emphasis added). The court must submit to the jury the nonstatutory mitigating circumstances which the defendant requests if they are "supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value." *State v. Pinch*, 306 N.C. at 26, 292 S.E. 2d at 223 (quoting *State v. Johnson*, 298 N.C. 47, 72-74, 257 S.E. 2d 597, 616-17 (1979)). The jury only "finds" a nonstatutory mitigating circumstance if it finds that the evidence supports the existence of the circumstance *and* if it deems it to have mitigating value. The pattern jury instruction for submitted nonstatutory mitigating circumstances reads:

> If you do unanimously find by a preponderance of the evidence that any of the following circumstances exist and they are deemed by you to have mitigating value, you will so indicate by having your foreman write 'yes' in the space after the mitigating circumstances . . . . If you do not unanimously find this circumstance to exist *or* do not deem it to have any mitigating value, you will so indicate by having your foreman write 'no' in the space provided.

N.C.P.I.—Crim. 150.10, at 33-34 (1988). Although evidence may support the existence of the nonstatutory circumstance, the jury may decide that it is not mitigating. Therefore, the court did not err in denying defendant's requested instruction that if the jury found any nonstatutory mitigating circumstances, it must give them some mitigating value.

Defendant next contends that the trial court erred by not intervening *ex mero motu* in the district attorney's sentencing argument. The district attorney argued, in part:

> [W]hen in God's name are we going to get concerned about the victim's rights? The only . . . way that the victims can be protected is . . . if juries apply the law. Not what they wish that it was, not applied with emotion or in a rage, but apply the law. Apply the law. And that's the only way victims can be protected. That is the only way that justice will ever come from this courtroom. That's the only way Deidre's memory will have some justice to it is if juries apply the law.
>
> You're not on this jury just to apply your discretion. You're not on this jury to do the easy thing. Each and every one of you, each and every one of you said that you could sit on this jury, you could listen to the evidence and you would apply the law. And that's what the State's asking you to do is to apply the law.
>
> . . .
>
> Now those are the four issues [aggravating and mitigating circumstances] you're going to have to answer. It's not a matter of your discretion. Those issues you're going to have to answer under the instructions of the Court . . . .
>
> The first issue . . . "Do you, the jury, unanimously find from the evidence beyond a reasonable doubt the existence of the aggravating circumstance that this murder was especially

> heinous, atrocious and cruel?" It's an aggravating circumstance that's required by law.
>
> . . .
>
> Now, Mr. Belser's going to have the last argument in this case, and I have no idea what he's going to get up here and argue to you. He might argue that the Bible says, "Thou shalt not kill," and that applies to the State as well as it does to individuals. Ladies and gentlemen, I almost hesitate—I don't like to argue the Bible, but let's look at that just a minute.

The district attorney then read verses from the Bible which say that anyone who kills another person shall be put to death. Defendant did not object to any of these statements by the district attorney.

Defendant argues that the district attorney misled the jurors about the law, that he attempted to get them to ignore their duty to weigh aggravating and mitigating circumstances, and that he instructed them that they had no choice in whether to recommend the death sentence because God's law required it. Because defendant did not object at trial, we must decide whether the court's failure to intervene *ex mero motu* was an abuse of discretion.

> [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. Brown, 320 N.C. 179, 194-95, 358 S.E. 2d 1, 12, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E. 2d 752, 761 (1979)).

For the following reasons, we find no abuse of discretion:

[19] First, the district attorney stated that the jurors should apply the law, not just exercise their discretion. We have held that a jury may not exercise "unbridled discretion" in recommending a sentence, but must exercise "guided discretion *in making the underlying findings*" and weighing aggravating and mitigating circumstances. *See State v. Pinch*, 306 N.C. at 33, 292 S.E. 2d at 227; *State v. Williams*, 305 N.C. 656, 689, 292 S.E. 2d 243, 263, *cert.*

denied, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). Therefore, the district attorney properly stated the law in arguing that the sentence was not purely a matter for the jury's discretion but must be determined "under the instructions of the Court."

[20] Second, we have held in other cases that the trial court did not abuse its discretion by not intervening *ex mero motu* when, during closing arguments, the prosecutor read verses from the Bible which say that a murderer shall be put to death. *State v. Zuniga*, 320 N.C. 233, 267-68, 357 S.E. 2d 898, 920, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 384 (1987); *State v. Brown*, 320 N.C. 179, 206, 358 S.E. 2d 1, 19, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987). We therefore hold that the trial court did not abuse its discretion here.

[21] Defendant next contends that N.C.G.S. § 15A-2000(e)(9), which allows the jury to find as an aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," is unconstitutional because it is subjective and arbitrary and does not meaningfully distinguish one murder from another. Defendant's argument has no merit.

In *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982), the defendant argued that this circumstance was unconstitutional because it "requires a subjective evaluation of the evidence by the jurors." *Id.* at 224, 283 S.E. 2d at 746. We held that the circumstance was constitutional because our interpretation of "especially heinous, atrocious, or cruel" had been approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913 (1978). *State v. Rook*, 304 N.C. at 224, 283 S.E. 2d at 747; *see also State v. Goodman*, 298 N.C. 1, 25-26, 257 S.E. 2d 569, 585 (1979). In *Proffitt*, the Supreme Court had held that Florida's "especially heinous, atrocious, or cruel" aggravating factor, construed by the Florida Supreme Court as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim," was not unconstitutional. "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." *Proffitt*, 428 U.S. at 255-56, 49 L.Ed. 2d at 925 (citations omitted).

Here, the trial court gave the following instruction from N.C.P.I.—Crim. 150.10: "For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing. *This murder must have been a conscienceless[sic] or pitiless crime which was unnecessarily torturous to the victim.*" (Emphasis added.) We hold, pursuant to *Proffitt*, that the jury received adequate guidance concerning the meaning of the "especially heinous, atrocious, or cruel" aggravating circumstance, and that the verdict therefore was not "subjective and arbitrary."

A recent United States Supreme Court case held that the "especially heinous, atrocious, or cruel" aggravating circumstance in Oklahoma's death penalty statute was unconstitutionally vague because it did not give the jury any guidance concerning the meaning of "especially heinous, atrocious, or cruel." *Maynard v. Cartwright*, 486 U.S. ---, 100 L.Ed. 2d 372 (1988). In *Maynard*, the trial court did not instruct the jury that the "especially heinous, atrocious, or cruel" aggravating circumstance was limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *See Cartwright v. Maynard*, 822 F. 2d 1477, 1488-89 (10th Cir. 1987), *aff'd*, 486 U.S. ---, 100 L.Ed. 2d 372 (1988). The present case is distinguishable because that instruction was given here. We thus hold that submission of the "especially heinous, atrocious, or cruel" aggravating circumstance here, for consideration in light of the foregoing instruction, was constitutionally permissible.

Defendant next contends that N.C.G.S. § 15A-2000 is unconstitutional. This argument is without merit. *E.g., State v. Benson*, 323 N.C. 318, 327, 372 S.E. 2d 517, 522 (1988); *State v. Johnson*, 317 N.C. 343, 385, 346 S.E. 2d 596, 620 (1986).

[22] Defendant next contends that the North Carolina Pattern Jury Instruction unconstitutionally imposed on the jury a duty to return a recommendation of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances were sufficiently substantial to call for the death penalty. This argument is without merit. *State v. Robbins*, 319 N.C. 465, 515, 356 S.E. 2d 279, 308-09 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1988).

[23] Finally, defendant contends that the trial court erred in instructing the jurors that they must be unanimous before they could find the existence of a mitigating circumstance. Defendant bases this argument on *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 381 (1988). For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we reject this argument.

We conclude that the sentencing phase of defendant's trial was fair and free of prejudicial error.

PROPORTIONALITY REVIEW

Because we have found no error in the guilt and sentencing phases, we are required to review the record and determine: (1) whether the record supports the jury's findings of the aggravating circumstances 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 of death 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) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E. 2d 279, 315 (1987), *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1988).

The jury found, as an aggravating circumstance, that the murder was especially heinous, atrocious and cruel. N.C.G.S. § 15A-2000(e)(9) (1988).[3] We hold that the evidence supports this aggravating circumstance. We further conclude that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

[24] In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E. 2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L.Ed. 2d 733 (1986). We use the "pool" of similar cases as defined in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983). *Id.*

3. See footnote 1. above.

However, "[w]e do not find it necessary to extrapolate or analyze *in our opinions* all, or any particular number, of the cases in our proportionality pool." *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 316 (emphasis in original).

Of the seven cases in which this Court has found the death penalty disproportionate, only two—*State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987), and *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983)—involved the aggravating circumstance that the murder was especially heinous, atrocious or cruel. Neither is similar to this case.

In *Stokes*, the defendant and several others planned to rob a man; during the robbery one of the assailants struck the victim with a stick, killing him. *Stokes*, 319 N.C. at 3, 352 S.E. 2d at 654. There are three points of distinction between *Stokes* and this case. First, the defendant in *Stokes* was seventeen years old; defendant here is twenty-nine years old. Second, in *Stokes* there was no evidence showing who was the leader in the robbery or that the defendant deserved death any more than an older participant who received a life sentence. Third, the defendant in *Stokes* was convicted on a felony murder theory and there was little or no evidence that he premeditated the killing. Here, defendant was convicted on a premeditation and deliberation theory and there was ample evidence of premeditation.

In *Bondurant*, the defendant shot the victim while they were riding in a car. *Bondurant*, 309 N.C. at 677, 309 S.E. 2d at 173. In finding the death sentence disproportionate, this Court emphasized the fact that the defendant there attempted to get immediate medical care for the victim. After the shooting, he directed the driver of the car to go to the hospital. He then went inside to get medical treatment for the victim. *Id.* Here, by contrast, when ambulance drivers arrived, defendant did not express any concern for the victim; instead, he acted as if the victim had been stabbing him. His later expressions of remorse are hardly comparable to the actions of the defendant in *Bondurant*.

There are three cases in the pool in which the jury recommended a sentence of death after finding as the only aggravating circumstance that the murder was especially heinous, atrocious or cruel. *State v. Gladden*, 315 N.C. 398, 340 S.E. 2d 673, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986); *State v. Huffstetler*,

312 N.C. 92, 322 S.E. 2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985), and *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, 70 L.Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L.Ed. 2d 655 (1981). We found the death sentence proportionate in these three cases.

In two of these cases, *Gladden* and *Martin*, the jury did not find any mitigating circumstances. However, in *Huffstetler* the jury found three mitigating circumstances: (1) that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; (2) that the killing occurred contemporaneously with an argument and by means of an instrument acquired at the scene and not taken there; and (3) that the defendant did not have a history of violent conduct. *Huffstetler*, 312 N.C. at 100, 322 S.E. 2d at 116.

We find *Huffstetler* similar to this case. First, the jury in *Huffstetler* found one aggravating circumstance—that the murder was "especially heinous, atrocious or cruel." Second, two of the three mitigating circumstances found are similar to those circumstances found here. They involve the defendant's mental or emotional state at the time of the murder and whether he took a weapon when he went to the murder scene. Finally, the facts in *Huffstetler* are very similar to the facts in this case. There, the defendant beat his mother-in-law to death with a frying pan after an argument. The victim had multiple wounds and lacerations on her head, neck and shoulders. Her jaw, neck, spine and left collarbone were fractured.

> The evidence presented at trial supports the view that the sixty-five year old female victim was brutally beaten to death during a prolonged attack in her own home. The defendant struck the victim with a cast-iron skillet at least fourteen times, breaking her jaws, collarbone and spine and fracturing her skull in several places. The deceased was struck repeatedly with enough force to spatter blood throughout the room in which she was killed. The blows struck were with sufficient force to push a portion of the victim's skull into her brain and expose brain tissue.
>
> . . .
>
> Thus, the record before us reveals a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault

> by an adult male upon a sixty-five year old female in her home. Having compared the defendant and the crime in this case to others in the pool of similar cases, we conclude that the sentence of death entered by the trial court is not disproportionate.

Id. at 117-18, 322 S.E. 2d at 126.

Here, similarly, defendant brutally and repeatedly slashed and stabbed the victim, inflicting twenty-four significant wounds, two of which—a slashing wound on her neck which cut the carotid artery, and a stab wound into her right lung—were capable of causing death. The evidence shows that the attack was prolonged: defendant forced open the bathroom door to get to the victim; he chased her throughout the house, slashing and stabbing her; and he finally cornered her in the living room and inflicted the fatal wounds. Whether the victim survived fifteen to forty-five minutes after receiving those wounds, as one expert testified, or a few minutes, as another expert testified, she went through some period of physical and psychological suffering after the slashing and stabbing had ended.

The facts here support the imposition of the death penalty even more strongly than do the facts in *Huffstetler*. There was no evidence that defendant here was under the influence of alcohol or drugs, as there was in *Huffstetler*. There is evidence that defendant planned the murder in advance. He threatened to kill the victim a day or so before the murder. The language used in making the threats undoubtedly invoked psychological suffering beyond the normal; defendant did not threaten merely to kill the victim, but also to cut her head off and cut her heart out and take it to her mother or grandmother. On the morning of the murder he watched the victim leave her mother's house, then followed her down the hill. The defendant in *Huffstetler*, by contrast, testified that he hit his mother-in-law during an argument.

There are two considerations here which were not present in *Huffstetler*. First, defendant repeatedly stabbed and slashed the victim to death in front of several small children. Second, the evidence supports the conclusion that the victim went through a period of psychological suffering in the day or so leading up to the murder. After defendant threatened to kill her, she swore out a warrant against him, planned to stay with her family, and re-

quested a police escort to get clothes from her apartment. On the night before the murder, defendant repeatedly phoned the victim's mother and asked to speak to the victim.

Finally, the facts of this case are similar to those of two other cases in the pool in which the defendants murdered their former girlfriends—*State v. Boyd*, 311 N.C. 408, 319 S.E. 2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L.Ed. 2d 324 (1985), and *State v. Spruill*, 320 N.C. 688, 360 S.E. 2d 667 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988). We held the death sentence proportionate in both of those cases.

In *Boyd*, the defendant was convicted of killing his former live-in girlfriend. The defendant met the victim. As she attempted to leave, he pulled out a knife and stabbed her repeatedly in front of her mother and her daughter. The victim suffered considerably before her death. She had difficulty breathing and she "rak[ed] [her hands] back and forth in the dirt." *Boyd*, 311 N.C. at 413, 319 S.E. 2d at 194. The victim had thirty-seven stab wounds on her body, including five penetrating wounds to her lungs and some defensive wounds on her hands. *Id.* The jury found as aggravating circumstances that the murder was especially heinous, atrocious or cruel and that the defendant previously had been convicted of a felony involving the use or threat of violence to the person. The jury found one or more unspecified mitigating circumstances of the sixteen circumstances submitted. *Id.* at 415-17, 319 S.E. 2d at 195-96.

In *Spruill*, the defendant was convicted of killing his former girlfriend. On the evening of the murder, the defendant followed the victim around at a nightclub. When the victim prepared to leave, she seemed very afraid of the defendant. He began chasing the victim, then stabbed her and cut her throat, causing her to strangle on her own blood. *Spruill*, 320 N.C. at 690-92, 360 S.E. 2d at 668-69. The jury found the aggravating circumstance that the murder was especially heinous, atrocious or cruel. *Id.* at 694, 360 S.E. 2d at 670. It found none of the five submitted mitigating circumstances. *Id.* at 701, 360 S.E. 2d at 674.

Although these cases differ from the present case in the numbers of aggravating and mitigating circumstances found, they have characteristics similar to those in the present case: (1) a

murder of a former girlfriend after previous threats to her; (2) fear on the part of the victim; (3) brutal, premeditated stabbings in front of other people; and (4) a period of time in which the victim suffered great physical and psychological pain before death.

We find that *Huffstetler*, *Boyd*, and *Spruill* are the cases in the pool most comparable to this case. In light of these cases, we cannot say that the death penalty recommendation in this case was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We hold that the defendant received a fair trial and sentencing hearing, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death sentence was disproportionate or excessive. *State v. Robbins*, 319 N.C. at 529, 356 S.E. 2d at 317.

No error.

Chief Justice EXUM concurring.

I concur with the majority's treatment of all issues in the guilt and sentencing phases of this trial.

If, in the sentencing phase, the Court were addressing the unanimity instruction issue for the first time, I would agree with defendant's position that these instructions violate the Eighth Amendment to the federal constitution as that amendment was interpreted in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), for the reasons stated in my dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), and *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988). The majority's position on this issue is, as a result of the Court's decisions in *McKoy* and *Allen*, the law of this state to which I am now bound. For this reason I concur with the majority's treatment of this issue.

Justice FRYE dissenting as to sentence.

For the reasons expressed in the Chief Justice's dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 and in *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988), I believe the United States Supreme Court's decision in *Mills v. Maryland*, 486

U.S. ---, 100 L.Ed. 2d 384 (1988), requires that defendant be given a new sentencing hearing. Accordingly, I dissent from that portion of the Court's opinion which rejects defendant's argument based upon the holding of *Mills*. I concur in the result reached by the majority on the guilt phase issues.

STATE OF NORTH CAROLINA v. HENRY LEE HUNT AND ELWELL BARNES

No. 5A86

(Filed 3 November 1988)

1. **Criminal Law § 15.1— murder—inflammatory pretrial publicity—change of venue denied**

The trial court did not err in a prosecution for first degree murder by denying defendant Hunt's motion for a change of venue or a special venire based on inflammatory media coverage where, although the trial court found that some of the newspaper articles were inflammatory, there was no evidence of the effect of the news reports on the residents of Robeson County. N.C.G.S. § 15A-957.

2. **Jury § 6— murder—individual voir dire denied—no prejudice from remarks of jurors**

The trial judge did not abuse his discretion in a prosecution for first degree murder by denying defendant Hunt's motion for individual voir dire and sequestration of prospective jurors where 146 potential jurors eventually had to be examined and the trial judge allowed selected individual voir dire whenever defendant requested it. Defendant was not prejudiced by certain remarks of prospective jurors. N.C.G.S. § 15A-1214(j).

3. **Criminal Law § 92.1— murder—multiple defendants—consolidation proper**

The trial court did not err by consolidating first degree murder cases for trial where one defendant, whom defendant Hunt claims he could not call as a witness because of the consolidation, was not called and it is not known whether he would have refused to testify; the witness could not have been compelled to testify if he had exercised his constitutional right not to incriminate himself; and the defense of defendant Barnes was not so antagonistic to the defenses of the other defendants that a severance was required. N.C.G.S. § 15A-926(b).

4. **Criminal Law § 92.1— conspiracy to murder—consolidation for trial—transactional connection**

There was a transactional connection supporting the consolidation for trial of two conspiracy and two murder charges where the second murder was committed to avoid detection for the first murder. N.C.G.S. § 15A-926(a).

5. Criminal Law § 73.2— conspiracy to murder—statements not hearsay

Testimony in a murder prosecution that the witness's wife had said that she was going to insure the victim and have him killed was not hearsay and was properly admitted. The testimony was not to prove that the victim's wife had insured the victim to have him killed, but was offered to show why the three defendants conspired to kill and then killed the victim. N.C.G.S. § 8C-1, Rule 801(c).

6. Constitutional Law § 72; Criminal Law § 77.3— murder—statement of codefendant

The trial court did not err in a murder prosecution by admitting into evidence an extrajudicial statement by a codefendant in which the codefendant recanted an earlier statement taking full blame and said that he had made that statement to protect someone. Defendant Hunt advanced no reason and the court could think of no reason the jury would infer that defendant Hunt was the person being protected. N.C.G.S. § 15A-927(c)(1).

7. Criminal Law § 106— conspiracy and murder—evidence sufficient

The evidence was sufficient for the jury to find defendant Hunt guilty of first degree murder and of conspiracy to commit the murder.

8. Homicide § 21.5; Criminal Law § 9— murder and conspiracy to murder—evidence of constructive presence—sufficient

The trial court did not err in a prosecution for conspiracy and murder by denying defendant Barnes' motion to dismiss as to the murder of Jackie Ransom where there was evidence that defendant Barnes asked Rogers Locklear whether he could take his brother's place in killing Jackie Ransom, defendant Barnes took Rogers Locklear to meet Henry Lee Hunt, defendant Barnes and Hunt were together when Rogers Locklear last saw them on the night of the murder, later that night the two men went to Hunt's trailer, the next morning defendant Barnes said he and Hunt had killed Ransom for $2,000, and defendant Barnes said Hunt had shot Ransom. The evidence was sufficient for the jury to conclude that defendant Barnes was present when the killing occurred with the intent to aid Hunt in the commission of the offense and that Hunt was aware of this intent.

9. Homicide § 21.5; Criminal Law § 9— conspiracy and murder—evidence sufficient

There was sufficient evidence for the jury to find that defendant Barnes aided and abetted in the murder of Larry Jones where there was evidence that defendant Barnes was in the automobile when Larry Jones was shot by Hunt, Barnes then started to shoot Larry Jones with a shotgun, Hunt told Barnes not to shoot Larry Jones and Hunt then shot Larry Jones again, and Barnes stood watch while Hunt and Ratley carried Jones' body into the woods and buried it.

10. Conspiracy § 6— conspiracy to murder—evidence sufficient

The trial court did not err by denying defendant Barnes' motions to dismiss two charges of conspiracy to murder where defendant Barnes asked Rogers Locklear if he could take his brother's place and kill Jackie Ransom;

defendant Barnes carried Rogers Locklear to Hunt's trailer and, after talking privately with Hunt, told Locklear "I got the gun. Me and Babe can get the job done"; there was evidence that Hunt told several people he would kill Larry Jones; Hunt and defendant Barnes were riding in an automobile with Jerome Ratley when they lured Larry Jones into the automobile, took him to a secluded place, and killed him; and defendant Barnes then said "that man was about to cause me to pull a life sentence."

11. Criminal Law § 102.6— murder and conspiracy—prosecutor's argument—failure to intervene ex mero motu—no error

The trial court did not err in a prosecution for murder and conspiracy by not intervening *ex mero motu* when the prosecutor argued that defendant Hunt was a professional assassin because the evidence supported a reasonable inference that defendant Hunt was a professional; when the prosecutor read questions from the Bible supporting the death penalty because the prosecutor was anticipating reliance by the defense on the commandment "Thou shalt not kill"; and references to previous sentences by the prosecutor did not suggest the possibility of parole in so direct a manner as to amount to a gross impropriety.

12. Homicide § 25— murder and conspiracy—instructions—no error

There was no plain error in a prosecution for murder and conspiracy where defendant Hunt argued that the court's instructions were so complex and so confusing that they were incomprehensible to the jury. N.C. Rules of Appellate Procedure, Rule 10(b)(2).

13. Criminal Law § 135.8— murder—aggravating factor—prior conviction involving violence to person

There was no prejudice in a prosecution for murder by allowing the admission of evidence in the sentencing phase to support the aggravating factor of conviction of a felony involving the use of or threat of violence to the person that defendant Hunt had previously been convicted of conspiracy to dynamite a dwelling house and of dynamiting a dwelling house where the State was not able to offer any evidence that the house was occupied at the time of the dynamiting, the court allowed defendant's motion to strike, the court instructed the jury not to consider the evidence, and the State introduced evidence that defendant had been convicted of three separate charges of armed robbery. N.C.G.S. § 15A-2000(e)(3) (1988).

14. Criminal Law § 135.8— murder—aggravating factor—murder committed to avoid arrest

The trial court did not err in a prosecution for murder by submitting to the jury the aggravating factor that the crime was committed to avoid or prevent a lawful arrest or to effect an escape from custody where the evidence, viewed in the light most favorable to the State, raises more than an inference that defendant Barnes abetted and aided defendant Hunt in killing the second victim to avoid being arrested for the murder of the first victim. N.C.G.S. § 15A-2000(e)(4) is not overbroad as interpreted and applied in this case, and the merger rule was not violated by the submission of this aggravating factor.

15. Criminal Law § 135.8— murder—aggravating factor—avoidance of another's arrest

The trial court did not err in the sentencing phase of a prosecution for murder by instructing the jury that in order to find the aggravating factor specified in N.C.G.S. § 15A-2000(e)(4) the jury must find that "when Elwell Barnes aided or abetted Henry Lee Hunt in the killing of Larry Jones, he did so with the purpose to avoid and prevent his arrest or the arrest of Henry Lee Hunt for the killing of Larry Jones—for the killing of Jackie Ransom." When the judge said "for the killing of Larry Jones" he made a verbal error which he quickly corrected and it was not error to instruct the jury to find the factor whether they found that Barnes acted to prevent his own arrest or to prevent an accomplice's arrest. The statute refers to preventing a lawful arrest; it need not be the defendant's own arrest.

16. Criminal Law § 135.8— murder—aggravating factor—pecuniary gain

The trial court did not err when sentencing defendant Barnes for murder by submitting the aggravating factor that the murder was committed for pecuniary gain where there was evidence that, when Rogers Locklear went to A. R. Barnes' house, defendant Barnes asked Locklear if he would let him take A. R.'s place and if he would pay him the same amount he had offered to A. R. and, when asked on the morning after the murder why he and Hunt had killed Ransom, defendant Barnes replied "for $2,000."

17. Criminal Law § 135.4— contract killing—aiding and abetting—Enmund v. Florida distinguished

Enmund v. Florida, 458 U.S. 782, did not apply where the evidence showed that defendant Barnes was an aider and abettor in two murders which were committed with premeditation and deliberation and that defendant Barnes intended that the victims be killed.

18. Criminal Law § 135.7— capital sentencing—consideration of mitigating factors—instructions

The death penalty is not unconstitutional as applied in North Carolina because the jury is instructed that one issue is "Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found are insufficient to outweigh the aggravating circumstance you have found?" If the jury must be satisfied beyond a reasonable doubt before finding that the mitigating circumstances outweigh the aggravating circumstances and the jury is in a state of equipoise as to the issue, it would answer the issue "no." Furthermore, the argument that it was error for the court to charge the jury that they must be unanimous before they could find a mitigating circumstance was overruled.

19. Criminal Law § 135.7; Constitutional Law § 80; Jury § 7.11— death penalty—prior rulings upheld

The Supreme Court in a murder prosecution overruled assignments of error challenging the North Carolina death penalty as unconstitutional, the death qualification of the jury, instructions on the duty to recommend death, and the placement of the burden of proof for mitigating circumstances on defendants where those issues had previously been decided against defendants' positions.

20. Constitutional Law § 30— murder—no bill of particulars for aggravating factors—no disclosure of impeaching or exculpatory information—no error

The Supreme Court in a murder prosecution declined to overrule prior decisions on issues involving the denial of a bill of particulars regarding aggravating factors and the denial of a motion for disclosure of impeaching or exculpatory information.

21. Jury § 6; Constitutional Law § 45— murder—denial of motion for sequestration and individual voir dire—denial of motion to appear as co-counsel—no error

The Supreme Court in a murder prosecution declined to overrule previous opinions regarding the issues of denial of a motion for sequestration and individual voir dire and denial of a motion to appear as a co-counsel.

22. Criminal Law § 135.10— murder—death sentences—not disproportionate

Death sentences for two defendants who committed a contract killing and then eliminated a witness were not imposed under the influence of passion, prejudice and other arbitrary factors and were not disproportionate. N.C.G.S. § 15A-2000(d)(2).

Chief Justice EXUM concurring.

Justice FRYE dissenting as to sentence.

APPEAL by defendants pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by *Clark, J.*, at the 18 November 1985 Session of Superior Court, ROBESON County. The defendants' motions to bypass the Court of Appeals as to lesser sentences were allowed pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court 11 May 1988; additional arguments heard 22 August 1988.

Henry Lee Hunt, Elwell Barnes and A. R. Barnes were tried for the murder and conspiracy to commit murder of Jackie Ransom. In the same trial Hunt and Elwell Barnes were tried for the murder and conspiracy to commit the murder of Larry Jones. Evidence at the trial tended to show that Dottie Locklear Ransom had first married Rogers Locklear. Locklear was a construction worker and often worked out of town for several days at a time. Dottie began seeing Jackie Ransom while Locklear was out of town. She eventually married him, although she never divorced Locklear. Ransom began living with her while Locklear was out of town, and would leave the house when it was time for Locklear to return.

In July 1984, Dottie asked Locklear about the possibility of insuring Ransom's life and then having him killed. She wanted to

buy a trailer and a cafe. On 3 August 1984 she purchased a $25,000 life insurance policy. She asked the agent whether, if Ransom were killed in a fight, she would be entitled to double indemnity for accidental death.

Dottie asked Locklear to find a hit man to kill Ransom. Locklear asked his brother Harry to run over Ransom with his car. Harry refused, but told Locklear that if he wanted a hit man he should see A. R. Barnes.

On 16 August, Locklear met A. R. Barnes and gave him a ride to Locklear's house. After some negotiation Rogers and Dottie Locklear agreed to pay A. R. Barnes $2,000 to kill Jackie Ransom. A. R. Barnes said "If I don't kill him, I'll get it done."

Locklear and A. R. met several times after that. On 8 September, Locklear went to A. R.'s house to see if he was going to kill Ransom, and to tell him the insurance policy had been received. Locklear did not see A. R., but saw his brother, the defendant Elwell "Babe" Barnes. Elwell Barnes asked Locklear if he could take his brother's place, and kill Ransom for the same compensation Locklear had promised his brother. Locklear replied that it was up to him.

Elwell Barnes then told Locklear to drive him to the home of the defendant Henry Lee "Mulehead" "Buck" Hunt. When they arrived at Hunt's trailer, Barnes talked with Hunt privately for about 10 minutes. Later, Hunt got into the car, put his hand on his pocket and told Locklear "I got the gun. Me and Babe can get the job done." Barnes replied "Yeah." They drove past a house and Hunt looked at it and said "That looks like where Jackie stay, there." They then drove down a road into some woods and Hunt put the gun in some bushes. They then drove back into town, and Locklear pointed out Jackie Ransom. Hunt told Locklear to get his wife and take her to a place at which there would be witnesses.

At about 11:00 or 11:30 that night the defendants Hunt and Elwell Barnes returned to Hunt's trailer. Hunt took off his clothes and put them in the washing machine, and put a pistol under his mattress. Barnes spent the night on the couch. The next morning Bernice Cummings, who lived with Hunt at his trailer, asked Barnes where they had been the night before. Barnes replied that

they had killed Jackie Ransom for $2,000, for Dottie and Rogers Locklear. Bernice asked who shot Ransom and Barnes replied "Henry Lee Hunt."

Later that day Locklear drove to Hunt's trailer. Hunt walked up to him and said "I killed Jackie last night." He said he wanted his money in 30 days or he would kill Dottie and Locklear. Later that day, Ransom's body was found in a shallow grave. An autopsy revealed that Ransom died from a gunshot wound to the head.

The next day, 10 September, the defendants were at Hunt's trailer. Buddy Roe Barton drove up. Hunt went to Barton's car and returned after a few minutes, and stated that Larry Jones was running his mouth, and that he "would put a stop to his damn mouth."

Larry Jones lived with Hunt's sister Aganora. He met several times with Detective Mike Stogner of the Lumberton Police Department and SBI Agent Lee Sampson and talked about Ransom's death.

On 14 September, Hunt told Bernice Cummings that he was going to "kill that water-headed, ratting son-of-a-bitch Larry Jones" and wanted to get a shovel so he would "bury him where he never could be found." He stated that Jones had been running his mouth and that he knew that Hunt had killed Ransom. Hunt procured a shovel from Mitt Jones and put it in his trunk. Later, Hunt got a shotgun and put it in the trunk of Bernice's car. Hunt said to Aganora and Bernice that he was going to kill Larry Jones because Jones knew he killed Jackie Ransom, and could get him a life sentence.

Later that day Hunt and Elwell Barnes were riding in an automobile driven by Jerome Ratley when they picked up Jones. They went to the home of a person called "String Bean." They left that place and continued driving. Hunt told Ratley to turn off onto a dirt road, then onto a tram road. Then Hunt told Ratley to stop and turn off the lights. Hunt then turned around and shot Jones in the chest. Ratley saw two or three shots. Hunt said "You don't eat no more cheese for no damn body else. I'll meet you in heaven or hell, one." Hunt then pulled Jones out of the car, and Barnes got the shotgun from the trunk. Jones started mumbling "Mule, Mule." Barnes pointed the shotgun at Jones' head. Hunt

said "Don't shoot him with the shotgun," and shot him with the pistol several times. Barnes kept a lookout while Hunt and Ratley dragged Jones' body into the woods about a hundred yards and buried him in a shallow grave. As they rode back into town, Barnes said "That man was about to cause me to pull a life sentence."

The next morning, 16 September, Hunt told Bernice Cummings that he had carried Larry Jones to where he would never be found.

On 1 October, Jones' body was found. An autopsy revealed that he died of a gunshot wound to the head. A ballistics expert testified that bullets removed from the body were fired from the .25 caliber Beretta that Hunt had given his son-in-law after the murders. While in jail, Hunt told his son-in-law he had killed Ransom and Jones. He also told him to get rid of the gun, and to get his brother to "get rid of the black guy," meaning Jerome Ratley, because "He's the one that can hurt me most."

At the close of all the evidence, the trial court granted a mistrial as to A. R. Barnes. The jury returned verdicts of guilty on all counts as to Elwell Barnes and Hunt, and recommended that both be sentenced to death for each murder charge. The court sentenced them to death for each murder charge and ten years imprisonment for each conspiracy charge.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General (in Hunt case), and Ralf F. Haskell, Special Deputy Attorney General (in Barnes case), for the State (original brief and argument); Lacy H. Thornburg, Attorney General, James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, Joan H. Byers, Special Deputy Attorney General, and Barry S. McNeill, Assistant Attorney General, for the State (supplemental brief and argument).

H. Mitchell Baker, III and Angus B. Thompson, II, for defendant appellant Hunt; Bruce W. Huggins, for defendant appellant Barnes (original brief and argument); Malcolm Ray Hunter, Jr., Appellate Defender, and Louis D. Bilionis, for defendant appellants (supplemental brief and argument).

E. Ann Christian and Robert E. Zaytoun for North Carolina Academy of Trial Lawyers, amicus curiae.

John A. Dusenbury, Jr., for North Carolina Association of Black Lawyers, amicus curiae.

WEBB, Justice.

[1] In his first assignment of error, defendant Hunt contends the trial court erred in denying his motion for a change of venue or a special venire. He argues that extensive inflammatory media coverage of the murders, coupled with extensive word-of-mouth publicity, made it impossible for him to receive a fair trial by a Robeson County jury.

N.C.G.S. § 15A-957 provides, in pertinent part:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

The purpose of N.C.G.S. § 15A-957 is to insure that jurors decide cases based on evidence introduced at trial and not on something they have heard outside the courtroom. *State v. Abbott*, 320 N.C. 475, 358 S.E. 2d 365 (1987). Under this statute, the burden is on the moving party to show that "it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." *State v. Gardner*, 311 N.C. 489, 497, 319 S.E. 2d 591, 597-98 (1984). In most cases a showing of identifiable prejudice to the defendant must be made, and relevant to this inquiry is testimony by potential jurors that they can decide the case based on the evidence presented and not on pretrial publicity.

At a pretrial hearing before Samuel E. Britt, Judge, the defendant offered evidence that Robeson County had a population of approximately 105,000. The *Robesonian*, a county newspaper, had a circulation in Robeson County of between 15,000 and 16,000 on weekdays and between 16,000 and 17,000 on Sundays. The *Fayetteville Observer* had circulations in Robeson County of approximately 3,100 and 1,600, respectively. Between the date of the first murder, 8 September 1984, and the date of the hearing, 12 September 1985, 16 articles concerning the murders appeared in the *Robesonian*, 8 appeared in the *Fayetteville Times*, 3 appeared in the *Fayetteville Observer*, and 6 newscasts concerning the murders were broadcast on the radio. Judge Britt found that some of the articles in the *Robesonian* were inflammatory. The first article mentioning defendant Hunt was entitled " 'Professional Killer' charged in Two Murders" and included these statements:

> "From what I know about him, he's the most dangerous person in Robeson County" [Sheriff's Department Detective] Locklear said. "He has a reputation for murder."
>
> . . . .
>
> "He's a professional killer," [Police Captain] Taylor said of Hunt. ". . . He seeks out people, stalks them, and then lures them away from a place, and then kills them."
>
> . . . .
>
> Robeson County Sheriff Hubert Stone said, "We consider him (Hunt) to be one of the most hardened criminals in Robeson County. We're investigating him into some other murders in the Lumberton area as well."
>
> Stone would not say which murders Hunt may be connected with but said the number may be six or seven.
>
> Hunt has previously been arrested for assault and battery, larceny of hogs, manufacturing non-tax paid liquor, conspiracy in use of explosives, and armed robbery.
>
> Several other articles contained similar information.

The court found that some of the newspaper articles were inflammatory but found the defendant had not made a showing that the prospective jurors would base their decisions upon pre-

trial information rather than evidence presented at trial. The motion for change of venue or a special venire was denied.

In the court's ruling we find no error. This case is distinguishable from *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983), in which there was plenary testimony that the majority of residents of Alleghany County had formed opinions which would make it difficult for them to decide the case based on the evidence produced in court. In this case there was no evidence of the effect of the news reports on the residents of Robeson County other than the reports. Of the twelve jurors who decided the case, five had no prior knowledge of the case, five had read something about it and two had heard it discussed. All jurors stated unequivocally that they could make their decisions unaffected by anything they had heard or read. We hold that we cannot disturb the ruling of the superior court that the defendant Hunt did not show it was "reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they may have formed."

[2] Defendant Hunt further contends that the trial court erred in denying his motion for individual voir dire and sequestration of the prospective jurors. He argues that he was prejudiced when several potential jurors made certain remarks in the presence of other potential jurors.

N.C.G.S. § 15A-1214(j) provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." Motions for individual voir dire and jury sequestration are addressed to the discretion of the trial judge; his ruling will not be reversed absent a showing of abuse of discretion. *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987).

We hold that the defendant has shown no abuse of discretion in the present case, especially in light of the fact that 146 potential jurors eventually had to be examined, and in light of the fact that the trial judge did allow selective individual voir dire whenever defendant requested it. Furthermore, we are not convinced that the defendant was prejudiced by the remarks by the

prospective jurors of which he complains. Prospective juror Otis Lloyd stated that he was in the insurance business, had talked to defendant about insurance and had been to the defendant's home. This remark was not prejudicial. Prospective juror Willie Taylor stated that he was a correctional officer and knew the defendant when defendant was in prison. Prospective juror Ray Hunt stated that he had made a bond for the defendant. These remarks did not prejudice defendant because there was evidence at the trial that defendant had been in prison. Potential juror Mary Oxendine stated that she had been told that codefendant A. R. Barnes was with her brother when he was murdered. This remark could not have prejudiced defendant Hunt since his name was not even mentioned. Potential juror Merril Locklear stated that when he was in elementary school, he and the defendant "would always pick at one another. You know, arguments or fights or something like that." This is such commonplace behavior among children that it cannot have been prejudicial. Several other prospective jurors stated that they had already formed opinions as to the defendant's guilt or innocence. We cannot assume that this prejudiced the defendant. Moreover, each of the jurors who actually decided the case stated that they had no preconceived opinions and could give the defendant a fair trial based on the evidence. The defendant has shown no abuse of discretion. This assignment of error is overruled.

[3] Both defendants assign error to the consolidation of their cases for trial with the cases of the other defendants pursuant to N.C.G.S. § 15A-926(b) and to the denial of their motions for severance of the cases for trial. Hunt, relying on *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982) and *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *vacated in part, Carter v. North Carolina*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976), says his defense was antagonistic to the defenses of A. R. Barnes and Elwell Barnes and that by consolidating the cases for trial he was deprived of evidence he could have used in his defense. In *Alford* we held it was error to consolidate for trial first degree murder charges against Alford and a codefendant when the effect of the consolidation was to prevent Alford from introducing a confession by the other defendant in which Alford was exonerated. In *Boykin* each defendant was charged with the murder of a person. These cases were consolidated for trial and the State introduced several statements by

one of the defendants to the effect that he had shot the decedent. The court would not allow him to explain that he had made these admissions to protect the other defendant. The court also refused to let him cross-examine a deputy sheriff as to a confession the codefendant had made. Under these circumstances we held it was error to consolidate the two cases for trial because it prevented the defendant from eliciting testimony favorable to him.

Hunt argues that he was prejudiced by the consolidation of the cases for trial because it prevented him from the full benefit of out of court statements by A. R. Barnes. A. R. Barnes made two statements to officers on 27 September 1984 in which he told them he shot Jackie Ransom in self-defense during a time Hunt was not present. On 28 September 1984 A. R. Barnes recanted these statements. Hunt contends he was prejudiced by the consolidation of the trials because he could not call A. R. Barnes as a witness and cross-examine him about these statements. We hold Hunt has not shown prejudice. He did not attempt to call A. R. Barnes as a witness and we do not know whether A. R. Barnes would have refused to testify. If the cases had not been consolidated A. R. Barnes could not have been compelled to testify if he had exercised his constitutional right not to incriminate himself. Hunt was not prejudiced by the consolidation of the cases for trial.

Elwell Barnes contends it was error to consolidate his trial with the trial of A. R. Barnes because his defense was antagonistic to the defense of A. R. Barnes. He says the theory of his defense as to the murder of Jackie Ransom was that A. R. Barnes killed Jackie Ransom without any assistance from Elwell Barnes. As to the murder of Larry Jones, Elwell Barnes says the killing was done by Henry Lee Hunt and Elwell Barnes was a "passive participant." Elwell Barnes argues that if he had been able to cross-examine A. R. Barnes he could have shown A. R. Barnes' confession was true and his recantation of the confession was false and "subsequently destroyed the State's theory Elwell Barnes aided and abetted Henry Lee Hunt in the murder of Larry Jones." One difficulty with this argument is that had A. R. Barnes pled the Fifth Amendment, Elwell Barnes could not have called him as a witness if the trials of the two men had been severed.

In *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986) and *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*

by *Jolly v. North Carolina*, 446 U.S. 929, 64 L.Ed. 2d 282 (1980), we dealt with the question of the severance of trials in which the defendants have antagonistic defenses. We held that defenses which are inconsistent are not necessarily so antagonistic as to require separate trials.

> The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all the other evidence in the case, defendants were denied a fair trial.
>
> Prejudice would ordinarily result where codefendants' defenses are so irreconcilable that "the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." . . . Severance should ordinarily be granted where defenses are so discrepant as to pose an evidentiary contest more between defendants themselves than between the state and defendants. . . . To be avoided is the spectacle where the state simply stands by and witnesses "a combat in which the defendants [attempt] to destroy each other."

Id. at 587, 260 S.E. 2d at 640.

In this case there was plenary evidence of Elwell Barnes' guilt other than the statements of A. R. Barnes. The statements of A. R. Barnes tended to exonerate Elwell Barnes. This is not a case in which the State simply stood by and allowed the defendants to convict each other. The defense of Elwell Barnes was not so antagonistic to the defenses of the other defendants that a severance was required.

[4] Each defendant also contends it was error to consolidate for trial the two conspiracy and two murder charges against him. N.C.G.S. § 15A-926(a) provides in part:

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

We have been liberal in our interpretation of this section. In *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981), we held there was a transactional connection, which supported consolida-

tion for trial, between three separate common law robberies with similar modus operandi. In *State v. Williams*, 308 N.C. 339, 302 S.E. 2d 441 (1983), we held there was a transactional connection between two separate charges of rape committed against one woman twenty-six days apart. It is apparent that the second murder in this case was an act connected to the first murder. The second murder was committed to avoid detection for the first murder. This transactional connection supports the consolidation of all the charges for trial pursuant to N.C.G.S. § 15A-926(a).

[5] The defendant Hunt under one assignment of error contends that certain testimony should have been excluded. On direct examination Rogers Locklear testified as follows:

> Q: . . . Along about June or July 1984, did you have occasion to have a conversation with your wife, Dottie Ransom?
>
> . . . .
>
> MR. THOMPSON: Object.
>
> . . . .
>
> THE COURT: Overruled, Gentlemen.
>
> Q: Did you, sir?
>
> A: Yes, sir.
>
> Q: All right. Now, tell us about that conversation with Dottie Ransom, please.
>
> A: Well, she told me that she was going to take insurance out on Jackie.
>
> Q: All right. Go ahead.
>
> A: And I asked her why was she going to take insurance out on him and she says, "So I can have him killed."

The defendant argues that this testimony was hearsay and his right to confront a witness against him guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by its admission. We hold this testimony was not hearsay and was properly admitted. N.C.G.S. § 8C-1, Rule 801(c) defines hearsay as follows: " '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." The testimony of Rogers Locklear was for the purpose of showing why the three defendants including Hunt conspired to kill and killed Jackie Ransom. The above quoted colloquy was not to prove that Dottie Ransom insured Jackie Ransom's life so that she could have him killed but was to prove why Rogers Locklear contacted A. R. Barnes and later Elwell Barnes and Hunt to have Jackie Ransom killed. The jury did not have to judge the credibility of Dottie Ransom as to whether she intended to have Jackie Ransom killed. It had to judge the credibility of Rogers Locklear to determine why he conspired with the three defendants to kill Jackie Ransom. This testimony was not hearsay and was properly admitted. *See* 1 Brandis on North Carolina Evidence § 138 (1988).

[6] Mike Stogner, a detective with the Robeson County Sheriff's Department, testified for the State. On cross-examination by the counsel for A. R. Barnes the following colloquy occurred.

> Q: Was the statement given to you by A. R. Barnes on the 28th different from that given to you on the 27th?
>
> A: Yes, sir, it was.
>
> Q: How was it different?
>
> A: It was a complete recantation of the original statement where he denied the first statement.
>
> Q: All right. Did he tell you why he had given the statement that he did on September 27, 1984?
>
> MR. BAKER: Object.
>
> THE COURT: OVERRULED.
>
> THE WITNESS: Yes, sir, he did.
>
> Q: (By Mr. Bullard:) Would you tell us about that, please?
>
> A: "A. R. Barnes stated that what he told Lee Sampson, SBI, and Detective Mike Stogner on Thursday and Thursday night, 9-27-84, about killing Jackie Ransom was not true. He was scared and was trying to cover up for someone else."

A. R. Barnes had made two statements to Mr. Stogner on 27 September 1984 in which he took full responsibility for the killing of Jackie Ransom. On 28 September 1984 he recanted this state-

ment. Hunt introduced into evidence the statements of 27 September 1984 and A. R. Barnes proffered the statement of 28 September 1984. The actual statement of A. R. Barnes to Mr. Stogner was that he was trying to protect Elwell Barnes. The statement was sanitized before its admission so as not to refer to Elwell Barnes as the person being protected.

The defendant Hunt contends that this extrajudicial statement of A. R. Barnes implicated him and his constitutional rights as delineated in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), were violated. *Bruton* holds that a defendant's Sixth Amendment right to confront witnesses against him is violated if he is implicated by the confession of a codefendant being tried with him who does not testify. N.C.G.S. § 15A-927(c)(1) provides that a prosecutor may introduce an out-of-court statement which would not otherwise be admissible if all references in the statement to the defendant are deleted so that the statement does not prejudice him. We hold that this statement did not implicate Hunt and was properly admitted into evidence. It did not mention Hunt. It did say that A. R. Barnes was attempting to protect someone else but Hunt has not advanced any reason and we can think of none as to why the jury would infer it was Hunt rather than someone else who was being protected.

The defendant relies on *State v. Gonzalez*, 311 N.C. 80, 316 S.E. 2d 229 (1984) and *State v. Owens*, 75 N.C. App. 513, 331 S.E. 2d 311, *disc. rev. denied*, 314 N.C. 546, 335 S.E. 2d 318 (1985). Both these cases are distinguishable from this case. In *Gonzalez* we held it violated the rule of *Bruton* when an extrajudicial statement of a codefendant was received in evidence which said, "I told him I was with two guys, but that I did not rob anyone, they did." We said this implicated the defendant because two men had committed the robbery. In this case A. R. Barnes' statement did not refer to anyone else who was involved in the killing of Jackie Ransom. In *Owens* the Court of Appeals held it was error to admit an extrajudicial statement of a nontestifying codefendant that he picked up the defendant shortly after a robbery because the defendant pointed a gun at him. The Court of Appeals said this placed the defendant near the scene shortly after a robbery with a gun similar to the one used in the robbery. No such incriminating evidence was introduced in this case.

[7] The defendant Hunt assigns error to the denial of his motions to dismiss the charges of first degree murder of Jackie Ransom and of conspiracy to murder Jackie Ransom. His argument is "that when the test used in *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984), is applied to the case at bar regarding the sufficiency of the evidence that a dismissal of the charges as to the murder and conspiracy of Jackie Ransom is required." We believe it takes no discussion of this argument to say that under *Brown* and many other cases decided by this Court that the evidence was sufficient for the jury to find that the defendant Hunt was guilty of the murder and conspiracy to commit the murder of Jackie Ransom.

[8] The defendant Elwell Barnes contends all the charges against him should have been dismissed. The State's theory was that Elwell aided and abetted in the two murders. A person is guilty of a crime by aiding and abetting in its commission if he is present at the scene of the crime, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and such intent was communicated to the actual perpetrators. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091, 47 L.Ed. 2d 102 (1976).

Elwell Barnes contends that all the evidence shows he was not actually or constructively present when Henry Lee Hunt killed Jackie Ransom. He argues further that assuming it may be inferred from the evidence he was present at the scene there is no evidence of the actual role he played in the crime. We hold the evidence that Elwell Barnes asked Rogers Locklear whether he could take his brother's place in killing Jackie Ransom, that Elwell Barnes took Rogers Locklear to meet Henry Lee Hunt, that Elwell Barnes and Hunt were together when Rogers Locklear last saw them on the night of the murder, that later that night the two men went to Hunt's trailer, that the next morning Elwell Barnes said he and Hunt had killed Ransom for $2,000, and that he said Hunt had shot Ransom is evidence from which the jury could conclude Elwell Barnes was present when the killing occurred with the intent to aid Hunt in the commission of the offense and Hunt was aware of this intent. It was not error to deny Elwell Barnes' motion to dismiss as to the murder of Jackie Ransom.

[9] Elwell Barnes says of the murder of Larry Jones that the evidence tends to show he may or may not have known of Hunt's intention to kill Larry Jones. He says the murder of Larry Jones was the sole act of Hunt and he did not encourage, command, advise or instigate Hunt to commit the murder. We hold that the evidence that Elwell Barnes was in the automobile when Larry Jones was picked up, that Elwell Barnes was in the automobile when Larry Jones was shot by Hunt, that Elwell Barnes then started to shoot Larry Jones with a shotgun, that Hunt told Elwell Barnes not to shoot Larry Jones and Hunt then shot Larry Jones again, and that Elwell Barnes stood watch while Hunt and Ratley carried Jones' body into the woods and buried it is sufficient evidence for the jury to find Elwell Barnes aided and abetted in the murder of Larry Jones.

[10] Elwell Barnes contends there was not sufficient evidence for the jury to find he conspired to kill either Jackie Ransom or Larry Jones. A conspiracy is an agreement by two or more persons to commit an unlawful act or to do a lawful act by unlawful means. *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969), *cert. denied*, 398 U.S. 959, 26 L.Ed. 2d 545 (1970). We hold there was sufficient evidence for the jury to find Elwell Barnes agreed with Hunt and Rogers Locklear to murder Jackie Ransom and that he agreed with Hunt to murder Larry Jones.

As to the charge of conspiracy to murder Jackie Ransom the evidence shows Elwell Barnes asked Rogers Locklear if he could take his brother's place and kill Jackie Ransom. Elwell Barnes then carried Rogers Locklear to Hunt's trailer and after Elwell Barnes had talked privately for a few minutes with Hunt, Hunt told Locklear, "I got the gun. Me and Babe can get the job done." This evidence supported the jury finding that Elwell Barnes agreed with Hunt and Locklear to murder Jackie Ransom. As to the charge of conspiracy to murder Larry Jones there was evidence that Hunt told several people he would kill Larry Jones. Hunt and Barnes were riding in an automobile with Jerome Ratley when they lured Larry Jones into the automobile, took him to a secluded place and killed him. Elwell Barnes then said, "That man was about to cause me to pull a life sentence." This was evidence which supports the jury finding that Elwell Barnes and Hunt agreed to murder Larry Jones. It was not error to deny the motions to dismiss these two charges of conspiracy.

[11] Defendant Hunt next contends the trial court erred in permitting the district attorney to make improper remarks during his jury arguments. Defendant Hunt did not object to any of these remarks; he contends the trial court should have corrected them *ex mero motu.* In hotly contested cases, counsel are given wide latitude in arguments to the jury and are permitted to argue the evidence which has been presented as well as all reasonable inferences which can be drawn from that evidence. *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988). The State's jury argument in capital cases is subject to limited 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. Id.*

Defendant Hunt first excepts to this statement made during the district attorney's argument at the guilt phase:

> What you got is cool deliberation. The deliberation, Ladies and Gentlemen of the Jury, of the professional. The deliberation of the professional assassin, the contract killer that the State has proven you are dealing with in this lawsuit.

In *State v. Swink*, 29 N.C. App. 745, 225 S.E. 2d 646 (1976), the Court of Appeals held that it was error for the prosecutor to refer to the defendant as a "professional criminal" in his closing argument. In *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967), this Court held that it was error for the prosecutor to argue, in effect, that the defendants were habitual storebreakers. Those cases, however, are distinguishable in two respects from the present case. In each of those cases, the defendant objected to the remark; the defendant in the present case did not do so. More important, the evidence in the present case clearly supports a reasonable inference that defendant Hunt is in fact a "professional assassin." A "professional" is "one that engages in a particular pursuit, study, or science for gain or livelihood." Webster's Third New International Dictionary p. 1811 (1964). An assassin is "one that murders either for hire or from fanatic adherence to a cause." *Id.* at 130. The State's evidence tended to show that Hunt committed a murder for $2,000. There was also evidence that Hunt had said, explaining why he had a glove in his pocket, "If

you had killed as many men as I had, you would have a brown glove in your pocket, too. . . ." We hold that the trial court did not err in failing to intervene *ex mero motu* to correct this remark.

Defendant Hunt next excepts to a portion of the district attorney's closing argument at the penalty phase in which he read quotations from the Bible, including the following: "but he that smiteth a man so that he dies, he shall surely be put to death," "Who so killeth any person, the murderer shall be put to death by the mouths of witnesses. Moreover, ye shall take no satisfaction for the life of a murderer which is guilty of death, but he shall surely be put to death." The district attorney was merely anticipating any possible reliance by the defense on the commandment "Thou shalt not kill," and arguing that the death penalty is not inconsistent with the Bible. This is a portion of the district attorney's argument:

> What would happen, Ladies and Gentlemen of the Jury, if one of the lawyers gets up here and he picks up this Good Book and he says, ". . . do you know what the Good Book says? It says Thou shalt not kill and that certainly means my client over here but it means . . . you, Ladies and Gentlemen of the Jury." . . . If he starts that, you say "Wait a minute Mr. Lawyer. I want you to read just a few verses down from that Commandment . . . where it says, '. . . but he that smiteth a man so that he die, he shall surely be put to death.' "

In *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987) and in *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983), we held that arguments similar to this one were not so improper as to require intervention by the trial court *ex mero motu*.

Defendant Hunt next excepts to the district attorney's discussion of his previous prison sentences:

> Now, the interesting thing, here, is that he received, according to this Judgment and Commitment, not less than ten nor more than fifteen years on case 155 . . . in case 156? Not less than ten nor more than fifteen years to begin at the expiration, end of the sentence in case 155. . . . And then in

> case 157, he's given ten to fifteen years to begin at the expiration of the sentence in case 156. . . . We are up to thirty to forty-five years in prison.
>
> . . . .
>
> These judgments were entered in 1971 . . . and yet he's out here, now. If he was where these judgments say, Larry Jones would be alive. Jackie Ransom would be alive. . . .

The defendant argues that the district attorney improperly suggested the likelihood that the defendant would be paroled if the jury recommended a life sentence.

A defendant's eligibility for parole is not a proper matter for the jury's consideration. *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1. However, in the present case, as in *Brown*, the word "parole" was never used, and there was no specific mention of the possibility that a life sentence could mean release in 20 years. We hold that the district attorney's argument did not suggest the possibility of parole in so direct a manner as to amount to a gross impropriety requiring *ex mero motu* intervention by the trial court. *See Brown*. This assignment of error is overruled.

The same reasoning requires us to overrule the defendant Barnes' tenth assignment of error, in which Barnes contends that the trial court should have intervened *ex mero motu* when the district attorney made reference to a previous sentence:

> Had Elwell Barnes, alias Babe, been previously convicted of another capital felony, the answer is obviously yes . . . the judgment says, "it is therefore considered, ordered and adjudged that the said Elwell Barnes be and is hereby sentenced to State's prison for and during the term" . . . get this . . . "of his natural life." And, yet, here he is out in 1981, and within three years, has killed two people. . . . "Natural life," says it right here. What can you depend on with that type of sentence, Ladies and Gentlemen of the Jury?

This argument did not suggest the possibility of parole in so direct a manner as to amount to a gross impropriety requiring *ex mero motu* intervention by the trial court.

[12] Defendant Hunt next contends the trial court committed plain error in that its instructions at both the guilt and penalty

phases were "so complex and confusing that they were incomprehensible to the jury." The defendant does not refer to any specific portions of the instructions, but excepts to all of them.

We find no merit in this assignment of error. Rule 10(b)(2) of the Rules of Appellate Procedure provides, in pertinent part:

> No party may 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. . . .

In the present case, after the trial court gave its jury instructions at the guilt phase and at the penalty phase, the jurors were sent to the jury room and the trial court asked the lawyers if they had any requests for corrections or additions. Hunt's counsel answered in the negative at the guilt phase, and at the penalty phase requested only one additional instruction, which the trial court gave. Hunt's counsel never objected to any portion of the instructions, or alleged that anything in the instructions was confusing.

Under the plain error rule, an appellate court can review an error that was not brought to the trial court's attention, but only if the error (1) is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or (2) amounts to a denial of a fundamental right of the accused, or (3) results in a miscarriage of justice, or (4) denies the defendant a fair trial, or (5) seriously affects the fairness, integrity, or public reputation of judicial proceedings, or (6) has a probable impact on the jury's finding that the defendant was guilty. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). In the present case, however, defendant has not pointed out, nor can we find, anything in the trial court's instructions that amounts to plain error. We further note that the jury never requested any additional instructions or clarifications. This assignment of error is overruled.

[13] The defendant Hunt next contends the court erred at the sentencing phase in allowing the admission of evidence that he had previously been convicted of conspiracy to dynamite a dwell-

ing house and of dynamiting a dwelling house. The State offered this evidence to prove the aggravating factor that the defendant had previously been convicted of a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988). After this evidence had been introduced the State was not able to offer any evidence that the house was occupied at the time of the dynamiting. The court then allowed the defendant's motion to strike evidence of the convictions on the ground the dynamitings did not involve a threat to a person. The court instructed the jury not to consider this evidence in the determination of this aggravating circumstance. The State introduced evidence that the defendant had been convicted of three separate charges of armed robbery to support this aggravating circumstance.

We hold that the defendant Hunt was not prejudiced by the admission of the evidence of the dynamiting convictions. The court instructed the jury not to consider it and we assume the jury followed the court's instructions. *State v. Clark*, 298 N.C. 529, 259 S.E. 2d 271 (1979). There was uncontradicted evidence that the defendant Hunt had committed armed robbery. This evidence supports the finding of this aggravating circumstance.

[14] Defendant Elwell Barnes next contends that the trial court erred in submitting to the jury in the Jones case the aggravating factor set out in N.C.G.S. § 15A-2000(e)(4):

> (4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The defendant argues that the submission of this factor was erroneous for three reasons. First, the defendant claims the evidence does not support a finding of this factor. We disagree. The evidence, when viewed in a light most favorable to the State, raises more than a reasonable inference that Barnes aided and abetted Hunt in killing Jones in order to avoid being arrested for the murder of Jackie Ransom. Especially important is the evidence that Barnes was well aware that Jones was talking to people about the murder of Jackie Ransom, and the evidence that Barnes stated after the killing, "That man was about to cause me to pull a life sentence."

Second, defendant Barnes argues that N.C.G.S. § 15A-2000(e)(4) "is overbroad as interpreted and applied in this case."

The defendant argues that the factor should not be submitted unless the person killed was either a police officer trying to effect a lawful arrest, or a victim of the original offense, or a witness to the original offense. The defendant cites no legal authority for this proposition, and we find no merit in it. Under the plain language of the statute, the factor is applicable whenever the murder was committed in order to avoid arrest, not only in the three situations specified by the defendant. In the present case, the person killed was talking with law enforcement personnel about the murder of Jackie Ransom, and the defendant knew he was talking about it. The evidence shows that he was killed to avoid arrest.

Third, defendant Barnes argues that the submission of this aggravating factor violates the merger rule as set forth in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980): "when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony." *Id.* at 113, 257 S.E. 2d at 568. The defendant's argument has no merit; the *Cherry* rule has no bearing on the present case, because defendant was convicted of first degree murder based not on the felony murder rule, but on the theory that he aided and abetted a premeditated and deliberated killing. Elwell Barnes also contends that the State prosecuted him for the murder of Larry Jones on the theory that he aided and abetted Henry Lee Hunt in the murder of Larry Jones for the purpose of avoiding arrest for the murder of Jackie Ransom. He contends that under *Cherry* this motive merged into the murder and cannot be used as an aggravating circumstance. The motive of the defendant is not an element of the crime and *Cherry* does not preclude its use as an aggravating circumstance.

[15] Defendant Barnes further contends that the trial court committed error when it instructed the jury that in order to find the aggravating factor specified in N.C.G.S. § 15A-2000(e)(4), the jury must find that "when Elwell Barnes aided or abetted Henry Lee Hunt in the killing of Larry Jones, that he did so with the purpose to avoid and prevent his arrest or the arrest of Henry Lee Hunt for the killing of Larry Jones—for the killing of Jackie Ransom." The defendant argues that this instruction would allow the

jury to find the aggravating factor if they found that Barnes acted with the purpose to avoid either his arrest or Hunt's arrest, for the murder of either Ransom or Jones. The defendant claims the jury should only have been permitted to find the factor if Barnes acted with the purpose of avoiding *his own* arrest for the murder of Ransom.

We disagree. First, when the judge said "for the killing of Larry Jones" he made a verbal error, which he quickly corrected by saying "for the killing of Jackie Ransom." Second, it was not error to instruct the jury to find the factor whether they found that Barnes acted to prevent his own arrest *or* to prevent Hunt's arrest. N.C.G.S. § 15A-2000(e)(4) reads in part, "for the purpose of avoiding or preventing *a* lawful arrest. . . ." (Emphasis added.) It need not be the defendant's own arrest. In the present case, there was evidence that Barnes acted with the purpose of preventing both his arrest and Hunt's arrest. This assignment of error is overruled.

[16] Defendant Barnes next contends that the trial court committed plain error in submitting to the jury in the Ransom case the aggravating factor set out in N.C.G.S. § 15A-2000(e)(6): "The capital felony was committed for pecuniary gain." The defendant argues that the evidence is insufficient to support a finding that he aided and abetted Hunt in the murder for pecuniary gain. We disagree. There is evidence that when Rogers Locklear went to A. R. Barnes' house on 8 September 1984, defendant Elwell Barnes asked Locklear if he would let him take A. R.'s place, and if he would pay him the same amount he had offered to A. R. The next morning, after the murder, when Bernice Cummings asked Elwell Barnes why he and Hunt killed Ransom, Barnes replied "for two thousand dollars." This evidence is sufficient to support a finding of the pecuniary gain aggravating factor; the defendant's assignment of error is overruled.

[17] Defendant Elwell Barnes next assigns error to what he contends is the court's failure to comply with *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140 (1982). *Enmund* dealt with a felony murder. The United States Supreme Court held that an aider and abettor to a robbery in which the victims were killed could not be executed when all the evidence showed he did not intend that the victims be killed. In this case the evidence showed Elwell Barnes

was an aider and abettor in two murders which were committed with premeditation and deliberation. He intended that the victims be killed. *Enmund* does not apply.

[18] The defendant Elwell Barnes next contends that the death penalty as applied in this State is unconstitutional because the jury is not given proper guidance in considering aggravating and mitigating circumstances. He bases this argument on the way the jury is instructed to apply N.C.G.S. § 15A-2000(b) pursuant to *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 173 (1983). The court used the charge suggested by *McDougall* in this case. Four issues were submitted to the jury. The third issue was as follows:

> Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance you have found?

The defendant says this issue is deficient because if the jury is in equipoise it must answer the issue "yes" and impose the death penalty. We do not believe the defendant Barnes' analysis of the issue is correct. If the jury must be satisfied beyond a reasonable doubt before finding the mitigating circumstances are insufficient to outweigh the aggravating circumstances and the jury is in a state of equipoise as to the issue it would answer the issue "no." We hold the issue was properly submitted.

Both defendants argue that it was error for the court to charge the jury that they must be unanimous before they could find a mitigating circumstance. The defendants base this argument on *Mills v. Maryland*, --- U.S. ---, 100 L.Ed. 2d 384 (1988), which dealt with the finding of mitigating circumstances in a capital case. For the reasons stated in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we overrule this assignment of error.

[19, 20, 21] The defendants argue under separate assignments of error eleven issues which they recognize have been decided against their positions in previous cases. Each of the defendants asks that we find error because (1) he was not provided a bill of particulars regarding aggravating factors upon which the State would rely, (2) the death penalty is unconstitutional, and (3) the court placed the burden of proving mitigating circumstances on

the defendants. Defendant Hunt asks that we find error for (1) the denial of his motion to appear as co-counsel, (2) the denial of his motion for disclosure or impeaching or exculpatory information, (3) for allowing the prosecutor to "death qualify" the jury, and (4) for instructing the jury that they had a duty to recommend death under certain circumstances. Defendant Barnes asks that we find error because (1) the court denied his motion for individual voir dire and the sequestration of the jurors, (2) the court ruled that jurors could be excused for cause if they could not under any circumstances impose the death penalty, (3) the court instructed the jury that it had a duty to return a recommendation of death if it found that the aggravating circumstances, in light of the mitigating circumstances, were sufficiently substantial to call for the death penalty, and (4) because N.C.G.S. § 15A-2000 is unconstitutional on its face and as applied in this case. The defendants concede that this Court has previously decided all these issues against their positions. These assignments of error are overruled.

Proportionality Review

[22] Having determined there is no error in the guilt or penalty phase of the trial sufficient to require a new trial or sentencing hearing, we are required by N.C.G.S. § 15A-2000(d)(2) to determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentence of death was imposed, (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 the pool of similar cases, considering both the crime and the defendant.

The jury found as to Henry Lee Hunt two aggravating circumstances in the murder of Jackie Ransom. These were that he had previously been convicted of a felony involving the threat of violence to the person and that the murder of Jackie Ransom was for pecuniary gain. The jury found two aggravating circumstances in the murder of Larry Jones by Henry Lee Hunt. These were that he had been previously convicted of a felony involving a threat of violence to the person and that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The jury found as to Elwell Barnes two aggravating circumstances in the murder of Jackie Ransom. These were that he had previously

been convicted of a capital felony and the murder was committed for pecuniary gain. The jury found two aggravating circumstances in the murder of Larry Jones by Elwell Barnes. These were that he had previously been convicted of a capital felony and that the murder of Larry Jones was committed for the purpose of avoiding or preventing a lawful arrest. The record supports the finding of these aggravating circumstances.

Elwell Barnes contends that the death sentence was imposed upon him under the influence of passion, prejudice and other arbitrary factors because of certain questions asked by the prosecuting attorney on the jury voir dire and on cross-examination of a witness for Elwell Barnes. The district attorney asked each juror a question as to whether they could be a part of the "legal machinery" which might impose the death penalty in this case. Elwell Barnes says this committed the jury to impose the death penalty before hearing any evidence. We do not believe such an inference is properly made from these questions. The district attorney had a right to question the jurors as to their views on the death penalty and these were proper questions. We certainly cannot hold that the questions so inflamed the jury that the verdict was rendered under the influence of passion, prejudice, or any other arbitrary factor. A psychiatrist testified for Elwell Barnes that he had an IQ of 68 which indicated his abilities are in the upper range of mild retardation. He characterized Elwell Barnes as a "follower." On cross-examination the psychiatrist was asked about a letter he had written to Elwell Barnes' attorney in which he said he did not find any mitigating circumstances. Elwell Barnes says the jury must have believed the psychiatrist because they found no mitigating circumstances. If the jury believed the testimony of the psychiatrist this does not show they were under the influence of passion, prejudice or other arbitrary factor in reaching a verdict.

We can find no indication that the death penalty was imposed on either defendant under the influence of passion, prejudice or other arbitrary factor. We also hold that the record clearly supports the submission of the aggravating circumstances considered and found by the jury.

We now turn to our statutory duty of a proportionality review. This requires us to determine whether juries in this state

have been consistently returning death sentences in similar cases considering the crimes and the defendants. *See State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177 (1983) and *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985). If this comparison reveals juries have consistently been returning death sentences in similar cases then we will have a strong basis for concluding the death sentences imposed in this case were not disproportionate.

We deal first with the murder of Jackie Ransom by Elwell Barnes. The jury found two aggravating circumstances, that Elwell Barnes had previously been convicted of another capital felony and the murder of Jackie Ransom was committed for pecuniary gain. Four mitigating circumstances were submitted to the jury. The jury did not find three of the mitigating circumstances submitted which were (1) the murder was actually committed by Hunt and Elwell Barnes was only an accomplice and his participation was relatively minor, (2) Elwell Barnes was under the domination of another person, and (3) Elwell Barnes has an IQ of 68 which impairs his ability to perform intellectual functions, and which impairs his judgment and insight in everyday living. The jury found as a mitigating circumstance, "Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value."

Elwell Barnes, relying on four cases involving contract killings which are *State v. Lowery*, 318 N.C. 54, 347 S.E. 2d 729 (1986); *State v. Hinson*, 310 N.C. 245, 311 S.E. 2d 256, *cert. denied*, 469 U.S. 839, 83 L.Ed. 2d 78 (1984); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); and *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981), argues that in none of these cases did the jury impose the death penalty and these cases are the most similar of the cases in the pool to this case. We note that in *State v. McLaughlin*, 323 N.C. 68, 372 S.E. 2d 49 (1988), we affirmed the death penalty in a contract murder case. In comparing this case with those in the pool it is worth noting that this is more than a contract killing case. The jury found that Elwell Barnes had previously been convicted of a capital crime and that he murdered again within a few days of the murder of Jackie Ransom. This is similar to *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987), in which we affirmed

the death penalty. We have not found a case factually similar to this one but upon a review of the cases in the pool we have no trouble affirming the death sentence. This was a brutal murder of a man Elwell Barnes did not know. He was anxious to participate in the murder. The murder was committed for pecuniary gain. The defendant had previously been convicted of a capital crime and he committed another murder not long after the murder of Jackie Ransom. Considering the nature of the crime and the character of the defendant, we hold the death penalty was not disproportionate.

We deal next with the murder of Larry Jones by Elwell Barnes. Two aggravating circumstances were found by the jury. They were that Elwell Barnes had previously been convicted of a capital crime and that the murder was committed to prevent or avoid lawful arrest. The same mitigating circumstances were submitted in the Jones murder as were submitted in the Ransom murder and again the jury found only one unspecified mitigating circumstance.

This case involves a murder to eliminate a possible witness against the defendant. In *State v. Maynard*, 311 N.C. 1, 316 S.E. 2d 197 (1984); *State v. Lawson*, 310 N.C. 632, 314 S.E. 2d 493 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985); *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); and *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), juries imposed death penalties in cases involving witness elimination, which were affirmed by this Court. In *State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985) and *State v. Crawford*, 301 N.C. 212, 270 S.E. 2d 102 (1980), the juries recommended life sentences in cases involving witness elimination. We believe this shows juries have been consistently imposing the death penalty in murder cases involving witness elimination.

In this case, in addition to finding that the defendant had committed the murder to avoid lawful arrest, the jury also found he had previously been convicted of a capital felony. The jury found him guilty of another murder committed six days prior to the murder of Larry Jones. The murder of Larry Jones was calculated. The defendant showed no remorse. The imposition of the death penalty was not disproportionate.

We deal next with the murder of Jackie Ransom by Henry Lee Hunt. The same consideration applies to him as to Elwell Barnes. This was a contract killing and more. The jury found that he had previously been convicted of a felony involving the threat of violence to the person. The jury found that he murdered a second person within a week of the murder of Jackie Ransom. He showed no remorse for the killing. The death sentence was not disproportionate.

As to the murder of Larry Jones by Henry Lee Hunt, again the same consideration applies to Henry Lee Hunt as to Elwell Barnes. Juries have been consistently returning death sentences in witness elimination murders and this case is more than a witness elimination murder. The defendant had murdered another person six days before he murdered Larry Jones. He showed no remorse for the murder of Larry Jones. The death sentence was not disproportionate.

In the trial of both defendants, we find

No error.

Chief Justice EXUM concurring.

I concur with the majority's treatment of all issues in the guilt and sentencing phases of this trial.

If, in the sentencing phase, the Court were addressing the unanimity instruction issue for the first time, I would agree with defendant's position that these instructions violate the Eighth Amendment to the federal constitution as that amendment was interpreted in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), for the reasons stated in my dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), and *State v. Allen*, 323 N.C. 208, 372 S.E. 2d 855 (1988). The majority's position on this issue is, as a result of the Court's decisions in *McKoy* and *Allen*, the law of this state to which I am now bound. For this reason I concur with the majority's treatment of this issue.

Justice FRYE dissenting as to sentence.

For the reasons expressed in the Chief Justice's dissenting opinions in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 and in

State v. Allen, 323 N.C. 208, 372 S.E. 2d 855 (1988), I believe the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), requires that defendants be given new sentencing hearings. Accordingly, I dissent from that portion of the Court's opinion which rejects defendants' arguments based upon the holding of *Mills*. I concur in the result reached by the majority on the guilt phase issues.

STATE OF NORTH CAROLINA v. ERNEST EUGENE SMITH, III

STATE OF NORTH CAROLINA v. DAVID MICHAEL SCHOCH

No. 163A88

(Filed 3 November 1988)

Obscenity § 1— dissemination of obscenity—sale of multiple items in one transaction—one offense

Since the legislature failed to establish the unit of prosecution under the statute prohibiting the dissemination of obscenity, N.C.G.S. § 14-190.1, the courts must resolve this ambiguity in favor of lenity. Therefore, a defendant may not be convicted of a separate offense for each obscene item disseminated in a single transaction but may be convicted of only one offense for each sales transaction involving obscene materials.

Justice MEYER dissenting.

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 89 N.C. App. 19, 365 S.E. 2d 631 (1988), affirming their convictions of disseminating obscenity, in violation of N.C.G.S. § 14-190.1. Judgments entered by *Lewis, J.*, on 7 November 1986 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 12 September 1988.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Assistant Attorney General, for the State.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., for defendant-appellant Smith.

Ferguson, Stein, Watt, Wallas and Adkin, P.A., by John W. Gresham, for defendant-appellant Schoch.

FRYE, Justice.

The dispositive issue presented on this appeal is whether the Court of Appeals erred when it affirmed the convictions of both defendants, holding that they were properly convicted of separate offenses arising out of the dissemination of each item determined by the jury to be obscene. The issue presented is one of first impression before this Court. The Court of Appeals decided that in enacting N.C.G.S. § 14-190.1 the legislature intended that a defendant could be convicted of a separate offense for each obscene item disseminated in a single transaction. We disagree and therefore reverse the Court of Appeals.

The undisputed facts are as follows:

On the afternoon of 1 October 1985, Officer H. F. Frye of the Charlotte City Police entered the Cinema Blue Bookstore in Charlotte. Defendant Schoch was the manager and defendant Smith worked as a clerk. The officer purchased a package of magazines and a film from Schoch. Defendant Smith took no part in this first sale. In a second sale later that afternoon, Sergeant T. G. Barnes, also of the Charlotte City Police, entered the same bookstore and purchased from both defendants Schoch and Smith two magazines. Defendant Schoch was subsequently prosecuted on five indictments charging him with disseminating obscenity in violation of the North Carolina Obscenity Statute, N.C.G.S. § 14-190.1 (one count for each of the three magazines and two films he sold to Officer Frye and Sergeant Barnes). Defendant Smith was tried on three indictments charging violation of the same statute (one count for each of the two magazines and one film he, together with Schoch, had sold to Sergeant Barnes). Neither defendant contests that he sold the materials which were found by the jury to be obscene.

In pertinent part N.C.G.S. § 14-190.1(a) provides:

> It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this article if he or it:
>
> (1) sells, delivers or provides or offers or agrees to sell, deliver or provide, any obscene writing, picture, rec-

> ord or other representation or embodiment of the obscene; or
>
> . . . .
>
> (3) publishes, exhibits or otherwise makes available anything obscene; or
>
> (4) exhibits, presents, rents, sells, delivers, or provides, or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, film strip or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

N.C.G.S. § 14-190.1 (1986 & Cum. Supp. 1987).

The statute makes it unlawful to intentionally disseminate obscenity. One disseminates obscenity within the meaning of the statute, by selling, delivering, providing or offering or agreeing to sell, deliver or provide "any obscene writing, picture, record or other representation or embodiment of the obscene." N.C.G.S. § 14-190.1(a)(1). The word "disseminate," depending on its context, may have a singular or plural connotation. This suggests that the General Assembly in enacting N.C.G.S. § 14-190.1 may have intended to punish the unlawful dissemination of each obscene item or intended that a single penalty attach to the unlawful conduct of intentionally disseminating obscenity. The statute makes no differentiation of offenses based upon the quantity of the obscene items disseminated. *See Commonwealth v. Beacon Distributors*, 14 Mass. App. 570, 441 N.E. 2d 541 (1982).

The Court of Appeals properly focused on the critical underlying question: What is the allowable unit of prosecution under N.C.G.S. § 14-190.1? The State contends, and defendants concede, that the allowable unit of prosecution is within the discretion of the legislature, subject only to constitutional limitations. However, defendants argue that when the legislature does not clearly express legislative intent, the court must determine the allowable unit of prosecution. In doing so, any ambiguity should be resolved in favor of lenity. *Bell v. United States*, 349 U.S. 81, 99 L.Ed. 905 (1955).

In the instant case the majority opinion of the Court of Appeals impliedly adopted the rule of statutory construction in *Bell*, but found no ambiguity. Nevertheless, the language of N.C.G.S. § 14-190.1 exhibits "no clear expression of legislative intent to punish separately and cumulatively for *each and every* obscene item disseminated, regardless of the number of transactions involved." *State v. Smith*, 89 N.C. App. 19, 24, 365 S.E. 2d 631, 634 (1988) (Wells, J., dissenting) (emphasis in original).

In *Bell*, a landmark case regarding the allowable unit of prosecution, the issue was whether the simultaneous interstate transportation of two women in violation of the Mann Act constituted two offenses or only one. Finding that the defendant in *Bell* could only be tried for one offense, the United States Supreme Court stated:

> When Congress has the will it has no difficulty in expressing it when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses when we have no more to go on than the present case furnishes.

Bell at 83-84, 99 L.Ed. at 910-11.

Bell established a rule of construction to be applied in federal cases: when the legislature fails to establish the allowable unit of prosecution under a statute, the courts must resolve the ambigui-

ty in favor of lenity. The principle enunciated in *Bell* was applied in *Maxwell v. State*, 152 Ga. App. 776, 264 S.E. 2d 254 (1979). There, a police officer purchased a theatre ticket from an adult theatre and viewed the showing of two feature films and four previews of coming attractions. A jury convicted defendants of six counts of distributing obscene material based on the showing of six different films in a single, uninterrupted and continuous showing. The trial court vacated the verdict and sentences. The Georgia Court of Appeals, relying largely on *Bell*, agreed with the trial court and stated that a single, uninterrupted, continuous showing of multiple films as part of a single exhibition constitutes only one count of distributing obscene materials in violation of the Georgia obscenity statutes.

Similarly, the court in *Commonwealth v. Beacon Distributors*, 14 Mass. App. 570, 441 N.E. 2d 541, reversed on multiplicity grounds multiple convictions in obscenity cases. There the police raided a warehouse maintained by one of the defendants and seized twenty different obscene films. The grand jury returned fourteen separate indictments in twenty counts each. From the eight defendants charged with possession of obscenity, and the twenty films seized, the State prosecuted on a total of 280 separate and distinct charges. The issue before the court, as in the instant case, was whether the legislature intended to punish the unlawful possession of each obscene material or intended to attach a single penalty to the unlawful possession of obscene materials. The court concluded that none of the indictments alleged more than a single offense because the unlawful possession of more than one obscene material in one place constitutes a single offense under the state's obscenity statute.

Other courts have similarly held that a single transaction involving obscene materials constitutes but one offense. *See State v. Cimino*, 33 Conn. Supp. 682, 336 A. 2d 1168 (1976); *State v. Hungerford*, 278 So. 2d 33 (La. 1973); *State v. Getman*, 293 Minn. 11, 195 N.W. 2d 827 (1972), *vacated on other grounds*, 413 U.S. 912, 37 L.Ed. 2d 1029 (1973); *State v. PeeDee News Co.*, 286 S.C. 562, 336 S.E. 2d 8 (1985); *State v. Davis*, 654 S.W. 2d 688 (Tenn. Crim. App. 1983). *Contra State v. Wilds*, 88 N.C. App. 69, 362 S.E. 2d 605 (1987); *Educational Books, Inc. v. Commonwealth of Va.*, 228 Va. 392, 323 S.E. 2d 84 (1984); *City of Madison v. Nickel*, 77 Wis. 2d 72, 223 N.W. 2d 865 (1974).

Applying the rule of *Bell*, which we find persuasive, we agree with the statement of Judge Wells in his dissenting opinion that "until the General Assembly unambiguously declares a contrary intent, we should assume that a single sale in contravention of G.S. § 14-190.1 does not spawn multiple indictments." *State v. Smith*, 89 N.C. App. 19, 25, 365 S.E. 2d 631, 635. This construction of the statute is in accord with the general rule in North Carolina that statutes creating criminal offenses must be strictly construed against the State. *State v. Hagerman*, 307 N.C. 1, 9, 296 S.E. 2d 433, 438 (1982); *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967).

In the instant case, defendant Schoch was charged and convicted upon five indictments alleging violations of N.C.G.S. § 14-190.1. Defendant Smith was similarly charged and convicted upon three indictments. The undisputed facts are that Schoch's criminal activity was the sale of one magazine and one film to Officer Frye in a single transaction, and two magazines and one film to Sergeant Barnes in a second transaction. Thus, defendant Schoch is guilty of two counts of disseminating obscenity. It is further undisputed that defendant Smith's criminal activity was participating in the sale of the same two magazines and one film to Sergeant Barnes in a single transaction. Thus, he is guilty of only one count of disseminating obscenity.

The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the superior court for further proceedings not inconsistent with this decision.

Defendants' petition for reconsideration of this Court's order of 5 May 1988 dismissing defendants' purported appeal on questions related to jury instructions is denied.

Reversed and remanded.

Justice MEYER dissenting.

Today the majority finds the language of N.C.G.S. § 14-190.1 ambiguous and concludes, applying the rule of *Bell v. United States*, 349 U.S. 81, 99 L.Ed. 905 (1955), the Court must resolve this ambiguity in favor of lenity toward the defendant. I find no ambiguity, and for that reason I must dissent.

The language of our statute shows a legislative intent to punish the sale of each separate obscene item, i.e., each separate magazine, film, book, etc. First, after a general statement that it is "unlawful . . . to intentionally disseminate obscenity," a definition of "disseminates obscenity" follows. That definition lists items which may be obscene; and, significantly, every item is a *singular* noun, e.g., "writing," "picture," "record," "representation," *et al.* Second, the statute uses the word "any" repeatedly. The adjective "any" is inclusive, signifying that sales of single items of obscenity are to be punished. Finally, the statute makes no express provision for the sale of multiple items that are sold as part of a single transaction; e.g., the statute does not provide that a person disseminates obscenity if he sells "writing(s), picture(s), record(s)." That language would be evidence of an intent to punish each *transaction*, rather than each sale of *each separate item.*

N.C.G.S. § 14-190.1(a), in pertinent part, provides:

> (a) It shall be unlawful for any person . . . to intentionally disseminate obscenity. A person . . . disseminates obscenity within the meaning of this Article if he . . .:
>
> (1) Sells . . . *any* obscene *writing, picture, record* or other *representation* or *embodiment* of the obscene; or
>
> . . . .
>
> (3) Publishes, exhibits or otherwise makes available *anything* obscene; or
>
> (4) . . . [S]ells . . . *any* obscene *still or motion picture, film, filmstrip,* or *projection slide,* or *sound recording, sound tape,* or *sound track,* or *any matter* or *material* of whatever form which is a *representation, embodiment, performance,* or *publication* of the obscene.

(Emphasis added.)

Construing similar language in the Virginia anti-obscenity statute, the Supreme Court of Virginia has held that a defendant may be charged with separate counts for each obscene item sold, even if the items are sold in a single transaction. *Educational Books, Inc. v. Commonwealth*, 228 Va. 392, 323 S.E. 2d 84 (1984).

Like the North Carolina statute, the Virginia statute at issue in *Educational Books*, Va. Code Ann. § 18.2-374 (1988), prohibits the sale of "*any*" obscene item. Also like our statute, the Virginia Code provides that "obscene items" shall include "*any* obscene . . . book, . . . magazine, . . . picture." Va. Code Ann. § 18.2-373 (1988). Also, like our statute, the Virginia provision lists singular nouns in its definition of "obscene items": "book," "magazine," "picture," *et al.* Further, like our statute, it does not expressly provide for the punishment of the sale of multiple items that are sold as part of a single transaction: e.g., "book(s), magazine(s), picture(s), etc." In the face of this clear statutory language, the Supreme Court of Virginia held that this statute shows unmistakable legislative intent to punish the sale of *each* obscene item. After thoughtful study of North Carolina's similar statute and using similar reasoning, our own Court of Appeals found unmistakable legislative intent to punish the sale of each obscene item sold in North Carolina. *State v. Smith*, 89 N.C. App. 19, 365 S.E. 2d 631 (1988). Other courts have held that the dissemination of several obscene items in a single transaction will support multiple convictions. *See City of Madison v. Nickel*, 66 Wis. 2d 71, 223 N.W. 2d 865 (1974) (defendant convicted of four violations of a local ordinance prohibiting the sale of obscene magazines; all four magazines purchased at the same time and by the same person).

The majority's interpretation of the statute gives no consideration to the relative harm done by the store clerk selling a single obscene item and the store clerk selling 100 different obscene items in a single transaction. The number of potential "readers" increases geometrically with each additional item sold. The legislature could not have intended the seller to receive the same punishment regardless of the number of items sold in a single transaction.

STATE OF NORTH CAROLINA v. KIMBERLY ROSE STONE

No. 125A88

(Filed 3 November 1988)

Homicide § 21.4— murder—evidence sufficient

There was substantial evidence that each of the essential elements of murder in the first degree was met and that defendant was the perpetrator of the murder, and the trial judge correctly denied defendant's motion to dismiss, where the evidence adduced at trial strongly indicated that defendant committed the offense with the same .22 caliber weapon delivered by defendant to her father during the investigation of the homicide; the similarity between the two front tires taken from the Monte Carlo automobile driven by defendant and the plaster cast made at the trash dump where the victim's body was found supports the inference that defendant drove her mother's Monte Carlo to the trash dump on the night of the murder; the testimony of the ammunition expert that the bullets removed from the body of the victim could have come from the box of ammunition taken from the apartment of defendant's father or from another box manufactured on the same day in November of 1968 strongly indicates that the victim's death was caused by ammunition in defendant's possession; the testimony of the ballistics expert that the .22 caliber revolver recovered from the apartment of defendant's father could have fired the bullets which caused the victim's death suggests that the revolver in defendant's possession was used to commit the offense; defendant was the last person to see the victim alive; defendant's false statement to investigating officers that she did not know anyone who owned a handgun and her subsequent delivery of the revolver and ammunition to her father indicate that defendant attempted to cover up her connection with the weapon; and the testimony of a deputy that the route from the trailer to the gas station could be driven in 13 minutes, coupled with the testimony that defendant was absent from the trailer for approximately one hour, shows that defendant had ample time to commit the murder.

APPEAL by defendant from judgment imposing sentence of life imprisonment entered by *Ellis, J.*, at the 2 November 1987 Criminal Session of Superior Court, CUMBERLAND County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 12 September 1988.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Gregory A. Weeks for defendant-appellant.

FRYE, Justice.

Defendant brings forth one assignment of error which involves the sufficiency of the evidence submitted to the jury. Defendant contends that the trial court erred by denying her motion to dismiss the charge of first degree murder because the State failed to present substantial evidence of each element of the offense charged. We find no error.

Defendant was charged with first degree murder in violation of N.C.G.S. § 14-17. On the morning of 5 November 1985, the body of Richard Pursel was found slumped behind the steering wheel of his pickup truck at a dump site located on Macedonia Church Road in Cumberland County.

Defendant was originally tried at the 20 October 1986 Criminal Session of Superior Court, Cumberland County, presided over by Judge Giles Clark. Prior to trial, Judge Clark found that there were no aggravating circumstances and granted defendant's motion that the case be tried as a non-capital case. The jury was unable to reach a verdict and a mistrial was declared on 29 October 1986. Upon retrial at the 2 November 1986 Session of Superior Court, the jury returned a verdict of guilty of murder in the first degree. From judgment of life imprisonment entered upon the jury verdict, defendant appeals to this Court as of right. N.C.G.S. § 7A-27(a) (1986 & Cum. Supp. 1987).

The sole question on appeal involves the sufficiency of the evidence to go to the jury. Defendant assigns error to the trial judge's denial of her motion to dismiss made at the close of all the evidence. We hold that the trial judge properly denied the motion.

The evidence, viewed in the light most favorable to the State, showed the following:

Richard Pursel, Suszan Page, Ronnie Allen and defendant spent the weekend preceding Pursel's death together at a trailer in Cumberland County owned by Page's parents. Page and Allen testified that on Monday, 4 November 1985, around 5:30 in the afternoon, defendant's mother arrived at the trailer. Defendant left the trailer with her mother to go to Wallace, North Carolina. Defendant returned to the trailer driving her mother's Monte Carlo automobile at approximately 9:30 p.m. Page, Pursel and Allen

were watching television when defendant returned. Shortly thereafter, Pursel and Page went into the bedroom. They came out of the bedroom after about an hour at which time defendant asked if someone could follow her to a gas station because she needed gas. Allen did not have a driver's license and Page was not feeling well, so Pursel volunteered to follow defendant in his red pickup truck to the gas station.

Defendant and Pursel left the trailer at approximately 11:30 p.m. Defendant returned to the trailer between 12:30 and 12:40 the following morning. Pursel did not return. Later that morning, the body of Richard Pursel was discovered at a trash dump site approximately ten miles from the trailer. Pursel was seated in the driver's seat, slumped over to the right, and he had three bullet wounds in the left side of his head. Powder burns were found around an entry wound on the left side of his face behind the eye indicating, according to the pathologist, that the weapon was fired from close range. An examination of the pickup truck by crime technicians revealed that the window on the passenger side was rolled up, the door on the passenger side was locked, and the keys were in the ignition. The truck was dusted for fingerprints and latent prints were found.

Three sets of automobile tracks were found in the area. Two sets of the tracks were identified as having been made by the vehicles of the persons who discovered the body. A plaster cast was made of the third set.

A witness testified that when he drove past the dump site around 11:15 p.m., he did not see the truck. When the witness drove past the site again between 11:30 p.m. and 11:45 p.m., he observed the truck parked at the dump site. During a police interview with defendant, Page and Allen, defendant told Cumberland County Sheriff's Department detectives that she had not been on Macedonia Church Road that night and that she did not know anyone who owned a handgun or a weapon of any kind except for her father who owned a shotgun. Later, sheriff's deputies recovered a .22 caliber pistol and a box of ammunition from the apartment of Jerry Stone, Sr., defendant's father. Defendant delivered the pistol and the ammunition to her father after the interview with police. Mr. Stone had given the pistol to defendant's mother who kept it in the glove compartment of the Monte Carlo.

Examinations and comparisons of the bullets and the pistol were performed by a State Bureau of Investigation (SBI) ballistics expert who testified that the three bullets removed from the victim were fired from a pistol which had eight lands and grooves of rifling with a right hand twist. He also testified that the .22 caliber pistol recovered from Mr. Stone's apartment was a Rohm revolver with eight lands and grooves of rifling and a right hand twist. It was his opinion that the bullets removed from the victim could have been fired from the .22 caliber revolver, but because of deformities in the bullets, he was not able to make a positive comparison between the bullets test fired from the revolver and those removed from the victim.

A Federal Bureau of Investigation (FBI) ammunition expert testified that from an analysis of the chemical composition of the three spent bullets and the cartridges from the box of ammunition, it was his opinion that the compositions of those items were typical of what one would find when examining bullets within the same box of cartridges or another box from the same manufacturer made on the same day. He also testified that the box of ammunition was manufactured in November 1968.

An SBI expert in analysis and comparison of tire impressions testified that the tread design, size, shape and wear of the tires taken from the Monte Carlo driven by defendant were consistent with the pictures and cast made of the impressions found at the scene.

Robert Bittle of the Cumberland County Sheriff's Department testified that, after driving the route that defendant drove from Page's trailer to the gas station, he determined the distance to be 9.7 miles and the driving time thirteen minutes. The distance from the trailer to the trash dump was 10.2 miles and a driving time of thirteen minutes and the distance from the gas station to the dump was 4.6 miles and six minutes driving time.

Defendant contends that the evidence was insufficient to establish the essential elements of first degree murder and that defendant committed the offense.

Murder in the first degree is "the unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Calloway*, 305 N.C. 747, 751, 291 S.E. 2d 622, 625 (1982). Malice

exists as a matter of law whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice. *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983). Premeditation is defined as thought beforehand for some length of time, however short. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation is defined as an intent to kill executed by defendant in a cool state of blood or in the absence of anger or emotion. *Id.* Premeditation and deliberation must ordinarily be proved by circumstantial evidence. *State v. Saunders*, 317 N.C. 308, 345 S.E. 2d 212 (1986). The test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

A review of all of the evidence in this case supports a reasonable conclusion that the homicide was committed with malice, premeditation and deliberation. While defendant asserts that the evidence was insufficient to establish each essential element of murder in the first degree, her primary argument is that the evidence was insufficient to show that she was the perpetrator of the offense and that, for this reason, her motion to dismiss should have been granted.

The law regarding the sufficiency of evidence to withstand a motion to dismiss has been enunciated in numerous decisions of this Court.

> When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980) (citation omitted).
>
> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State,

> and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. *Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649; *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971) . . . . All evidence actually admitted, both competent and incompetent, which is favorable to the State must be considered (citation omitted).

State v. Bullard, 312 N.C. 129, 160, 322 S.E. 2d 370, 387 (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. Stephens*, 244 N.C. 380, 384, 93 S.E. 2d 431, 433 (1956). The evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893 (1984). However, a motion to dismiss should be allowed where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983); *State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980).

Once the court determines that a reasonable inference of defendant's guilt may be drawn from the circumstances, then "it is for the jury 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). Courts may resort to circumstantial evidence of motive, opportunity, capability and identity to identify the accused as the perpetrator of the crime. *See State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985).

There was substantial evidence in the instant case from which jurors could draw a reasonable inference that defendant was the perpetrator of the murder of Richard Pursel. Defendant was linked to the weapon, the bullets, and the dump site through circumstantial evidence. Defendant had access to a weapon and

bullets which could have caused the death of the victim, had the time and opportunity to commit the murder, and drove a car which could have made the tire tracks found at the dump site.

Defendant relies on *State v. Bell*, 65 N.C. App. 234, 309 S.E. 2d 464, *aff'd per curiam*, 311 N.C. 299, 316 S.E. 2d 72 (1984), to support the argument that there is insufficient evidence to show that she committed the offense charged. In *Bell*, the defendant was convicted of second degree murder. The Court of Appeals held that the evidence taken in the light most favorable to the State at most showed only that the defendant had an opportunity to kill the victim and that evidence of opportunity alone is insufficient to survive a defendant's motion to dismiss. *Bell*, 65 N.C. App. at 241, 309 S.E. 2d at 467.

In *Bell*, the court relied on *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977), for the proposition that evidence of either motive or opportunity alone is insufficient to carry a case to the jury. There is no clear evidence of defendant's motive in the instant case. Nevertheless, proof of motive is not necessary to sustain a conviction of murder. *State v. Landingham*, 283 N.C. 589, 600, 197 S.E. 2d 539, 546 (1973).

The facts in *Bell* distinguish it from the instant case. There, as stated in the opinion, "[t]he only substantial evidence linking defendant to the crime consisted of the victim's keys which were found in the defendant's pockets." *Bell*, 65 N.C. App. at 241, 309 S.E. 2d at 468-69. Here, there is more. The evidence adduced at trial strongly indicates that defendant committed the offense with the same .22 caliber weapon delivered by defendant to her father during the investigation of the homicide. The similarity in tread design, shape, size and wear between the two front tires taken from the Monte Carlo automobile driven by the defendant and the plaster cast made at the trash dump supports the inference that defendant drove her mother's Monte Carlo to the trash dump on the night of the murder. The testimony of the ammunition expert that the bullets removed from the body of the victim could have come from the box of ammunition taken from the apartment of the defendant's father, or from another box manufactured on the same day in November of 1968, strongly indicates that the victim's death was caused by ammunition in defendant's possession. The testimony of the ballistics expert that the .22 caliber

revolver recovered from the apartment of defendant's father could have fired the bullets which caused the victim's death suggests that the revolver in defendant's possession was used to commit the offense charged. The statements taken from Page, Allen and defendant indicate that defendant was the last person to see the victim alive. Defendant's false statement to investigating officers that she did not know anyone who owned a handgun and her subsequent delivery of the .22 caliber revolver and ammunition to her father indicate that defendant attempted to cover up her connection with the weapon. The testimony of Robert Bittle of the sheriff's department that the route from the trailer to the gas station could be driven within thirteen minutes, coupled with the testimony that defendant was absent from the trailer for approximately one hour, shows that defendant had ample time to commit the murder.

The combination of these circumstances, together with the other evidence presented at trial, represents evidence sufficiently substantial for a jury to draw the reasonable inference that defendant was the perpetrator of the offense charged. While an alternative perpetrator could have been a person who came to the dump site on the night in question, in an automobile with tires similar in tread design, size, shape and wear to the tires on the Monte Carlo, who also possessed seventeen-year-old bullets manufactured on the same day as those defendant possessed, and a .22 caliber revolver with eight lands and grooves and a right hand twist, it is not necessary, in order to withstand a motion for dismissal, that the circumstantial evidence exclude every reasonable hypothesis except that of guilt. Rather, "if there be any evidence tending to prove the fact in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely raises a suspicion or conjecture in regard to it, the case should be submitted to the jury." *State v. Stephens*, 244 N.C. 380, 383, 93 S.E. 2d 431, 433 (1956).

Applying the foregoing principles, we conclude that, considering the evidence in the light most favorable to the State, there is substantial evidence that each of the essential elements of murder in the first degree was met and that defendant was the perpetrator of the murder. Therefore, the trial judge correctly denied defendant's motion to dismiss and properly submitted the case to the jury. Accordingly, in defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. MELVIN CLAUDE ROSE, JR.

No. 54A88

(Filed 3 November 1988)

1. **Homicide § 18.1— murder—premeditation and deliberation—evidence of state of mind**

In a murder prosecution where there was psychiatric testimony that defendant could not form the specific intent to kill because he was suffering from a psychotic episode resulting from chronic stress, defendant was entitled to an instruction allowing the jury to consider this testimony in determining whether he in fact premeditated and deliberated the murder of the two victims.

2. **Criminal Law § 53; Homicide § 18— murder—premeditation and deliberation—psychiatric opinion—excluded**

The trial court did not err in a murder prosecution by not instructing the jury that they could consider the opinion of an expert regarding whether premeditation and deliberation existed where defendant's psychiatric expert had been asked whether defendant could have premeditated or planned or deliberated the killings, the State's objection was sustained, defendant did not make an offer of proof until the next day, the psychiatrist was not then present, and the trial court refused to allow insertion of the answer into the record. Even assuming that the answer was apparent from the context, the doctor's opinion that defendant could not have premeditated or deliberated would have been inadmissible as a conclusion that a legal standard had not been met. N.C.G.S. § 8C-1, Rule 103.

3. **Criminal Law § 138.29— aggravating factor—joined offenses—improper**

The trial court erred by aggravating a sentence for second degree murder of one victim by the joined offense of the murder of the second victim. N.C.G.S. § 15A-1340.4(a)(1)o (1983).

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a life sentence and a consecutive fifty-year sentence entered by *Fountain, J.*, at the 19 October 1987 Special Criminal Session of Superior Court, TYRRELL County, upon defendant's conviction by a jury of one count of first-degree murder and one count of second-degree murder. Heard in the Supreme Court 11 October 1988.

Lacy H. Thornburg, Attorney General, by Isham B. Hudson, Senior Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant was indicted on two counts of murder for the shooting deaths of his cousin, Danny Ray Bateman, and Bateman's girlfriend, Jill Alexander. The cases were joined and tried as capital cases. The jury convicted defendant of first-degree murder for the shooting of Danny Bateman, for which it recommended a life sentence, and of second-degree murder for the shooting of Jill Alexander, for which the trial court imposed a fifty-year consecutive sentence.

Since we award defendant a new trial for the murder of Danny Bateman and a new sentencing hearing for the murder of Jill Alexander, a summary of the facts will suffice. On the evening of 30 January 1987, defendant and his wife were entertaining defendant's cousin, Danny Bateman, Danny's girlfriend, Jill Alexander, and another friend in their home in Columbia, North Carolina. Defendant was drinking whiskey and the other men were drinking beer. At approximately 12:30 a.m., defendant left the house to find a local hunter in town, taking a pistol and a shotgun with him. While in town, he displayed the weapons to several friends and shot out a window of the Columbia Health Clinic. Defendant returned to his house at approximately 1:25 a.m. and, after drinking the whiskey remaining in his cup, went to his bedroom without saying a word. His wife followed him, but ten minutes later returned to the living room where the guests were watching television, saying that defendant had a gun. Defendant came in and fired a .410 shotgun at Jill Alexander's head, killing her. He then picked up a .22 rifle and shot Danny Bateman in the side. At this point, everyone except defendant made for the front door on hands and knees. Defendant fired twice more as they exited the house. Danny ran across the street, but defendant followed him and shot him in the head, fatally wounding him.

At trial, defendant's theory of defense was that he was either (1) legally insane or (2) if legally sane, he was by reason of his state of mind incapable of premeditation or deliberation or of forming a specific intent to kill at the time of the crimes. Among other witnesses, Dr. Billy Royal, a forensic psychiatrist, testified for the defense. According to Dr. Royal, defendant was experiencing a psychotic episode on the night of the killings, such that he did not understand his actions or know right from wrong and

could not have formed the specific intent to kill Danny Bateman or Jill Alexander. He testified further that the psychotic episode had resulted from chronic stress which, in turn, resulted from defendant's method of resolving problems in his relationships with people and that an injury from a bump on the head which defendant had received in December 1986 was a contributing cause. Finally, Dr. Royal testified that defendant's psychotic episode began between the time when defendant left for town and immediately before the shootings and terminated at some moment after the shootings. Defendant could have had momentary psychotic episodes while in town and could afterwards have returned to a state in which he functioned in a fairly normal way.

On appeal, defendant presents seven questions for review. We address two. Defendant first contends that the trial judge erroneously failed to give two of defendant's requested written jury instructions. He argues that this failure so prejudiced him that he is entitled to a new trial for both murders. Because we hold that the trial judge should have given one of the instructions, we award defendant a new trial for the murder of Danny Bateman.

[1] Defendant submitted two special instructions, the first of which was as follows:

> You may consider the Defendant's mental condition in connection with his ability to form the specific intent to kill.

The trial judge refused to give this instruction. Instead, he gave the standard instruction to the effect that intent is a state of mind, that is, a mental attitude which must ordinarily be proved by circumstances from which it may be inferred, rather than by direct evidence. Defendant argues that because his state of mind was a predominant feature of these joined cases, he was entitled to his requested instruction under *State v. Shank*, 322 N.C. 243, 367 S.E. 2d 639 (1988). Defendant's argument has merit as to the murder of Danny Bateman. In *Shank*, this Court concluded that "[t]estimony that a defendant was incapable of planning his activities or carrying out plans, and that he was under mental or emotional disturbance, could assist the jury in determining whether [he] in fact premeditated and deliberated." *Id.* at 248, 367 S.E. 2d at 643. We held there that such testimony was admissible under N.C.G.S. § 8C-1, Rule 704, and that the error in the trial court's refusal to allow the testimony was prejudicial, entitling

that defendant to a new trial for the murder of his wife. In the case *sub judice*, the trial court properly allowed Dr. Royal's testimony that in his opinion defendant could not form the specific intent to kill Jill Alexander or Danny Bateman. Defendant was entitled to have the jury consider this testimony in determining whether he in fact premeditated and deliberated the murder of the two victims. It follows, therefore, that since the testimony was before the jury, defendant was entitled to a jury instruction on this element of the crimes. *See* N.C.G.S. § 15A-1232 (Cum. Supp. 1987).

The law is well settled that a judge is required to instruct on all substantial features of the case. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). *See* N.C.G.S. § 15A-1232 (Cum. Supp. 1987). Where an instruction is requested by a party, and where that instruction is supported by the evidence, it is error for the trial court not to instruct in substantial conformity with the requested instruction. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649; *State v. Hairr*, 244 N.C. 506, 94 S.E. 2d 472 (1956). The instruction that the trial court gave was a general statement to the jury on intent and the method of proving that defendant had formed the specific intent to kill. Defendant's requested instruction would have allowed the jury to focus on defendant's mental condition as it pertained to his ability to premeditate and deliberate. In light of the centrality of the issue of defendant's state of mind, we conclude that a reasonable possibility exists that, had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1983). Defendant, therefore, is entitled to a new trial for the murder of Danny Bateman.

Defendant is not, however, entitled to a new trial for the killing of Jill Alexander. Defendant was tried for first-degree murder in her case, but the jury found him guilty of second-degree murder. From its verdict, the jury apparently did not find that defendant had formed the specific intent to kill after premeditation and deliberation required for a conviction of first-degree murder. In proving second-degree murder, the State is not required to prove that defendant had the specific intent to kill. *State v. Alston*, 295 N.C. 629, 635, 247 S.E. 2d 898, 902 (1978); *State v. Lester*, 289 N.C. 239, 243, 221 S.E. 2d 268, 271 (1976). Defendant thereby suffered no prejudice from the trial court's refusal to

give his requested special instruction with regard to the murder of Jill Alexander.

[2] Defendant requested a second special instruction, as follows:

> Finally, in considering whether premeditation and deliberation existed you may consider the opinions rendered by expert witnesses regarding those elements.

The trial court refused to give this instruction. Defendant contends that the refusal was prejudicial error. We disagree.

During direct examination of Dr. Royal, defendant's counsel asked him if he had an opinion as to whether or not defendant "under his state of mind" at the time of the killings could have "premeditated or planned or deliberated" them. The State's objection to this question was sustained. No proffer of what the answer would have been was made at that time. Defense counsel attempted to insert an answer into the record on the following day. Dr. Royal was no longer present and the trial court properly refused to allow such an insertion. The trial transcript reveals that the jury had no expert opinion evidence before it in which the expert witness testified that his opinion was applicable to the elements of premeditation and deliberation. Since defendant's requested instruction was not supported by the evidence, the trial court properly refused to give it. *State v. Bailey*, 254 N.C. 380, 119 S.E. 2d 165 (1961).

Defendant contends, however, that Dr. Royal's answer was admissible under N.C.G.S. § 8C-1, Rule 103. Assuming, arguendo, that the answer was apparent from the context within which the question was asked and that it would have been Dr. Royal's opinion that defendant could not have premeditated or deliberated the killings, such testimony would have been inadmissible as a conclusion that a legal standard had not been met. *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

> The rule that an expert may not testify that . . . a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness. 3 D. Louisell & C. Mueller, Federal Evidence § 395 (1979). *See also State v. Robinson*, 310 N.C. 530, 538, 313 S.E. 2d 571, 577 (1984).

Id. at 100, 337 S.E. 2d at 849. *See also State v. Weeks*, 322 N.C. 152, 166, 367 S.E. 2d 895, 904 (1988) (testimony embraced precise legal terms, definitions of which are not readily apparent to medical experts); *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986) (expert's use of term "proximate cause" constituted testimony that a legal standard had been met). Premeditation and deliberation are legal terms of art.

> Premeditation means that the defendant formed the specific intent to kill for some length of time, however short, before the actual killing. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). Deliberation means that the intent to kill was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). No particular length of time is required for the mental processes of premeditation and deliberation; it is sufficient that the processes occur prior to, and not simultaneously with, the killing. *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

State v. Cummings, 323 N.C. 181, 188, 372 S.E. 2d 541, 547 (1988). A medical expert's opinion as to whether these legal standards have or have not been met is inadmissible. That determination is for the finder of fact.

[3] Defendant next contends that the trial judge erroneously aggravated his sentence for the second-degree murder of Jill Alexander by the joined offense of the murder of Danny Bateman. The State concedes the point, as it must. Apart from the joined offense of the first-degree murder of Danny Bateman, defendant's only other prior convictions were for failing to stop for a blue light and driving while impaired, both of which arose out of the same incident. In sentencing defendant, the trial court found that

> [t]he murder for which the defendant is convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of *another crime of murder.*

(Emphasis added.)

A sentencing judge may not use a joined or joinable offense in aggravation. *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d

223 (1985); *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984). *See* N.C.G.S. § 15A-1340.4(a)(1)(o) (1983). Because the trial court aggravated defendant's sentence for the murder of Jill Alexander by the joined offense of the murder of Danny Bateman, defendant is entitled to a new sentencing hearing on the second-degree murder of Jill Alexander.

We hold that defendant is entitled to a new trial for the murder of Danny Bateman and a new sentencing hearing for the second-degree murder of Jill Alexander. In view of our disposition of these cases, we do not address defendant's other assignments of error.

No. 87CRS28 (Danny Bateman): New trial;

No. 87CRS27 (Jill Alexander): New sentencing hearing.

PEGGY JEAN EDWARDS ROPER v. MACK ANDERSON EDWARDS AND JUDITH BERTLING EDWARDS

No. 3PA88

(Filed 3 November 1988)

Trusts § 19— constructive trust—sufficiency of evidence

Plaintiff is entitled to a constructive trust requiring defendants to convey a one acre tract to plaintiff to prevent unjust enrichment of defendants where the record shows that defendants had been engaged in litigation with plaintiff's grandmother over entitlement to 136 acres of land; the agreement settling this litigation reserved to the grandmother ultimate control over entitlement to only one acre of the 136 acre tract; the grandmother conveyed to defendants the remainder of the 136 acre tract, as well as rights in the one acre during the lifetime of the grandmother, in exchange for defendants' agreement to convey the one acre tract as the grandmother by will might direct; the grandmother's will devised the one acre tract to plaintiff; and defendants have refused to convey the one acre tract to plaintiff.

ON discretionary review of a decision of the Court of Appeals, reported at 88 N.C. App. 149, 362 S.E. 2d 612 (1987), affirming a judgment entered by *Walker (R. G., Jr.), J.*, at the 16 March 1987 Civil Session of Superior Court, RANDOLPH County. Heard in the Supreme Court 13 September 1988.

Haworth, Riggs, Kuhn & Haworth, by John Haworth and Susan H. Thomas, for plaintiff-appellant.

Ivey Mason & Wilhoit, by Rodney C. Mason and Robert E. Wilhoit, for defendant-appellees.

WHICHARD, Justice.

The issue is whether a constructive trust should be imposed to require defendants to convey certain land to plaintiff. We hold that it should, and we accordingly reverse the Court of Appeals.

The record establishes the following undisputed facts:

Myrtle B. Edwards, plaintiff's grandmother, died on 4 September 1986. Prior to her death, the grandmother had a dispute with defendants over entitlement to a 136 acre tract of land. The parties settled civil litigation emanating from this dispute by the execution of a settlement agreement which provided, in pertinent part, as follows:

Plaintiff's grandmother would convey to defendants, "in fee simple absolute, without reserving any life estate in said tract," the entire 136 acres. Within this 136 acres was a tract containing one acre, more or less, which was "not [to] be sold or encumbered by [defendants] at any time prior to" the grandmother's death. Defendants were to make such conveyance of the one acre tract as the grandmother might specify in her will by express reference thereto. Absent such specification, the tract was to remain defendants' property in fee simple absolute.

The parties executed a mutual release to implement the settlement agreement, and the civil litigation was dismissed in reliance on the agreement. Although not a party to the litigation, plaintiff joined in the execution of the agreement and the release.

Plaintiff's grandmother then executed a deed conveying the one acre tract to defendants. The deed expressly recited that the conveyance was in consideration of the settlement agreement. Both the granting and habendum clauses provided that they were subject to the pertinent terms and conditions of the settlement agreement. The deed also expressly recited that the grantees—defendants here—were "obligated to make such conveyance of the . . . premises" as the grantor might specify in her will, and

that, absent such specification, the property would remain that of the grantees in fee simple absolute.

Following the grandmother's death, her will was admitted to probate in common form. The will devised the one acre tract to plaintiff, expressly referring to the foregoing provisions of the settlement agreement with defendants. Despite plaintiff's repeated demands, however, defendants have refused to convey the one acre tract.

Consequently, plaintiff brought this action seeking a judgment "requiring defendants to execute a Deed conveying to plaintiff the real property . . . free of encumbrances or in lieu thereof that the Judgment convey said property to plaintiff free of encumbrances." Plaintiff and defendants moved for summary judgment, contending in their respective motions that the foregoing undisputed facts entitled them to judgment as a matter of law. The trial court denied plaintiff's motion and allowed defendants' motion.

On appeal, the Court of Appeals affirmed. *Roper v. Edwards*, 88 N.C. App. 149, 362 S.E. 2d 612 (1988). On 9 March 1988 we allowed plaintiff's petition for discretionary review. We now reverse.

The Court of Appeals noted that plaintiff admitted, in her brief in that court, that both the settlement agreement and deed contain a prohibited restraint on alienation, leaving her without a remedy at law. *Id.* at 150, 362 S.E. 2d at 613, citing *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976). The court responded to plaintiff's argument that she was entitled to the equitable remedy of a constructive trust based on unjust enrichment by stating that plaintiff had not made the requisite showing that the unjust enrichment was "the result of fraud, a breach of duty, or some other circumstance making it inequitable for defendants to keep the property." *Id.* at 151, 362 S.E. 2d at 613. It determined that defendants had "a legal right to refuse to convey the property because of the restraint on alienation and this exercise of a legal right cannot amount to fraud," *id.* at 151, 362 S.E. 2d at 614, and it concluded that the record was devoid of indication "that defendants had any legal duty to convey the property to the plaintiff." *Id.* at 151, 362 S.E. 2d at 613.

We agree that defendants have no legal duty to convey the property to plaintiff. "Our Court has consistently held that a condition annexed to the creation of an estate in fee simple disabling the conveyee from alienating it for any period of time is void as a restraint on alienation." *Crockett v. Savings & Loan Assoc.*, 289 N.C. at 623, 224 S.E. 2d at 583. This does not end the inquiry, however. The question whether defendants had an equitable duty to convey the property to plaintiff remains.

Plaintiff seeks the remedy of a constructive trust.

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . . [A] constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. . . . [T]here is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing by the holder of the property, or by one under whom he claims . . . .

Wilson v. Development Co., 276 N.C. 198, 211-12, 171 S.E. 2d 873, 882 (1970). This equitable device belies its name, for no ongoing trust relationship is created when a court imposes a constructive trust.

> [T]he constructive trust plaintiff wins an *in personam* order that requires the defendant to transfer specific property in some form to the plaintiff. When the court decides that the defendant is obliged to make restitution, it first declares him to be constructive trustee, and then orders him[,] as trustee, to make a transfer of the property to the beneficiary of the constructive trust, the plaintiff.

D. Dobbs, *Remedies* § 4.3, at 241 (1973). Thus, imposing a constructive trust here would, in effect, result in specific perform-

ance of the settlement agreement. Defendants would be declared constructive trustees of the one acre tract and ordered to convey it to plaintiff.

Defendants argue that the absence of fraud defeats plaintiff's request for a constructive trust. We disagree. A constructive trust is imposed "to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty *or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.*" *Wilson v. Development Co.*, 276 N.C. at 211, 171 S.E. 2d at 882 (emphasis added). "Inequitable conduct short of actual fraud will give rise to a constructive trust where retention of the property by the holder of the legal title would result in his unjust enrichment." 4A R. Powell, *Powell on Real Property* § 596[1], at 48-23 (1986). Fraud need not be shown if legal title has been obtained in violation of some duty owed to the one equitably entitled. *Electric Co. v. Construction Co.*, 267 N.C. 714, 719, 148 S.E. 2d 856, 860 (1966).

> A constructive trust * * * is a trust by operation of law which arises contrary to intention . . . against one who * * * *in any way* against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

Id. (emphasis added) (quoting 54 Am. Jur. *Trusts* § 218 (1945)). *See also Speight v. Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936) (equity impresses constructive trust where legal title obtained by violation of fiduciary relationship or "*in any other unconscientious manner*") (emphasis added). "On the whole . . . the constructive trust is seen by American courts today as a remedial device, to be used *wherever specific restitution in equity is appropriate on the facts.*" D. Dobbs, *Remedies* § 4.3, at 246 (emphasis added). Thus, if imposition of a constructive trust is appropriate on the facts, we need not determine whether actual fraud has been established.

The undisputed facts here present a compelling case for application of the constructive trust remedy. Defendants were engaged in litigation with plaintiff's grandmother over entitlement to 136 acres of land. The agreement settling this litigation reserved to the grandmother ultimate control over entitlement to

only one acre, more or less, of the 136 acre tract. Defendants received the remainder, as well as rights in the one acre during the lifetime of the grandmother, in exchange for their agreement to convey the one acre tract as the grandmother by will might direct. To permit defendants to retain the extensive benefits they received in the bargained-for settlement, while refusing to perform the apparently meager concession they made in the process, would unjustly enrich defendants, *Wilson v. Development Co.*, 276 N.C. at 211, 171 S.E. 2d at 882, and would be manifestly "against equity and good conscience." *Electric Co. v. Construction Co.*, 267 N.C. at 719, 148 S.E. 2d at 860. "Equity applies the principles of constructive trusts wherever it is necessary for the obtaining of complete justice . . . ." *Speight v. Trust Co.*, 209 N.C. at 566, 183 S.E. at 736. Complete justice clearly cannot be obtained if defendants are permitted, to plaintiff's detriment, to retain title to the one acre tract which they bargained away in exchange for un contested title to the remaining 135 acres originally in dispute.

Accordingly, the decision of the Court of Appeals is reversed. The cause is remanded to the Court of Appeals for further remand to the Superior Court, Randolph County, for entry of an order declaring defendants constructive trustees of the one acre tract, more or less, and requiring them to convey said tract to plaintiff as provided in the settlement agreement and deed.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JERRY LEWIS FORD

No. 651A87

(Filed 3 November 1988)

1. Criminal Law §§ 103, 99.3— defendant not allowed to demonstrate murder weapon—no error

In a murder prosecution in which defendant relied on an accident defense, the trial judge did not express an opinion on defendant's character and credibility by refusing to allow defendant to use the murder weapon to demonstrate his testimony even though seven State's witnesses handled the weapon in the course of their testimony. Defendant had not forewarned the court that he would request use of the weapon to demonstrate his testimony, and, absent prior arrangements, courtroom security was a legitimate concern.

2. Criminal Law § 102.6— murder—prosecutor's argument concerning absence of satellite shotgun wounds—no error

The prosecutor in a murder case could properly rebut defendant's accident defense by calling the jury's attention to defendant's failure to produce evidence of satellite wounds from the shotgun pellets where the only medical evidence presented established that the victim had approximately a two and one-half inch hole in the right side of her chest, there was no evidence of satellite wounds, and the absence of such evidence supports an inference that the victim was shot at close range.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) (1986) from the imposition of a sentence of life imprisonment upon his conviction of first degree murder before *Rousseau, J.*, at the 24 August 1987 Criminal Session of Superior Court, GUILFORD County. Heard in the Supreme Court 11 October 1988.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of first degree murder and sentenced to life imprisonment. We find no error.

The State's evidence, in pertinent summary, showed the following:

The victim, defendant's estranged wife, was a member of the United States Army Reserve. On 13 September 1986, shortly after the victim had completed a weekend drill, defendant was observed in the reserve unit parking lot driving fast and "screeching" the tires on his car. He then parked near the victim and motioned or called for her to come to him. When the victim ignored him, defendant went to her and grabbed her by the collar. He released her upon the request of the owner of a van parked nearby.

Defendant then went to his car and pulled out a shotgun. The reserve unit members standing nearby scattered. Defendant followed the victim. When the victim turned around, defendant pointed the shotgun at her. She asked defendant not to shoot her. Defendant said to her: "I told you to come back," and "I told you I

was gonna [sic] get you[,] girl. I told you." Several witnesses then heard a gunshot. A witness heard someone say, "I told you I was gonna [sic] get you, didn't I."

Several people helped the victim to the ground. Defendant jumped in his car and drove rapidly and recklessly as he exited the parking lot. The victim died later that evening from a gunshot wound that entered her chest and abdomen.

Defendant's testimony tended to establish an accident defense. A few days before the shooting he had looked through a window and seen the victim, dressed in night clothes, embracing a man later known to him as John Cathcart. The victim refused to open the door in response to defendant's knock. Defendant broke out the windows of Cathcart's car, then left and called the victim on the telephone. Cathcart took the phone and threatened defendant.

Two weeks later defendant went to the reserve unit parking lot and told the victim "all I want to do is just talk to you." He told her "something like, 'God will make you pay for the way you treat me.' " She laughed at him, and he grabbed her. Defendant then looked around and saw people coming toward him, including Cathcart, who appeared to have a knife in his hand. Defendant went to his car and "got the gun out." He did not remember cocking it, and he "didn't never point the gun at" the victim. He was pointing the gun toward the ground and trying to collect himself when Sgt. James Foust, Jr., jumped out of a van and grabbed the gun. The gun went off, and defendant heard the victim scream. He then ran to his car and left.

Defendant read to the jury the following from a statement he made to law enforcement officers on the night of the shooting:

> . . . I didn't want her to get shot. I just wanted her to talk to me. I went out there to talk to her. She was standing with a group of people. I pulled her over to the front of the car. The man came up with a knife in his hand. I let her go. I went to my car and got my gun, . . . and a group of people got in a van. I went up to the van and a man grabbed my gun. . . . We wrestled with it—each other and the gun went off and shot her.

[1] Defendant first contends that the trial court erred by refusing to allow him to use the weapon from which the fatal shot was fired to demonstrate his testimony. He argues that the court had allowed seven State's witnesses to handle the weapon in the course of their testimony, and that its subsequent refusal to treat him likewise constituted an impermissible expression of opinion on his character and credibility.

The trial court may not express an opinion in the presence of the jury on questions the jury must decide. N.C.G.S. § 15A-1222 (1988). The credibility of a witness is such a question. *See* 1 Brandis on North Carolina Evidence § 8 (1988). "It is immaterial how such opinion is expressed or implied, whether in the charge of the court, in the examination of a witness, in the rulings upon objections to evidence or in any other manner." *State v. Freeman*, 280 N.C. 622, 626-27, 187 S.E. 2d 59, 63 (1972) (decided under former N.C.G.S. § 1-180); *see also State v. Wilhelm*, 59 N.C. App. 298, 302, 296 S.E. 2d 664, 667 (1982), *disc. rev. denied*, 307 N.C. 702, 301 S.E. 2d 395 (1983) (decided under present N.C.G.S. § 15A-1222).

However, " 'in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial[,] or which involve the proper administration of justice in the court, are within [the court's] discretion.' " *State v. Smith*, 320 N.C. 404, 415, 358 S.E. 2d 329, 335 (1987) (quoting *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E. 2d 631, 635 (1976)). *See also Shute v. Fisher*, 270 N.C. 247, 253, 154 S.E. 2d 75, 79 (1967). "[T]he power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice." *Roberson v. Roberson*, 40 N.C. App. 193, 194, 252 S.E. 2d 237, 238 (1979).

The orderly conduct of this trial included insuring, to the extent possible, the safety of those in the courtroom and the continued presence of the defendant. The trial court reasonably could have concluded that both might be jeopardized by placement of the weapon in defendant's hands during the course of trial. Defendant had not forewarned the court that he would request use of the weapon to demonstrate his testimony. He could have sought, *in limine* or on voir dire, to arrange conditions under which he could so use the weapon without raising substantial concern for courtroom security. He failed to do so, however; and ab-

sent such arrangements, courtroom security was a legitimate concern. Under these circumstances, we hold that the court acted well within its discretionary power to control the orderly conduct of the trial in not allowing defendant to handle the weapon in the course of his testimony, and that its ruling did not constitute an impermissible expression of opinion on defendant's character or credibility.

[2] Defendant further contends that the trial court erred in allowing the prosecutor to state the following in closing argument:

> The defendant tells you that Foust wrestled the gun away from him, but if it happened like the defendant said, and it was an accidental shot, and [the victim] was just over here (indicating) to the side, and he didn't have the gun right up to her, wouldn't there be satellite wounds from the shotgun pellets around this wound?

Defendant did not object to this argument at trial. The standard of review thus is "whether the statements amounted to such gross impropriety as to require the trial judge to act *ex mero motu*." *State v. Oliver*, 309 N.C. 326, 356, 307 S.E. 2d 304, 324 (1983). We perceive no impropriety in the argument.

Counsel may argue the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975). "It is permissible for the prosecutor to draw the jury's attention to the failure of the defendant to produce exculpatory testimony from witnesses available to defendant." *State v. Thompson*, 293 N.C. 713, 717, 239 S.E. 2d 465, 469 (1977).

The only medical evidence presented established that "the decedent had approximately a two and a half inch oblong hole in the right side of her chest" and "surgical interventions on her body." There was no evidence of satellite wounds. Such evidence would have tended to be exculpatory because it would have supported defendant's accident defense. The absence of such evidence, contrastingly, supports an inference that the victim was shot at close range. The prosecutor thus properly could rebut defendant's accident defense by calling the jury's attention to defendant's failure to produce such evidence. *State v. Thompson*,

293 N.C. at 717, 239 S.E. 2d at 469; *State v. Britt*, 288 N.C. at 711, 220 S.E. 2d at 291.

No error.

FEDERAL LAND BANK OF COLUMBIA, PLAINTIFF v. SAMUEL LIEBEN, GOODSON FARMS, INC., J. MICHAEL GOODSON, AND ESTATE OF GREYLIN R. GOODSON, AND SAMUEL LIEBEN, DEFENDANT, CROSS-CLAIM PLAINTIFF AND THIRD PARTY PLAINTIFF AND GOODSON FARMS, INC., J. MICHAEL GOODSON, AND ESTATE OF GREYLIN R. GOODSON, DEFENDANTS AND CROSS-CLAIM DEFENDANTS v. EDWARD F. MOORE, THIRD PARTY DEFENDANT

No. 201PA88

(Filed 3 November 1988)

ON plaintiff's petition for discretionary review, pursuant to N.C.G.S. § 7A-31(c), of a decision of the Court of Appeals, 89 N.C. App. 395, 366 S.E. 2d 592 (1988), which affirmed judgment for defendant Lieben entered by *Pope, J.*, sitting without a jury, at the 10 November 1986 session of Superior Court, SAMPSON County. Heard in the Supreme Court on 13 October 1988.

Richard L. Burrows for plaintiff appellant.

Petree, Stockton & Robinson, by Daniel R. Taylor, Jr. and Clifford Britt, for Samuel Lieben, defendant appellee.

PER CURIAM.

Affirmed.

ETTA COUCH v. NORTH CAROLINA EMPLOYMENT SECURITY COMMISSION, AND KID'S WORLD

No. 212PA88

(Filed 3 November 1988)

APPEAL by defendant North Carolina Employment Security Commission pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported at 89 N.C. App. 405, 366 S.E. 2d 574 (1988), which vacated and remanded the order of *Hobgood (Robert), J.*, entered 25 June 1987 in Superior Court, ORANGE County, affirming the decision of the Commission to disallow claimant's claim for unemployment compensation where she voluntarily left employment after her employer substantially reduced the number of hours of work. Heard in the Supreme Court 13 October 1988.

North State Legal Services, Inc., by John L. Saxon, for petitioner-appellee.

T. S. Whitaker, Chief Counsel, and C. Coleman Billingsley, Jr., for respondent-appellant North Carolina Employment Security Commission.

PER CURIAM.

Based solely on the reasoning of the majority opinion of the panel below, the Court of Appeals is

Affirmed.

DEBRA ANNE KARP v. UNIVERSITY OF NORTH CAROLINA

No. 80PA88

(Filed 3 November 1988)

REVIEW on writ of certiorari of the decision of the Court of Appeals, 88 N.C. App. 282, 362 S.E. 2d 825 (1987), which affirmed the order of the North Carolina Industrial Commission dated 25 November 1986. Heard in the Supreme Court 10 October 1988.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, for plaintiff appellee.

Lacy H. Thornburg, Attorney General, by Steve Nimocks, Special Deputy Attorney General, and Victor H. E. Morgan, Assistant Attorney General, for defendant appellant.

PER CURIAM.

Affirmed.

WILLIAM DURWOOD METTS v. DOCTOR JAMES D. PIVER AND DOCTOR CHARLES T. STREETER, SR.

No. 664PA87

(Filed 3 November 1988)

ON discretionary review of an unpublished opinion of the Court of Appeals, 87 N.C. App. 509, 362 S.E. 2d 4 (1987), which affirmed in part and reversed in part an order entered by *Lewis (J. B., Jr.), J.*, on 29 July 1986 in Superior Court, ONSLOW County, granting summary judgment in favor of defendants. Heard in the Supreme Court 10 October 1988.

Braswell & Taylor, by Shelby Duffy Albertson and Roland C. Braswell, for plaintiff.

Marshall, Williams, Gorham & Brawley, by Daniel Lee Brawley, Lonnie B. Williams, and Charles D. Meier, for defendants.

PER CURIAM.

Discretionary review improvidently allowed.

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

BARTHOLOMEW v. WAKE FOREST UNIVERSITY

No. 401P88.

Case below: 90 N.C. App. 770.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

BRANCH v. THE TRAVELERS INDEMNITY CO.

No. 457PA88.

Case below: 90 N.C. App. 116.

Petition by defendant (Travelers Indemnity Co.) for writ of certiorari to the North Carolina Court of Appeals allowed 3 November 1988.

CHANDLER v. U-LINE CORP.

No. 497P88.

Case below: 91 N.C. App. 315.

Petition by third-party defendant for temporary stay allowed 7 November 1988 pending consideration and determination of its petition for discretionary review.

COLE v. COLE

No. 393P88.

Case below: 90 N.C. App. 724.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

COMMISSIONERS OF CLAY COUNTY v.
SHERIFF OF CLAY COUNTY

No. 313A88.

Case below: 90 N.C. App. 411.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 October 1988.

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

DETTOR v. BHI PROPERTY CO.

No. 420A88.

Case below: 91 N.C. App. 93.

Petition for discretionary review filed by plaintiffs pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues allowed 3 November 1988.

IN RE TRUST UNDER WILL OF JACOBS

No. 428P88.

Case below: 91 N.C. App. 138.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

JOYCE v. WINSTON-SALEM STATE UNIVERSITY

No. 455P88.

Case below: 91 N.C. App. 153.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 November 1988.

McDONALD v. SCARBORO

No. 425P88.

Case below: 91 N.C. App. 13.

Petition by defendant (W. Gardner McCrary) for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

MOORE v. BOBBY DIXON ASSOC.

No. 426P88.

Case below: 91 N.C. App. 64.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 November 1988.

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

MYRICK v. COOLEY

No. 476A88.

Case below: 91 N.C. App. 209.

Petition for discretionary review filed by plaintiff pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues denied 3 November 1988.

NANCE v. ROBERTSON

No. 404P88.

Case below: 91 N.C. App. 121.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

PEARSON v. NATIONWIDE MUTUAL INS. CO.

No. 310PA88.

Case below: 90 N.C. App. 295; 323 N.C. 175.

Reconsideration of petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed and discretionary review allowed 3 November 1988.

PIEDMONT FORD TRUCK SALE v. CITY OF GREENSBORO

No. 394PA88.

Case below: 90 N.C. App. 692.

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 3 November 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 November 1988.

SMITH v. QUINN

No. 422PA88.

Case below: 91 N.C. App. 112.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 November 1988.

STATE v. BENFIELD

No. 454P88.

Case below: 91 N.C. App. 228.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988. Temporary stay dissolved 3 November 1988.

STATE v. BYRD

No. 410A88.

Case below: 91 N.C. App. 170.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and App. Rule 16(b) as to additional issues denied 3 November 1988. Petition by defendants for writ of supersedeas allowed 3 November 1988 on the condition that the secured appearance bonds remain in effect.

STATE v. COLVIN

No. 305P88.

Case below: 90 N.C. App. 411.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

STATE v. CROSS

No. 479P88.

Case below: 91 N.C. App. 585.

Petition by defendant for temporary stay denied 31 October 1988. Petition by defendant for writ of habeas corpus denied 3 October 1988.

STATE v. FULLER

No. 403P88.

Case below: 90 N.C. App. 771.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

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

STATE v. GREEN

No. 411PA88.

Case below: 91 N.C. App. 127.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 November 1988.

STATE v. ROBEY

No. 435P88.

Case below: 91 N.C. App. 198.

Notice of appeal by Attorney General pursuant to G.S. 7A-30 dismissed 3 November 1988. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied and supersedeas dissolved 3 November 1988.

STATE v. STURKIE

No. 439PA88.

Case below: 91 N.C. App. 249.

Petition by defendant for writ of supersedeas to stay judgment of superior court and motion for bond denied 17 October 1988. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 17 October 1988. Petition by Attorney General for writ of supersedeas to stay judgment of Court of Appeals allowed 17 October 1988.

STATE EX REL. BRYANT v. STOREY

No. 374P88.

Case below: 90 N.C. App. 770; 323 N.C. 369.

Motion by plaintiff for reconsideration of petition for discretionary review denied 3 November 1988.

WHITING v. THE DURHAM HERALD

No. 400P88.

Case below: 90 N.C. App. 772.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 November 1988.

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

PETITION TO REHEAR

ARONOV v. SECRETARY OF REVENUE

No. 336PA87.

Case below: 323 N.C. 132.

Petition by plaintiff to rehear denied 3 November 1988.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND NORTH CAROLINA NATURAL GAS CORPORATION v. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION (INTERVENOR), AND CITIES OF WILSON, ROCKY MOUNT, GREENVILLE AND MONROE, NORTH CAROLINA (INTERVENORS)

No. 124A87

(Filed 8 December 1988)

1. **Utilities Commission § 51— appellate review of decision of Utilities Commission**

The Supreme Court's statutory function in reviewing a decision by the Utilities Commission is to assess whether the Commission's order is affected by errors of law, and to determine whether there is substantial evidence, in view of the entire record, to support the position adopted.

2. **Utilities Commission § 41— return on common equity—case law on overall rate of return**

Our case law addressing the overall rate of return is apposite to the rate of return on common equity.

3. **Utilities Commission § 41— fair rate of return—subjective judgment**

Under N.C.G.S. § 62-133, the determination of what is a fair rate of return requires the exercise of subjective judgment.

4. **Utilities Commission § 41— fair rate of return—presumption of reasonableness—appellate review**

The Utilities Commission, not the courts, is authorized by the legislature to determine what is a fair rate of return. Once fixed by the Commission, the rates are deemed prima facie just and reasonable, and the party attacking such rates bears the burden of proving that they are improper. However, this does not preclude appellant from showing on appeal that the order is not supported by competent, material and substantial evidence.

5. **Gas § 1; Utilities Commission § 41— natural gas rates—return on common equity—conclusion supported by evidence**

The Utilities Commission's conclusion approving a 14.0% rate of return on common equity for a natural gas company was supported by competent, material and substantial evidence in view of the entire record.

6. **Gas § 1; Utilities Commission § 41— natural gas rates—return on common equity—ability of customers to switch fuels**

The Utilities Commission could properly consider any increased risk to a natural gas company's investors caused by the possible loss of customers who may switch to alternate fuels in determining the company's rate of return on common equity.

7. Gas § 1; Utilities Commission § 41— natural gas rates—return on common equity—size and management of utility

The Utilities Commission did not err in considering the fact that a natural gas company is "a small but efficient and well-managed natural gas utility" in determining the company's rate of return on common equity where the sense of the Commission's order was that the utility's small size increased but its efficient management reduced investor risk, and the two factors tended to cancel each other. Furthermore, the law permitted the Commission to consider both size and management in assessing investor risk insofar as such risk may bear on an appropriate return on equity capital since a utility's small size may increase investor risk and justify a higher return, and good management could be considered as a factor which reduces investor risk and militates in favor of a lower return on equity capital.

8. Gas § 1; Utilities Commission § 57— natural gas rates—return on common equity—specificity of findings

The Utilities Commission's findings in support of its return on common equity conclusion in a natural gas rate case were sufficiently detailed and specific to comply with N.C.G.S. § 62-79(a). The Commission was not required to show the specific effect of each factor upon the ultimate rate of return approved.

9. Gas § 1.1; Utilities Commission § 43— natural gas rates— customer classifications—rates of return—no unreasonable discrimination

The Utilities Commission's order contained findings sufficient to justify its conclusion that approved rates of return for various classes of customers of a natural gas utility are just and reasonable and do not unreasonably discriminate against cities which are wholesale customers of the utility. N.C.G.S. § 62-140(a).

Justice MEYER dissenting.

Justice MARTIN dissenting.

Justice MEYER joins in this dissenting opinion.

APPEAL by the cities of Wilson, Rocky Mount, Greenville and Monroe, North Carolina (Cities), and Public Staff—North Carolina Utilities Commission (Public Staff) pursuant to N.C.G.S. § 7A-29(b) from the Utilities Commission's (Commission) final order entered on 10 November 1986 in Docket No. G-21, Sub 255, approving rates and charges for natural gas service provided by North Carolina Natural Gas Corporation (NCNG). Heard in the Supreme Court 9 February 1988.

McCoy, Weaver, Wiggins, Cleveland & Raper by Donald W. McCoy and Alfred E. Cleveland for North Carolina Natural Gas Corporation, appellee.

David T. Drooz, Staff Attorney, and Gisele L. Rankin, Staff Attorney, Public Staff Legal Division, North Carolina Utilities Commission, intervenor appellant and appellee.

Spiegel & McDiarmid by David R. Straus, Cynthia S. Bogorad and Barbara S. Esbin; Poyner & Spruill by J. Phil Carlton for Cities of Wilson, Rocky Mount, Greenville and Monroe, North Carolina, intervenor appellants.

EXUM, Chief Justice.

On this appeal from the Commission's final order granting partial increase in rates and charges to NCNG the questions presented are whether the Commission erred in concluding: (1) the approved rate of return on common equity for NCNG is supported by competent, material, and substantial evidence in view of the entire record; (2) the final order was sufficiently detailed and specific to comply with statutory law; (3) the approved rates established for the various classes of NCNG's customers do not unreasonably discriminate against Cities and are supported by competent, material and substantial evidence in view of the entire record. We hold the Commission did not err and affirm its final order.

I.

On this appeal, Public Staff and Cities set forth three basic contentions. First, Public Staff argues the Commission's finding approving a 14.0% rate of return on common equity for NCNG is unsupported by competent, material and substantial evidence in view of the entire record.[1] Second, Public Staff urges the Commission erred in not making specific findings for the approved return on equity and in denying the Public Staff's motion for specific

1. The statutory basis for Public Staff's argument is from N.C.G.S. § 62-94(b) which provides: "The Court may . . . (5) reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: . . . Unsupported by competent, material and substantial evidence in view of the entire record as submitted . . . ."

findings.[2] Last, Cities contend the Commission's conclusion that the RE-1 rate is not unduly discriminatory is not supported by the findings of fact; therefore, it is erroneous as a matter of law, arbitrary, and capricious.[3] We will address each of these arguments in turn.

NCNG provides natural gas to the public under a certificate of public convenience and necessity issued by the Commission. Wholesale natural gas service is provided to Cities, each of which is authorized under N.C.G.S. §§ 160A-311(4), -312 to own and operate a natural gas distribution service for its respective citizens. Cities take delivery of natural gas from NCNG at the "city gate" and distribute that gas through their municipally owned and operated distribution facilities to the residential, commercial, and industrial retail customers served by each city. The prices at which Cities sell gas to their customers is not subject to Commission regulation. NCNG also furnishes retail natural gas service in eastern North Carolina to residential, commercial and industrial customers.

NCNG has separate retail rate schedules for residential, commercial and small industrial, industrial process, and other commercial and industrial uses.[4] Industrial customers with alternate

2. The Public Staff contends the Commission's findings on this issue violate N.C.G.S. § 62-79(a). This statute provides in pertinent part:

> All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record . . . .

N.C.G.S. § 62-79(a)(1) (1982 Repl. Vol.).

3. The Cities' argument is based in part on N.C.G.S. § 62-140(a), which states: "No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service."

4. These schedules include: Rate Schedule 1—Residential; Rate Schedule 2—ommercial and Small Industrial; Rate Schedules 3A and 3B—Industrial Process es; Rate Schedule 4A—Other Commercial and Industrial Non-IST customers; Schedule 4B—Other Commercial and Industrial IST customers; Rate Schedule —Boiler Fuel Non-IST customers; Rate Schedule 5B—Boiler Fuel IST customers; Rate Schedule 6A—Large Boiler Fuel Non-IST customers; Rate Schedule 6B—Large Boiler Fuel IST customers; Rate Schedule T-1—Transportation rate applicable to boiler fuel industrial volumes; and Rate Schedule T-2—Transportation rate applicable to nonboiler fuel industrial volumes.

fuel capability may be served under a negotiated rate.[5] NCNG serves the bulk of Cities' wholesale gas customers' needs under Rate RE-1, applicable to gas ultimately resold by Cities to Cities' residential, commercial and certain industrial customers. The remaining gas destined for certain other of Cities' industrial customers with alternate fuel capability is sold under SM-1, a rate negotiated with Cities.

Procedurally, this case comes to this Court as follows:

On 27 March 1986 NCNG filed an application with the Commission for authority to increase its rates and charges by $6,145,662 annually. NCNG proposed to make the new rates effective on 26 April 1986.

The Commission entered an order on 22 April 1986 that declared the application to be a general rate case pursuant to N.C.G.S. § 62-137, suspended the proposed rate increase for a period up to 270 days from the proposed effective date, required public notice and scheduled public hearings, required testimony and exhibits of parties other than NCNG to be prefiled by 15 July 1986, and set the matter for hearing on the evidence of the parties beginning 4 August 1986. NCNG filed supplemental testimony and exhibits on 30 June 1986 which raised the Company's requested rate increase from $6,145,662 to $8,193,100.

The Carolina Utility Customers Association, Inc. (CUCA) and Aluminum Company of America (Alcoa) filed Petitions to Intervene on 25 April 1986 and 10 June 1986, respectively. On 10 July 1986 Cities filed a Petition to Intervene and a Motion for Limited Admission to Practice by David R. Straus and Gary J. Newell of the Washington, D.C. law firm of Spiegel and McDiarmid. The Commission allowed all petitions and the motion.

A hearing panel consisting of Commissioner A. Hartwell Campbell, presiding, and Commissioners Sarah Lindsay Tate and Ruth E. Cook heard the case in chief in Raleigh from 4 August through 7 August 1986. The hearing panel entered a "Recommended Order Granting Partial Increase in Rates and Charges" on 15 October 1986, with Commissioner Cook dissenting in part.

5. Rate Schedule S-1 represents NCNG's negotiated rates for industrials served by NCNG.

The hearing panel found that 14.2% was a reasonable return on common equity for NCNG, and that NCNG's annual revenues should be increased by $6,100,577.

All parties duly filed exceptions to the hearing panel's recommended order. The Public Staff also moved the Commission to make specific findings with respect to the return on common equity allowed NCNG. The full Commission held oral arguments on the exceptions on 3 November 1986.

The Commission entered its "Final Order Granting Partial Increase in Rates and Charges" on 10 November 1986. The Commission found that 14.0% was a reasonable rate of return on common equity for NCNG, and that NCNG's annual revenues should be increased by $5,956,540. Chairman Robert O. Wells and Commissioner Ruth E. Cook filed dissenting opinions with respect to the rate of return issue.

NCNG filed revised tariffs and rate schedules that were designed to implement the Commission's 10 November 1986 final order. On 5 December 1986 the Commission entered an order approving the revised tariffs. Cities and Public Staff now appeal from the Commission's final order.

II.

A.

The Public Staff contends on this appeal that the Commission's finding[6] approving the 14.0% rate of return on common

6. The Commission has labeled its determination that 14.0% is a fair rate of return on common equity a "finding." What constitutes a fair rate of return on equity, however, is ultimately a matter of judgment and therefore more appropriately denominated a conclusion of law. *See, e.g., State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. 238, 246 n.6, 372 S.E. 2d 692, 697 n.6 (1988); *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 693, 370 S.E. 2d 567, 570 (1988); *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351-52, 358 S.E. 2d 339, 346 (1987). In this order as in previous orders the Commission's summary of evidence, findings of fact, and conclusions of law are mixed together in portions of the record denominated "Findings of Fact" and "Evidence and Conclusions for Findings of Fact." *Id.* Throughout this opinion we have tried to distinguish between and denominate findings and conclusions on the basis of the distinctions we drew in *Public Staff* and *Eddleman*. *Public Staff*, 322 N.C. at 693, 370 S.E. 2d at 570; *Eddleman*, 320 N.C. at 351-52, 358 S.E. 2d at 345-46. As this Court noted in *Eddleman*, "[a]s long as 'each link in the chain of reasoning' appears in the Commission's order, mislabeling is merely an inconvenience to the courts." *Eddleman*, 320 N.C. at 352, 358 S.E. 2d at 346.

equity[7] is unsupported by competent, material and substantial evidence in view of the entire record and therefore violates N.C.G.S. § 62-94(b)(5). More specifically, Public Staff argues "the Company's rate of return testimony is so riddled with contradictions and conflicting inferences that it fails as substantial evidence . . . ." In addition, Public Staff alleges the "Commission fail[ed] to indicate any valid basis in the evidence for awarding a higher return than Mr. Evans' 13.3%." Finally, Public Staff claims the Commission erred in ignoring other witnesses who testified regarding risks affecting NCNG's rate of return. NCNG responds that the Commission did properly exercise its discretion in setting the rate of return on common equity and its findings are supported by substantial evidence in view of the entire record.

In determining the appropriate rate of return on common equity the Commission relied on the direct testimony and exhibits of NCNG witnesses Wells and Butler, and Public Staff witness Evans. NCNG witness Wells testified that the company's immediate future is one of high risk. He explained that 70% of NCNG's gas sales and transportation volumes[8] in fiscal 1985 was

7. In the context of traditional utility regulation "rate of return" is a percentage which the Commission concludes should be earned on the rate base. *See State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. at 244, 372 S.E. 2d at 696; N.C.G.S. § 62-133(b)(4) (1982 Repl. Vol. & 1988 Cum. Supp.); C. F. Phillips, Jr., *The Regulation of Public Utilities* 332 (1984). The "rate base" is the undepreciated original cost of the utility's property which is used and useful in providing service to the public. *See State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. at 244, 372 S.E. 2d at 696; N.C.G.S. § 62-133(b)(1) (1982 Repl. Vol. & 1988 Cum. Supp.); C. F. Phillips, Jr., *The Regulation of Public Utilities* 158-59 (1984). The "rate of return on common equity" represents the annual percentage return to be allowed to the utility's stock investors. It represents but one component in the determination of the rate of return. The second component is the utilities cost of long-term debt or the "rate of return on debt." The weighted average of these two components based on the relative capital structure of the utility equals the company's overall "rate of return." *See generally* N.C.G.S. § 62-133(b)(4) (1982 Repl. Vol. & 1988 Cum. Supp.) (describing how Commission shall determine rate of return); J. C. Bonright, A. L. Danielson, & D. R. Kamerschen, *Principles of Public Utility Rates* 305-312 (1988) (discussing the determination of a fair rate of return on an original-cost rate base); C. F. Phillips, Jr., *The Regulation of Public Utilities* 345-376 (discussing the cost of capital standard in determining a fair rate of return).

8. NCNG's services also include the transportation of customer owned gas. These customers are served under Rate Schedule T-1—transportation rate applicable to boiler fuel industrial volumes and Rate Schedule T-2—transportation rate applicable to nonboiler fuel industrial volumes.

delivered to industrial and large commercial customers that are able to use oil or propane as an alternate fuel. Wells claimed gas prices under NCNG's present rates are higher than the prices of oil and propane fuels available to most of these customers and the Company would lose the majority of its industrial load if lower priced spot market gas were not available. Wells pointed out that even with the lower priced gas, NCNG has already lost three large industrial users. Wells' ultimate recommendation was for a 16.5% return on common equity, but he qualified his recommendation with the belief that the unusual risks facing NCNG justified even a higher rate of return.

NCNG witness Butler determined his recommended required return on common equity by dividing an investor's anticipated earnings per share by the per share book value of the Company's common stock.[9] Butler emphasized that NCNG's return on equity should reflect the higher-than-average risks created by the Company's heavy reliance on sales to industrial customers who have the ability to switch to alternate fuels. Butler's original prefiled testimony recommended a return on equity of 17.9%. In oral testimony, however, Butler adjusted his computations to reflect what he called "the Company's increased common equity base" since his original filing. Butler's adjusted rate and ultimate recommendation was for a return on equity of 16.8%.

Public Staff witness Evans relied principally on a discounted cash flow method (DCF) to estimate the appropriate rate of return on common equity for NCNG. "According to this method the proper rate of return is determined by adding to the common stock's current yield a rate of increase which investors will expect to occur over time." *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 693-94, 370 S.E. 2d 567, 570 (1988); *See* C. F. Phillips, Jr., *The Regulation of Public Utilities* 356-57 (1984). Evans performed a NCNG specific DCF study which produced a return requirement of 13.42%. In order to provide a "check" on this result he applied the DCF method to two groups of companies "selected to be similar in risk to NCNG." This study produced rates of return of 12.73% and 12.41%. Based upon this

9. The formula used by Butler is as follows:

$1.92 current dividend per share divided by an estimated payout ratio of 55% equals $3.49 earnings per share. $3.49 earnings per share divided by $20.81 book value per share equals 16.8% return on equity.

analysis Evans concluded that a reasonable estimate of the cost of equity to NCNG was within the range of 12.8% to 13.8%. Evans ultimately recommended a 13.3% return on common equity.

Evans also "strongly disagree[d]" with NCNG witness Butler's testimony. In his opinion, Butler's methodology for estimating the cost of capital to NCNG was inappropriate because "it does not incorporate the market price of NCNG's stock and it also fails to consider expected returns on alternative investments of equivalent risk."

B.

[1] N.C.G.S. § 62-94 prescribes the scope of appellate review of a decision by the Commission. Under this standard, the reviewing court

> (b) . . . may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

N.C.G.S. § 62-94 (1982 Repl. Vol.). This Court's statutory function is to assess whether the Commission's order is affected by errors of law, and to determine whether there is substantial evidence, in view of the entire record, to support the position adopted. *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323

N.C. 238, 243-44, 372 S.E. 2d 692, 695 (1988); *see, e.g., State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E. 2d 339, 347 (1987); *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 316 N.C. 238, 242, 342 S.E. 2d 28, 31-32 (1986); *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 314 N.C. 171, 179-80, 333 S.E. 2d 259, 265 (1985).

[2] Though we are addressing here only the rate of return on common equity which is but one component of the overall rate of return, this Court has stated "our case law addressing the overall rate of return is apposite." *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 30, 287 S.E. 2d 786, 803 (1982). The statutory guidelines for determining a utility's rate of return in a general rate case are set forth in N.C.G.S. § 62-133(b)(4). This statute provides that the Commission shall fix an overall rate of return on the cost of a utility's property that will enable a well-managed utility to: (1) produce a fair return for its shareholders, (2) allow the utility to maintain its facilities and services at a reasonable level, and (3) enable the utility to compete in the market for capital funds on terms that are reasonable and fair to its customers as well as its existing investors. *See* N.C.G.S. § 62-133 (b)(4) (1982 Repl. Vol. & 1988 Cum. Supp.). This Court has interpreted this statute to mean

> the Legislature intended for the Commission to fix rates as low as may be reasonably consistent with the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, those of the State Constitution, Art. I, § 19, being the same in this respect.

Utilities Comm. v. Power Co., 285 N.C. 377, 388, 206 S.E. 2d 269, 276 (1974).

[3, 4] Under N.C.G.S. § 62-133 the determination of what is a fair rate of return requires the exercise of subjective judgment. *Utilities Commission v. Duke Power Co.*, 305 N.C. at 23, 287 S.E. 2d at 799; *see Utilities Comm. v. Telephone Co.*, 298 N.C. 162, 178, 257 S.E. 2d 623, 634 (1979); *cf.* J. C. Bonright, A. L. Danielson & D. R. Kamerschen, *Principles of Public Utility Rates* 317 (1988) (describing the highly judgmental aspect of determining the cost of equity capital); C. F. Phillips, Jr., *The Regulation of Public Utilities* 363-64 (1984) (noting the difficulty in estimating the cost of equity capital and recognizing that estimates vary significantly). We emphasize that it is the Commission, not the

courts, which is authorized by the legislature to determine what is a fair rate of return. *State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 548, 299 S.E. 2d 763, 767 (1983); *Utilities Comm. v. Power Co.*, 285 N.C. at 396, 206 S.E. 2d at 276; *see Utilities Comm. v. Power Co.*, 285 N.C. 398, 413, 206 S.E. 2d 283, 295 (1974); *Utilities Commission v. Telephone Co.*, 266 N.C. 450, 457, 146 S.E. 2d 487, 492 (1966); *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 456, 130 S.E. 2d 890, 895 (1963) (quoting *Utilities Comm. v. State and Utilities Comm. v. Telegraph Co.*, 239 N.C. 333, 80 S.E. 2d 133 (1954)). Once fixed by the Commission the rates are deemed prima facie just and reasonable. N.C.G.S. § 62-94(e) (1982 Repl. Vol.). The party attacking rates established by the Commission bears the burden of proving that they are improper. *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 316 N.C. at 242, 342 S.E. 2d at 31; *Utilities Commission v. Duke Power Co.*, 305 N.C. at 10, 287 S.E. 2d at 792. This does not preclude appellant from showing on appeal, if it can, that the order is not supported by competent, material, and substantial evidence. *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 316 N.C. at 242, 342 S.E. 2d at 32; *Utilities Commission v. Duke Power Co.*, 305 N.C. at 10, 287 S.E. 2d at 792; *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 424, 428, 230 S.E. 2d 647, 650 (1977). The credibility of testimony and the weight to be accorded it are matters to be determined by the Commission. *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 316 N.C. at 242, 342 S.E. 2d at 36; *State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. at 549, 299 S.E. 2d at 768 (quoting *Utilities Commission v. Duke Power Co.*, 305 N.C. at 21, 287 S.E. 2d at 798); *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 688, 208 S.E. 2d 681, 691-92 (1974); *Utilities Comm. v. City of Durham*, 282 N.C. 308, 322, 193 S.E. 2d 95, 105 (1972). As this Court stated in *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 371, 189 S.E. 2d 705, 739 (1972):

> The weighing of the evidence and the drawing of the ultimate conclusion therefrom as to what is necessary to enable a utility to attract capital is for the Commission, not the reviewing court. It has been said many times that this is so because the Commission is a body of experts "composed of men of special knowledge, observation and experience" in the field of rate regulation.

Id.

C.

[5] With these principles in mind we hold that the Commission's ultimate conclusion approving a 14.0% rate of return on common equity for NCNG is supported by competent, material and substantial evidence in view of the entire record. The final order shows that the Commission carefully reviewed the testimonies of Public Staff witness Evans and NCNG witness Butler. The Commission concluded the evidence indicated several existing factors which make NCNG more financially stable than in 1983 when the company was allowed a rate of return on common equity of 15.5%. These factors include: lower and more stable interest rates; investor confidence in the NCNG's stock and bonds; Commission approval of the IST;[10] and inclusion of the company's new LNG plant in the cost of service.[11] On the other hand, the Commission concluded the evidence supported the proposition that NCNG faces substantial risk of customers switching to oil or obtaining their own gas. NCNG is particularly vulnerable in this area because 70% of its sales volumes go to industrial customers who have this switching capacity.

---

10. The Industrial Sales Tracker (IST) is a ratemaking mechanism whereby NCNG is able to protect its profit margin on sales to customers who have the capability to use alternate fuels. As this Court has previously noted:

> The IST applies to customers presently being served under Rate Schedule Nos. 4, 5, 6 and RE-1 that are capable of using heavy fuel oil as an alternate fuel. The Commission estimated the level of fixed cost recovery NCNG would obtain from these customers by subtracting projected variable costs from the revenues NCNG could expect to receive from IST customers. This calculation was based on anticipated sales and oil prices. The resulting figure is NCNG's allowed profit margin. If oil prices drop so that heavy fuel oil becomes cheaper to use than natural gas forcing NCNG to negotiate lower rates with its IST customers, the IST allows NCNG to add a surcharge to the rates of customers not covered by the IST to maintain its profit margin. If oil prices should increase allowing NCNG to make profits in excess of its allowed profit margin, the excess is passed on to the Non-IST customers by a credit. At the end of each year there is a "true-up."

State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc., 313 N.C. 215, 226, 328 S.E. 2d 264, 271 (1985).

11. NCNG witness Barragan testified that the primary reason for requesting this rate increase was to recover the annual operating and capital costs of the Company's new liquefied natural gas storage plant (LNG Plant). Barragan also testified the LNG Plant was built primarily to store liquefied natural gas in the summer to meet wintertime peak day demands and to provide system reliability and safety throughout the year.

Weighing the conflicting testimony of the expert witnesses, the Commission concluded that the rate of return on common equity of 16.5% requested by NCNG was clearly excessive, while the rate of return of common equity of 13.3% recommended by the Public Staff was too conservative. The Commission thereby settled upon 14.0% as a reasonable and appropriate rate for NCNG. The Commission thus set a rate of return within the range of those recommended by NCNG's witnesses on one hand and Public Staff's witness on the other. We can find no legal error affecting this determination.

Each of the Public Staff's contentions must fail. First, the Commission's order makes clear that it considered and gave some weight to the testimony and exhibits of Company witnesses Wells and Butler. Its order also makes clear that the Commission gave much greater weight to the testimony and exhibits of Public Staff's witness Evans. Evans testified "that a reasonable estimate of the cost of equity to NCNG is within the range 12.8% to 13.8%[,]" and the Commission's rate exceeded the upper range of this "estimate" by only .2%.

Second, the Commission did set forth several factors which supports its conclusion that a 14.0% rate of return on common equity is appropriate. In setting this rate of return the Commission actually reduced the return on common equity—15.5%—allowed in NCNG's previous rate proceeding. In support of its common equity return conclusion the Commission said:

> The authorized rate of return on common equity of 14.0% allowed herein is consistent with the evidence offered in this proceeding. Such evidence clearly indicates that interest rates have declined significantly since the Company's last general rate case Order in December 1983, when N.C.N.G. was allowed a rate of return on common equity of 15.5%. Furthermore, current interest rates are stable and the stock of N.C.N.G. is trading well above book value. The cost of financing is clearly lower than it has been in several years. The Company is a financially healthy utility. For instance, Company witness Butler testified that although N.C.N.G.'s mortgage bonds are not rated by either Moody's or Standard and Poor's, investors have regarded the Company's credit as worthy of A/A ratings. The 14.0% rate of

return on common equity allowed in this proceeding also reflects and recognizes the fact that the risk of N.C.N.G. has decreased as a result of continued approval of the IST and the inclusion of the Company's LNG plant in the cost of service.

On the other hand, the Commission is well aware of the current volatility of the gas market. N.C.N.G. faces the substantial risk of customers switching to oil or obtaining their own gas. This risk is exacerbated for N.C.N.G. because 70% of its sales volumes go to industrial customers. These factors certainly affect the reasonable rate of return which the Company should be allowed in this proceeding. The Commission recognizes that N.C.N.G. is a small but efficient and well-managed natural gas utility and, in recognition thereof, has authorized an appropriate rate of return in this proceeding which is consistent with such fact and current economic conditions and applicable risk considerations. The return on common equity of 14.0% allowed in this case is 150 basic points less than the 15.5% rate of return N.C.N.G. was allowed in its last general rate case. This reduction of almost 10% in the Company's allowed rate of return reflects consideration of the risk factors discussed above.

[6] All the factors set out in the Commission's order properly bear on its common equity rate of return determination. There is no factor set out which the Commission, as a matter of law, improperly considered. The Public Staff argues that the law precludes the Commission from considering any increased risk to NCNG investors caused by the possible loss of customers who may switch to alternative fuels. We disagree. Consideration of this kind of risk factor lies clearly within the ambit of the Commission's ratemaking expertise.

[7] The Public Staff next contends the Commission improperly considered the fact that NCNG is "a small but efficient and well-managed natural gas utility." Again we disagree. First, it is clear from its order that the Commission gave little, if any, weight either to the fact that NCNG was small or that it was well managed and efficient. The Commission mentioned these facts in its assessment of the risk an NCNG investor might incur. The sense of the Commission's order is that the utility's small size in-

creases, but its efficient management reduces, the risk. With regard to investor risk, therefore, the two factors tend to cancel each other.

Second, the law permits the Commission to consider both size and management in assessing investor risk insofar as such risk may bear on an appropriate return on equity capital. A utility's small size may increase investor risk and justify a higher return. See *Utilities Comm. v. Telephone Co.*, 298 N.C. at 178-79, 257 S.E. 2d at 634-35 (Commission relied on expert testimony that utility's small size justified the addition of a "risk premium of 2 to 3%" in setting a proper return on equity capital). Every utility has a duty to be well managed and "furnish adequate, efficient and reasonable service." N.C.G.S. § 62-131(b) (1982 Repl. Vol.). This Court has not questioned "the necessity for the Utilities Commission to take into account the efficiency of the company's operations in fixing its rates in a general rate case . . . ." *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 209, 306 S.E. 2d 435, 443 (1983). Inadequate service because of inefficient management may justify a lower rate of return. *Utilities Comm. v. Telephone Co.*, 285 N.C. at 679-80, 208 S.E. 2d at 686-87.

While efficient management should not justify a higher common equity rate of return, it is appropriate for the Commission to consider good management as a factor which reduces investor risk and militates in favor of a lower return on equity capital. When the Commission's mention of this factor is read in context, it is clear that this is the impetus the Commission gave to it. The Commission considered NCNG's being well-managed as a counterbalance to its being small, as reducing investor risk, and as militating toward a lower, not a higher, rate of return on common equity.

Considering the highly subjective and judgmental process by which a common equity rate of return determination must ultimately be made and the Commission's obviously heavy reliance on witness Evans' testimony, we hold the Commission's decision on this issue is within the latitude permitted to it by the law and is supported by substantial, competent evidence in light of the whole record.

III.

[8] Public Staff also argues the Commission erred in denying its motion for, and not making, more specific findings to support its return on equity conclusion. More specifically, Public Staff contends the "Commission's rate of return findings and conclusions include general statements of law and a mere recital of the parties' contentions. . . . This does not satisfy G.S. 62-79(a) and . . . case law principles." NCNG counters, claiming the Commission's order satisfies the requirements of NCNG § 62-79(a). We agree with NCNG.

N.C.G.S. § 62-79(a) provides:

> All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:
>
> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

We have interpreted this statute as requiring the Commission to find all facts essential to a determination of the question at issue. *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 351, 358 S.E. 2d at 345 (quoting *State ex rel. Utilities Comm. v. Haywood Electric Membership Corp.*, 260 N.C. 59, 64, 131 S.E. 2d 865, 868 (1963)); *State ex rel. Utilities Comm. v. Edmisten*, 314 N.C. 122, 151, 333 S.E. 2d 453, 471 (1985), *vacated on other grounds sub nom. Nantahala Power & Light Co. v. Thornburg*, 477 U.S. 902 (1985). In addition, "[t]he [Commission's] failure to include all the necessary findings of fact is an error of law and a basis for remand upon N.C.G.S. § 62-94(b)(4) because it frustrates appellate review." *State ex rel. Utilities Comm. v. The Public Staff*, 317 N.C. 26, 34, 343 S.E. 2d 898, 904 (1986); *accord State ex rel. Utilities Comm. v. AT&T Communications*, 321 N.C. 586, 588, 364 S.E. 2d 386, 387 (1988) (per curiam); *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 699, 370 S.E. 2d at 573 (quoting *State ex rel. Utilities Comm. v. The Public Staff*, 317 N.C. 26, 34, 343 S.E. 2d 898, 904 (1986)). The Commission, however, is not re-

quired to "comment upon 'every single fact or item of evidence presented by the parties.' " *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 351, 358 S.E. 2d at 345 (quoting *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 745, 332 S.E. 2d 397, 474 (1985), *rev'd on other grounds*, 476 U.S. 953 (1986)). Moreover, "[t]he Commission's summary of the appellant's argument and its rejection of the same is sufficient to enable the reviewing court to ascertain the controverted questions presented in the proceeding. That is all that G.S. § 62-79 requires." *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 351, 358 S.E. 2d at 345 (quoting *State ex rel. Utilities Comm. v. Conservation Council*, 312 N.C. 59, 62, 320 S.E. 2d 679, 682 (1984)). We recently held that § 62-79(a) is violated when the Commission's finding of a return on equity failed "to make specific findings showing what effect, if any, it gave to financing costs . . . in arriving at its common equity rate of return decision." *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. at 701, 370 S.E. 2d at 574.

With these principles in mind, we hold the Commission did comply with N.C.G.S. § 62-79(a). The Commission's order makes clear that it surpassed the minimal requirements we set out in *Conservation Council*. *See Conservation Council*, 312 N.C. at 62, 320 S.E. 2d at 682. Here the Commission did not merely summarize the arguments of the parties and then reject those offered by appellants. By contrast, the Commission considered and necessarily gave greater weight to Public Staff's evidence, which attempted to support a 13.3% rate of return, than to NCNG's evidence, which attempted to support a 16.5% rate of return. Public Staff's evidence was neither rejected nor ignored, but it was, instead, given substantial weight in the Commission's ultimate conclusion. More pertinently to the question under consideration, the Commission here did array those factors suggesting a higher rate of return against those suggesting a lower rate.

The facts here are unlike those presented in *Public Staff*, in which we held the Commission's order did violate N.C.G.S. § 62-79(a). *Public Staff*, 322 N.C. at 701, 370 S.E. 2d at 574. In that case the Commission failed to specify the extent to which specifically quantifiable financing costs affected the ultimate rate of return approved. *Id.* at 700, 370 S.E. 2d at 574. Here *Public*

Staff does not contend that there is some objectively quantifiable factor which the Commission improperly considered or failed to consider. Instead, the Public Staff insists that the Commission must "show[ ] the weight (i.e., the specific effect) of each factor affecting rate of return . . . ." We agree with the Commission, at least in the absence of a factor like that present in *Public Staff*, "that the determination of a reasonable rate of return is, in the end, basically a matter of sound regulatory judgment." Given this subjectivity ordinarily inherent in the determination of a proper rate of return on common equity, there are inevitably pertinent factors which are properly taken into account but which cannot be quantified with the kind of specificity here demanded by Public Staff. *See, e.g., id.* at 697, 370 S.E. 2d at 572; J. C. Bonright, A. L. Danielson & D. R. Kamerschen, *Principles of Public Utility Rates* 314-17 (1988); C. F. Phillips, Jr., *The Regulation of Public Utilities* 363-65 (1984).

We conclude, on this record, that the Commission's order is sufficiently detailed and specific, and its findings in support of its conclusion are adequate enough, to comply with the requirements of N.C.G.S. § 62-79(a).

IV.

[9] The Cities argue the Commission has not adequately, through appropriate findings supported by evidence, justified the differences in the rates of return for Cities as compared to NCNG's other customer classes.[12] Cities contend that without

12. In order to properly address the Cities' argument we think it helpful to review again what "rates of return" represent and how they can be determined for each class of customers. The "rate of return" is a percentage which the Commission concludes should be earned on the rate base. *See* N.C.G.S. § 62-133(b)(4) (1982 Repl. Vol. & 1988 Cum. Supp.). The "rate base" is the undepreciated historical cost of the utility's property which is used and useful in providing service to the public. *See* N.C.G.S. § 62-133(b)(1) (1982 Repl. Vol. & 1988 Cum. Supp.).

As we explained in *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. at 244-45, 372 S.E. 2d at 696:

> Determining the effective rate of return for a particular NCNG customer class involves a mathematical computation containing several components. The computation must be performed after the fact by utilizing the financial information for a given test year with adjustments made for any subsequent increase in rates. There are in the computation three basic components which must be ascertained. First, an allocation must be made to determine the portion of the

such justification these differences amount to unreasonably discriminatory rates which violate § 62-140(a).[13] We disagree.

We outlined the relevant law in this area in *State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc.*, 313 N.C. 215, 222, 328 S.E. 2d 264, 269 (1985), when we noted:

> A substantial difference in service or conditions must exist to justify a difference in rates. "There must be no *unreasonable* discrimination between those receiving the same kind and degree of service." While decisions of the Commission involving the exercise of its discretion in fixing rates are accorded great deference, the Commission has no power to authorize rates that result in unreasonable and unjust discrimination. In determining whether rate differences constitute unreasonable discrimination, a number of factors should be considered: "(1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services." Other factors to be considered include "competitive conditions, consumption characteristics of the several classes and the value of service to each class, which is indicated to some extent by the cost of alternate fuels available."

Id. (citations omitted).

> total rate base applicable to each customer class. Likewise an allocation, . . . must be made to determine the cost of service or operating expenses applicable to each customer class. Finally, the revenues NCNG collected from each customer class for the test period, adjusted for any subsequent increase in rates, must also be determined. Once all of the components have been agreed upon the computation itself is not complicated. The formula for determining the rate of return for each class is as follows: Operating revenues less cost of service (operating expenses and taxes) divided by the rate base equals the rate of return. Thus, the rate of return for any particular customer class varies inversely with the amount of the rate base and the amount of the cost of service, and directly with the amount of revenues, allocated to that customer class.

Id. at 244-45, 372 S.E. 2d at 696.

13. This statute provides, in pertinent part:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or services either as between localities or as between classes of service.

N.C.G.S. § 62-140(a) (1982 Repl. Vol. & 1988 Cum. Supp.).

With these principles in mind, we emphasize at the outset that this Court has recently considered Cities' discrimination argument in the context of NCNG's prior rate proceeding. *See State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. at 242-52, 372 S.E. 2d at 694-700. The Cities' present contentions are substantially the same as those made in *Carolina Utility Customers Assoc.*, where we held:

> [T]he Commission's ORDER does contain findings sufficient to justify its conclusion that the approved rates of return are just and reasonable and do not unreasonably discriminate among the various classes of NCNG customers. . . . While an assessment of the Commission's ORDER based simply on the cost of service evidence might suggest the adopted rates are unreasonably discriminatory, the Commission's analysis of the noncost factors permitted in our case law is sufficient to justify the Commission's decision.

Id. at 251-52, 372 S.E. 2d at 700.

The record now before us originates from the 27 March 1986 application filed by NCNG for authority to adjust its rates and charges. NCNG claims to have filed the present rate case primarily to recover the annual operating and capital costs of its new LNG Plant. Over 75% of NCNG's $8,193,100 request as revised was to recover cost of the LNG Plant while most of the remaining requested increase was claimed to be attributable to shrinking margins on negotiated sales and reduced total sales caused by low oil prices. After taking evidence and making findings, the Commission approved an increase of $5,956,540 in annual gross revenues. This increase necessarily required an adjustment to NCNG's schedules of rates and charges for customer classes. Essentially all of NCNG's customer classes received a rate increase.[14] Cities' rates were increased by 6.0%.[15] Notably, Carolina Customers Association, Inc. (CUCA), the Aluminum Company of

14. Only Rate Schedule 5A—Boiler Fuel Non-IST customers, and Rate Schedule 6A—Large Boiler Fuel Non-IST customers were decreased by 0.2% and 4.4%, respectively.

15. Other customer rate increases included: Residential Rate Schedule 1 was increased by 15.9%; Commercial Rate Schedule 2 was increased by 5.9%; and Industrial Rate Schedules 3A, 3B, and 4A were increased by 0.9%, 0.5% and 1.7%, respectively.

America (Alcoa), and Public Staff all intervened in the proceeding, but only Cities has brought an appeal claiming the newly set rates are discriminatory. Cities continue to argue that the discrimination in the rates of return among NCNG's several customer classes approved by the Commission are not justified by adequate findings supported by the whole record; therefore, by approving them the Commission exceeded its statutory authority. Appellees counter the evidence and findings adequately justify that the approved rates do not unreasonably discriminate among NCNG's classes of customers.

The Commission's order in this proceeding does address the discrimination issue presented by Cities. The Commission's ultimate conclusion on the discrimination issue is:

> It would be unjust and unreasonable to establish rates in this proceeding based upon equalized rates of return for all customer classes. Other relevant factors which must be considered in setting rates in addition to the estimated cost of service include the ability to negotiate rates, value of service, quantity of natural gas used, the time of use, the manner of use, the equipment which NCNG must provide and maintain in order to meet the requirements of its customers, competitive conditions, and consumption characteristics.

In support of this conclusion the Commission relied upon the following evidence, findings of fact and conclusions of law:

> First, the Commission was of the opinion
>
> the cost-of-service studies presented by the various parties are certainly an important and relevant guide or factor to be weighed in designing rates in this proceeding. Nevertheless, it must be kept in mind that the cost-of-service studies presented in this docket are not objective in nature, but rather reflect the preparer's judgment as to how to fairly allocate common costs among customer classes, as well as being based on numerous assumptions.

As an example, the Commission referred to the testimony and exhibits of Public Staff witness Davis who used two different methodologies for his four cost-of-service studies with widely divergent results. Witness Davis testified that while "these studies are useful tools in assisting with the design of rates, but

since it is a judgmental study, it should not be used solely to determine the magnitude of adjustments to rates."

Second, the Commission concluded that there are several other factors or ratemaking principles in addition to cost of service to consider in designing rates for natural gas utilities. The Commission lists the following factors:

> (1) the value of service to the customer; (2) the type and priority of service received by the customer and, if the service is interruptible, the frequency of interruptions; (3) the quantity of use; (4) the time of use; (5) the manner of service; (6) the competitive conditions in the market place related to the acquisition of new customers; (7) the historic rate differentials between the various classes of customers; (8) the revenue stability to the utility; and (9) the economic and political factors which are inherent in the ratemaking process.

The Commission's order does not specifically address each of these interrelated factors seriatim. The order does, however, set forth evidence, findings of fact, and conclusions of law which demonstrate that the Commission gave consideration to each of these factors and their applicability to each customer class. This evidence and findings as they relate to appellant Cities include the following:

First, the Commission found that 33% of NCNG's sales to Cities is being made at negotiated rates due to the alternate fuel capability of some industrial customers served by Cities. The Commission concluded that this factor makes Cities a greater business risk to NCNG than those residential, industrial and commercial customers who do not have fuel-switching ability and cannot negotiate their rates. Because those industrial customers with alternative fuel capabilities are generally large consumers of natural gas, the impact of losing such a customer far exceeds the impact of any one residential or small industrial or commercial customer leaving the system. The Commission concludes that this increased risk associated with serving a substantial industrial market indirectly through Rate RE-1 and Rate SM-1 favors a higher rate of return for these Rate Schedules.

Second, the Commission found many of the rate base's capital costs allocated to Cities are substantially below those of residen-

tial and commercial customers. Capital costs allocated to the Cities were incurred by NCNG twenty-five to thirty years ago when the original transmission lines were constructed. Those facilities have low original costs and are substantially depreciated. Since more of the recent capital costs are allocated to residential and commercial customers, they suffer the brunt of the post-1973 inflation in those costs. The Commission considered this to be a legitimate difference between customers, which should be taken into account in setting rates, since cost-of-service studies are not adjusted for dollars of unequal purchasing power.

Third, Cities' priority of service also played a part in the Commission's decision to maintain Cities' rate of return above the overall system rate of return according to the cost-of-service studies. The Commission found that Cities have the same priorities of service assigned to their different classes of users as NCNG has for its ratepayers. When NCNG interrupts service to a given class of its customers, Cities must likewise interrupt service to their comparable class of users. Cities' mix of customers having different priorities of service is unlike NCNG's mix of customers having different priorities. The Schedule RE-1 rate is intended to reflect an adjustment to the price charged to Cities to compensate for this discrepancy. This factor is not captured in a cost-of-service study.

Last, but perhaps most important, the Commission reviewed and compared the rate differentials between NCNG's various classes of customers to justify the rate of return differentials presently approved and an increase in Cities' rates. The Commission found that a larger percentage increase was being imposed on the majority of NCNG customers in this proceeding than is being imposed on Cities, even though the majority of NCNG's customers are residential just as the majority of Cities' users are residential. More specifically, the Commission found Cities' Rate Schedule RE-1 has been increased in this case by 6.0% while residential Rate Schedule 1 has been increased by 15.9%. Furthermore, NCNG proposed to increase Schedule RE-1 by 8.74% as part of a 6.45% overall increase, and appellant Public Staff proposed to increase Schedule RE-1 by 5.38% as part of a 4.11% overall increase. The Commission concluded that by adopting a 6.0% increase for Schedule RE-1 as part of a 4.72% overall increase "the rate design approved by this proceeding does not

unreasonably discriminate against the Cities after weighing and balancing all of the relevant factors discussed by the Supreme Court in the *Textile Manufacturers'* opinion."

As noted previously the basis of Cities' argument is essentially the same as that set forth in *Carolina Utility Customers Assoc. Id.* at 242, 372 S.E. 2d at 694-95. Cities again contend that the Commission has failed to adequately justify the discrimination against RE-1 customers that is present in NCNG's rate structure. As we noted in our prior decision:

> We are cognizant of the cogent arguments made by appellants that the differences relied on by the Commission in approving NCNG's rate schedules do not justify the discriminations in rates of return so as to make them reasonable discriminations. Appellees argue with equal cogency to the contrary. Both sets of arguments are essentially fact based and are more properly made to the Commission than to this Court. The Commission has . . . supported its conclusions on the discrimination issue with evidentially supported factual findings that it has determined in its administrative expertise *do* justify the discriminations it has approved. It is not this Court's duty to evaluate the accuracy of complex statistical models, conflicting methodologies, and the opposing expert opinions drawn therefrom. This, instead, is the duty of the Commission which has special knowledge, experience and training best suited to make such determinations.

Id. at 251, 372 S.E. 2d at 699-700. So it is here.

We note as particularly significant the testimony and exhibits of NCNG witness Teele which show that if Cities were required to bear fully their share of the allocation of the LNG Plant costs, Cities' rates would have increased by 7.4%. The Commission concluded NCNG's proposed allocation of these costs as described by Teele "were just and reasonable" and Cities do not contest this conclusion on appeal. The Commission, however, imposed only a 6.0% increase in Cities' rates. The Commission, therefore, lessened the impact of the LNG Plant costs insofar as it affected Cities' rates, thereby moving Cities' rates closer to the company-wide overall rate of return and Cities' estimated cost of service.

In addition, the cost of service studies presented by Teele, Public Staff witness Davis, and Cities' witness Kersten, all demonstrate that under NCNG's proposed rate increase none of NCNG's customer classes, including the residentials, yield revenues below the estimated cost of serving them. While we cannot ascertain it with certainty on this record, it appears that the same holds true as to the rates actually approved by the Commission. Although there are still significant disparities in rates of return between the various customer classes, the rates set for each customer class produce revenues in excess of the operating costs allocable to that class.

There is, in short, far less actual discrimination among NCNG's customer classes in the rates approved here than there was in the rates approved in *Carolina Utility Customers Assoc.* Since we concluded the rates approved in *Carolina Utility Customers Assoc.* were not unreasonably discriminatory, it follows that those approved here must not be.

After a careful review of the record we hold the Commission's order does contain findings sufficient to justify its conclusion that the approved rates of return are just and reasonable and do not unreasonably discriminate against Cities. Furthermore, the Commission's findings are supported by substantial evidence in view of the whole record.

In conclusion and for the reasons stated, we hold that the Commission did not err in this proceeding. Its order is, therefore,

Affirmed.

Justice MEYER dissenting.

I dissent for the reasons stated in my dissenting opinion in *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. 238, 372 S.E. 2d 692 (1988), i.e., for the failure of the Commission to justify and quantify the magnitude of the variances dictated by the non-cost factors upon which it relied to justify the rate discrimination which it approved.

The majority is apparently satisfied that the Commission has taken to heart our admonition and is moving progressively, though at a painfully slow pace, to eliminate or significantly

reduce the substantial discrimination between the various classes of customers caused by the subsidization of certain classes of customers by other classes and the very substantial difference between the rate of return for the various classes of customers approved by the Commission and those which would be dictated by cost-of-service studies. As to the cities in particular, while it is true that in the two most recent NCNG rate cases, the Commission has placed all or most of the rate increases on the classes other than the municipal customers, I believe faster progress toward the goal is warranted.

I also join Justice Martin's dissenting opinion as to the Commission's rewarding the company through the rate structure for the standard of management required of it by the General Statutes.

I vote to reverse the Commission's order or to remand the case for reconsideration of the issues of rate discrimination and rate of return on common equity.

Justice MARTIN dissenting.

I respectfully dissent from the holding of the majority approving the 14.0 percent rate of return on common equity set by the Commission.

The majority seeks to dismiss the Commission's reliance upon the factor "NCNG's efficiency and good management." This Court has no way of knowing the relative weight or consideration that the Commission gave to the various factors upon which it based its conclusion; it may very well have given most reliance to the efficiency factor. In other areas of the law where the fact finder relies upon an improper factor, a new hearing is ordered. *Cf. State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987); *State v. Cameron*, 314 N.C. 516, 335 S.E. 2d 9 (1985); N.C.G.S. § 150B-51(b) (1987). Here the Court is applying the whole record test, not the any competent evidence test. N.C.G.S. § 62-94(b)(5) (1982). The question is whether the net effect of all the record evidence provides substantial support for the findings and decision.

That NCNG is "efficient and well-managed" is certainly commendable, and many other utilities could profit by its example; however, this fact should not be considered by the Commission in

determining a proper rate of return. NCNG has a statutory duty to operate in an efficient and well-managed manner. N.C.G.S. § 62-131(b) (1982). Inadequate service because of *inefficient* management is a proper consideration for a *lower* rate of return. *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974). This is appropriate because the utility has failed to fulfill its statutory duty. Further, this finding is inconsistent with the duty of the Commission to set rates as low as constitutionally possible. *Utilities Comm. v. Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974). Any savings due to efficient management should be passed on to ratepayers, not shareholders. The rate of return is tied to the duty of the utility to operate in an efficient fashion. N.C.G.S. § 62-133(b)(4) (Cum. Supp. 1988).

Further, the majority contends that the Commission "gave little, if any, weight either to the fact that NCNG was small or that it was well managed and efficient." As already stated, this Court has no way of knowing what weight the Commission gave to the various factors that it relied upon, except as set out by the Commission itself. Here the Commission wrote with respect to this factor: "The Commission recognizes that N.C.N.G. is a small but efficient and well-managed natural gas utility and, *in recognition thereof*, has authorized an appropriate rate of return in this proceeding which is consistent with such fact . . . ." (Emphasis added.) Thus it is clear from the Commission's own words that it authorized the rate of return based upon the "small and efficient" factor.

The majority relies upon *Utilities Comm. v. Telephone Co.*, 298 N.C. 162, 257 S.E. 2d 623, where this Court stated that a "small utility like Mebane" posed greater risks for the investor. *Telephone Co.* is not applicable where the utility is small but also well managed and efficient, because there is no increased risk to the shareholders.

Inexplicably, the majority then holds that the Commission only considered the efficiency factor for the purpose of supporting a *lower* rate, thereby destroying the credibility of its reliance upon *Telephone Co.*

Finally, the majority concedes that the setting of a common equity rate of return is "highly subjective and judgmental." This is, indeed, the best argument to prohibit the Commission from

relying upon inappropriate factors in this process. Such prohibition will reduce the subjectivity of the Commission's task.

I vote to remand this case to the Commission for a new determination of the equity rate of return without regard to the size of NCNG or the fact that it is efficient and well managed.

Justice MEYER joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DANNY MARK DEANES

No. 489A87

(Filed 8 December 1988)

1. **Criminal Law § 73.2— residual hearsay exception—prescribed inquiries by trial court**

A trial court considering the admission of evidence under N.C.G.S. § 8C-1, Rule 803(24) (1988), the residual exception to the hearsay rule, must determine in this order: (A) Has proper notice been given? (B) Is the hearsay not specifically covered elsewhere? (C) Is the statement trustworthy? (D) Is the statement material? (E) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts? (F) Will the interests of justice be best served by admission? The trial court must make findings of fact and conclusions of law on the issues of trustworthiness and probativeness, and must make conclusions of law and give its analysis on the other issues.

2. **Criminal Law § 73.2— rape of child—statements child made to social worker—admissible**

In a prosecution for the first degree rape of a five-year-old child in which the child did not testify, there were sufficient circumstantial guarantees of trustworthiness to admit the testimony of a social worker as to statements the child had made to her where the court's findings and conclusions demonstrate that the court properly considered factors bearing upon the child at the time the statement was made and other evidence which, in retrospect, tended to support the truthfulness of the child's statement. Moreover, there was no merit to the contention that the evidence failed to support the finding that the child consistently described the same basic events each time she was interviewed; any error in the finding that the child would have been unable to use the dolls to describe sexual intercourse without some experience was harmless, given the other persuasive findings supported by overwhelmingly competent evidence; and certain hearsay statements were not objected to and introduced, the rules of evidence are somewhat relaxed during a voir dire, and there was plenary other evidence to support the trial judge's findings of trustworthiness.

3. Criminal Law § 73.2; Witnesses § 1.2— child rape victim—child not competent to testify—statements to social worker admitted

The trial court did not abuse its discretion in a prosecution for the rape of a five-year-old child by finding the child incompetent and thus unavailable to testify where the judge conducted a competency hearing at which he was able to observe for himself the child's competence to be a witness, and the record shows that the child could not respond to simple questions about basic facts in her life and that she was contradictory, uncommunicative, and frightened.

4. Constitutional Law § 70— child rape victim—ruled incompetent to testify—statements to others admitted—no violation of right to confrontation

In a prosecution for the first degree rape of a five-year-old child in which the child did not testify but her statements to others were admitted, there was no merit to defendant's argument that his right to confrontation under the Sixth Amendment of the U. S. Constitution and article I, section 23 of the North Carolina Constitution was violated where the trial judge correctly concluded that the trustworthiness and probative prongs of the test set out in *State v. Smith*, 315 N.C. 76, were established and the evidence was properly admitted under the residual exception to the hearsay rule.

5. Criminal Law § 73.2; Witnesses § 1.2— child rape victim—child incompetent to testify—out-of-court statements admitted—no per se rule

Although the admission of a child rape victim's out-of-court statements was approved in a case in which the child did not testify at trial, there is no per se rule that a child victim's statement to a social worker is admissible when the child is not found to be competent as a witness and there is some corroboration of the child's statements. The confrontation clause and N.C.G.S. § 8C-1, Rule 803(24) require a case-by-case examination of the facts.

6. Criminal Law § 73.1— child rape victim—doctor's testimony as to lab test results—hearsay—later admitted without objection

There was no prejudice in a prosecution for the rape of a five-year-old child from the testimony of a doctor that the lab had called her office the day after she sent the child's specimen and informed her that the culture was positive for gonorrhea because testimony that the child had tested positive for gonorrhea was admitted without objection the next day through the testimony of the lab manager.

7. Criminal Law § 73.2— child rape victim—laboratory test results—not hearsay

The trial court did not err in a prosecution for the rape of a five-year-old child by admitting into evidence a laboratory worksheet prepared by Roche Labs confirming the presence of gonorrhea in the child where the manager of the lab section performing the test was a qualified witness; he identified the exhibit as a computer worksheet documenting the work performed on the specimen and testified that the work on the specimen was done and the results recorded promptly by a medical technologist in the regular course of business; and although the tests were performed and recorded after defendant had been arrested and charged with the child's rape, the requirement that the records be prepared *ante litem motam* is satisfied in that there is no evidence that

anyone at the lab had any knowledge of the criminal prosecution or any motive to distort the truth if they had known of it.

8. **Rape and Allied Offenses § 4.2— child rape victim—potential long term effect of untreated gonorrhea—irrelevant but not prejudicial**

There was no prejudice in a prosecution for the first degree rape of a five-year-old child from testimony concerning the potential long term effect of untreated gonorrhea in a small child in view of the overwhelming evidence against defendant. N.C.G.S. § 15A-1443(a) (1988).

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a mandatory sentence of life imprisonment entered by *Griffin, J.*, at the 15 July 1987 Criminal Session of Superior Court, HERTFORD County, upon defendant's conviction by a jury of first-degree rape. Heard in the Supreme Court 12 September 1988.

Lacy H. Thornburg, Attorney General, by Catherine C. McLamb, Assistant Attorney General, and Elizabeth G. McCrodden, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

Defendant Danny Mark Deanes was convicted of the first-degree rape of a five-year-old girl and sentenced to life imprisonment. Having reviewed the four assignments of error defendant has presented, we find no error in his trial.

The State's evidence, in pertinent summary, showed the following: in early May of 1987, the defendant Danny Mark Deanes was living in the home of the victim's mother. Also living there were the five-year-old victim, her younger sister, her mother, and her mother's boyfriend. The house was small, with three rooms—a living room, a kitchen, and one bedroom. The bedroom contained two beds—a large bed and a small one. The victim's mother, her boyfriend, and the two little girls slept in the bedroom; the defendant slept on a couch in the living room.

The victim's mother testified that on Friday morning, 1 May 1987, she began drinking at home as she usually did. Her two little girls were at home with her. They went out about noon and returned home about 7:00 p.m. She fed, bathed, and dressed the

girls for bed. At about 8:00 p.m. she and her daughters went to sleep together in one bed in the bedroom. Having been drinking most of the day, she was intoxicated when she went to bed.

When the mother awoke about midnight, the victim was talking to her. The child complained that she was sore and sticky around her vagina. Her mother looked at her and saw that the area was "sore and sticky-like." She bathed the child and put some vaseline on the irritated area. The mother asked the child if anyone had been "messing with" her. The child said, "Yes." When the mother asked, "Who?" the child answered, "Danny."

The mother walked into the living room and saw her boyfriend asleep on the couch and defendant asleep in a chair. They had been to a party and had come in while she was asleep. She did nothing then because she was still under the influence of alcohol. The next morning she asked the defendant if he had "messed with" the child, and he denied it.

That Saturday morning the child began calling the defendant the "Monster Man." On Monday, 4 May, the Hertford County Department of Social Services (DSS) received an anonymous report that the victim had been raped. As a result of that call, Murfreesboro Chief of Police, Robert Harris, visited the victim's mother. She was drunk. He told her he had received a report that her daughter had been raped. At first, she said her child had not been raped; she had a rash, and the report was only a rumor. When the Chief said he would bring charges against her if he found she was lying, she said she was afraid to report it because she had no money to take the child to the doctor and no evidence of the rape except that the child had started to call the defendant "Monster Man."

Chief Harris called DSS social worker Susan Farmer to arrange for her to take the child to a physician for an examination. Later that day, Ms. Farmer and Chief Harris talked with the victim and her mother in the police car parked in front of their house. The child seemed ill at ease, so Chief Harris and the victim's mother got out of the car so the social worker and the child could talk privately.

Once alone with the child, Ms. Farmer tried to make her feel at ease. Ms. Farmer talked about how pretty she was, asked

about her brothers and sisters, and "got her to laughing and talking some." Then, once the child was relaxed, Ms. Farmer asked her if anyone had "messed with her" or "touched her in any way that they shouldn't." The child answered, "Yes, the Monster Man" had. Then the social worker asked specifically: "What did the Monster Man do?" The child answered: "Messed with me" and pointed down at the area around her vagina.

When Ms. Farmer asked where it had happened, the child pointed to her house and indicated it happened in the bedroom, but was not more specific. The child said her mama and her sister were asleep and there were other people in the house. Then the social worker asked "Who is the Monster Man?" and the child answered, "Danny." The five-year-old said she did not know his last name.

Ms. Farmer asked if anyone else who had come to her mother's house had ever touched her. The child said, "No." When asked *who* had visited her mother's house she gave the first names of her mother's boyfriend and a female friend of her mother. She also said there were other people who came over, but she didn't know their names. The child said her mother's boyfriend had never touched her. Ms. Farmer asked again, "Who has touched you in a way that did not feel right or any place that they shouldn't?" Again, the child answered, "The Monster Man." Then Ms. Farmer asked the child if she knew what a lie was. The child answered, it's "when you tell a story." Ms. Farmer asked, "does that mean when you are not telling the truth?" And the child answered, "Yes."

Then the social worker talked with the mother and made arrangements for the child, her mother, and sister to stay overnight with the maternal grandmother.

On Tuesday, 5 May, Ms. Farmer took the child and her mother to see Dr. Bonnie Revelle, a pediatrician in practice in Ahoskie. After the child had spent a few minutes alone with Dr. Revelle and had been hesitant in responding to her questions, Ms. Farmer was called in to talk with the child and to calm her during the examination. The doctor began the physical exam by checking the child's eyes and nose and ears and listening to her heart. Then the child was put on all fours in order to examine her vagina. There was a greenish-white discharge; the hymen was more re-

laxed and open than is normal for a five-year-old, and there were three areas around the vaginal opening which were chafed. When she was asked why she had been brought to see the doctor, she said it was because of her "rash." Then Ms. Farmer asked if someone had been "messing with" her, and she nodded "yes." Then Ms. Farmer asked her if she could "tell Dr. Revelle who" it was. The child told Dr. Revelle, "Danny."

Then the child and her mother went with Ms. Farmer to her office. There Ms. Farmer interviewed the child using anatomically correct dolls. Ms. Farmer testified that she began, as is always her procedure, by sitting on the floor with the child. She offered the child the female doll and let the child hold the doll. She asked the child if she liked the doll, and she said she did. Then, on her own, the child unsnapped the doll's dress and pulled it off, leaving the panties on. After the child had looked at the doll and played with it for a few minutes, Ms. Farmer began to talk about the male doll with the child. She asked if the child knew the doll was a boy; she said, "Yes." Then the child opened his shirt. She laughed when she saw the doll had hair on his chest and under his arms. Then Ms. Farmer asked if the child knew the difference between boys and girls; in answer, the child undid the doll's pants, pulled his pants down, and then put his pants back on. Then Ms. Farmer picked up the girl doll again and said, "Let's pretend this doll's name is the same as yours." The child liked that, and held the doll for a few minutes.

Then Ms. Farmer said: "I want you to take the male doll and . . . show me what happened to you." The child took the male doll, undid his pants and pulled them down, put him on top of the female and tried to insert the penis into the vagina of the female doll. Then Ms. Farmer asked, "Is this what happened to you?" The child said, "yes." When Ms. Farmer asked who the male doll was, the child said, "Danny."

Then Ms. Farmer took the child and her mother to Police Chief Harris' office. The child said her mother had been drinking on the day the incident occurred, and that she had gone to bed and to sleep. Then using the dolls, she again demonstrated what had happened to her, and related that she had awakened her mother and told her that Danny had messed with her.

Pediatrician Bonnie Revelle also described the child's physical exam on Tuesday, 5 May. After the child's initial reluctance to

volunteer information, Dr. Revelle asked her if anyone had touched her in her private area. The child nodded, "Yes." Dr. Revelle asked her, "Who messed with you?" She responded, "Danny." At that time, only the two of them were in the examining room. As part of the exam, Dr. Revelle had taken a sample of the vaginal discharge, plated it on a growth medium and sent it to Roche Biomedical Laboratories for identification of the organism. The next day a person from the lab called her to report that the culture was positive for gonorrhea.

Peter Huley, Manager of the Microbiology and Virology Section of Roche Biomedical Laboratories, testified. He identified the original computer worksheet, and a copy documenting the work performed on the child's specimen. The copy was introduced in evidence. Huley testified further that the test was done in the regular course of business using standard procedures and that the information was recorded promptly using standard procedures. He testified further that he had not known until he was called to testify that morning that there was any legal involvement with the case. He summarized the procedures used in the lab to confirm that the culture from the child's specimen tested positive for gonorrhea.

The State also introduced evidence that a sample of discharge taken from the penis of the defendant had tested positive for gonorrhea. A nursing supervisor from the Health Department testified that a person will show symptoms of gonorrhea within one to three days after sexual contact with an infected person.

When the child was called as a witness, the trial judge conducted a voir dire to determine if the child were competent as a witness. After the child, the social worker, the police chief, and the pediatrician were examined on voir dire, the court found the child to be "a shy and ineffective communicator," and not competent to testify. He concluded that the child was unavailable as a witness.

The defendant presents four assignments of error, which we will address in turn.

I

[1] In his first assignment of error, Deanes contends that the trial judge should not have permitted social worker Susan

Farmer to testify to the statements the child made to her on 4 and 5 May. He challenges her testimony under Rule 803(24) and under the confrontation clauses of the sixth amendment of the United States Constitution and article I, section 23 of the North Carolina Constitution.

The court admitted the statements as substantive evidence under North Carolina Rule of Evidence 803(24), the residual or "catchall" exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(24) (1988). To facilitate appellate review of the propriety of the admission of evidence under 803(24), this Court has prescribed a sequence of inquiries which the trial court must make before admitting or denying evidence under Rule 803(24). *State v. Smith*, 315 N.C. 76, 92, 337 S.E. 2d 833, 844 (1985). The trial court must determine in this order:

(A) Has proper notice been given?

(B) Is the hearsay not specifically covered elsewhere?

(C) Is the statement trustworthy?

(D) Is the statement material?

(E) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?

(F) Will the interests of justice be best served by admission?

Id. at 92-97, 337 S.E. 2d at 844-47. The trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness, because they embody the two-prong constitutional test for the admission of hearsay under the confrontation clause, i.e., necessity and trustworthiness. *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597 (1980); *State v. Smith*, 312 N.C. 361, 323 S.E. 2d 316 (1984). On the other four issues, the trial court must make conclusions of law and give its analysis. We will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied. *Milk Producers Co-op v. Dairy*, 255 N.C. 1, 120 S.E. 2d 548 (1961).

Defendant contends that the challenged evidence (1) was not sufficiently trustworthy, (2) was not more probative on the issue than any other evidence the State could have procured through

reasonable efforts, and (3) did not serve the interests of justice because admission of the statements deprived the defendant of his right to confrontation.

A. *Trustworthiness*

[2] Deanes first contends that the child's statements to the social worker did not possess sufficient "circumstantial guarantees of trustworthiness." He contends that the judge erred in considering evidence that did not bear on the trustworthiness of the child's statements at the time the statements were made and that the context in which the child's statements were made does not guarantee their trustworthiness. In addition, he argues that certain physical evidence relied upon by the judge to support his findings was incompetent.

First, we consider the rule's requirements for the element of trustworthiness. Rule 803(24) permits the admission of a statement "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 803(24) (1988). The confrontation clause also imposes a requirement of trustworthiness. The statement of a hearsay declarant is admissible only if it bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L.Ed. 2d 597, 608.

In *State v. Smith* we recognized that certain factors are acknowledged by courts and commentators as "significant in guiding the trial judge's determination of the proffered statement's trustworthiness." 315 N.C. at 92, 337 S.E. 2d at 845. By way of illustration, we listed four of the factors consistently recognized as significant: (1) assurance of personal knowledge of the declarant of the underlying event, (2) the declarant's motivation to speak the truth or not speak the truth, (3) whether the declarant ever recanted the testimony, and (4) the practical availability of the declarant at trial for meaningful cross-examination. *Id.*

Like the rule's specific hearsay exceptions, the first two of these significant factors bear upon the declarant at the time the statement is made. Consequently, they have "circumstantial guarantees of trustworthiness" "equivalent" to the specific exceptions in Rule 803.

The third and fourth factors listed (whether the declarant ever recanted the statement and whether the declarant is available for meaningful cross-examination) do not bear upon the declarant at the time he is speaking but, viewed in retrospect, tend to support the truthfulness of his statement, and therefore, bear on the question of the truthfulness of the hearsay statement. *See* McCormick on Evidence § 324.2 (3d ed. 1984).

In his order, the trial judge made the following conclusions of law supporting the trustworthiness of the statements made by the child to Ms. Farmer:

> 3. That the child is motivated to speak truthfully about the events because of the injury she received which produced the physical evidence observed by Dr. Revelle on her body and the need for such injury to be treated;
>
> 4. That the nature and character of the statement[s] are consistent with the physical evidence observed by Dr. Revelle in that the child would be motivated to deal truthfully with a person in authority, such as Susan Farmer, and particularly the doctor who was treating the child's injury;
>
> 5. That the totality of the circumstances in this case assure a reasonable probability of truthfulness of the statements made by the declarant . . . to Miss [sic] Farmer and Dr. Revelle.

The trial judge concluded that, at the time the child made the statement to the social worker, she was motivated to tell the truth for at least two reasons: (1) "because of the injury she received . . . and the need for such injury to be treated," and (2) because a five-year-old child "would be motivated to deal truthfully with a person in authority such as Susan Farmer."

Deanes contends that the circumstances do not show the child was "motivated to tell the truth." He points out there was no evidence she would be punished if she lied, and the only evidence that she knew the difference between the truth and a lie was the social worker's statement as to what the victim said when the social worker asked if she knew what a lie is. Second, Deanes maintains there was no evidence that Ms. Farmer approached the child as an "authority figure," pointing to evidence

tending to show she established a friendly rapport with the child. Finally, he contends that because the child's statements were not volunteered and were repetitious of the words used by the social worker, her responses may have been influenced by her adult questioners. As support, Deanes points out the child repeated the phrase, "messed with," to describe her assault, the same phrase used by the social worker.

Deanes' contentions that the circumstances do not show the child was motivated to tell the truth are without merit. First, absent a history of fabrication in a child, there is no authority for the proposition that to be motivated to tell the truth a five-year-old must be subject to punishment.

Second, it is only common sense to recognize that an adult need not "approach" a child as an "authority figure" in order to *be* a "person in authority" to a child. By designating Ms. Farmer a "person in authority," the judge acknowledges she arrived with the sheriff, questioned the child, took her to the doctor, and was an adult to whom the child would be motivated to tell the truth because she had taken the time to put the child at ease, to express interest in her, and to draw her out—as the record shows this social worker had done.

Finally, there is no reason to question the truthfulness of a five-year-old simply because she did not initiate the conversations with Ms. Farmer and Dr. Revelle to report the incident, as Deanes suggests we should. Children may fail to initiate a report of sexual abuse for many reasons: they may lack the verbal capacity to report it or the knowledge that an incident is inappropriate or criminal. They may be embarrassed, or threatened into silence, and they may fear that when they do report it, their reports may be "dismissed as fantasy or outright lies." D. Whitcomb, E. Shapiro & L. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* at 4 (1985). In cases of child sexual abuse, it is often necessary to ask questions designed to help the child describe what happened.

There is evidence the social worker was aware of the danger of putting words in the child's mouth and that she took pains to guard against that danger. The social worker testified she did not suggest answers or responses to the child during any interview. Furthermore, defense counsel had the opportunity to question her

about the procedures she used to interview the child and so to expose to the jury any bias inherent in the procedure. He did not do so. Finally, we find no indication in the record that the social worker suggested answers to the child during any interview with her, or that the interviews using the anatomical dolls were not administered in a neutral way. The fact that the child used the same words that the social worker used to describe what Deanes did to her only shows that the social worker was attuned to the words that would carry meaning to the child. By pointing to her vaginal area when she first told Ms. Farmer, "He messed with me," the child signalled that she understood the phrase, "messed with."

The trial court also concluded that other factors, not bearing upon the child at the time the statement was made, supported the truthfulness of her statement to the social worker. He noted first that the content of the child's statements was "consistent with" the clinical evidence of abuse and infection observed by Dr. Revelle, and second, that the "totality of the circumstances" assured a reasonable probability of truthfulness. The "totality of the circumstances" included the following factual findings which are consistent with the child's statement: (1) the child's enactment of sexual intercourse through the use of the dolls, (2) her statement that the person who did this to her was "Monster Man" whom she identified as "Danny," (3) that the defendant Danny Deanes spent the night at the child's house on the night she first complained to her mother, (4) that the defendant had also been diagnosed and treated for gonorrhea, and (5) that the child had described the same basic events each time she had been interviewed, and had not recanted since initially describing them.

These findings and conclusions of law demonstrate that the trial court properly considered factors bearing upon the child at the time the statement was made and other evidence which, in retrospect, tended to support the truthfulness of the child's statement. Consequently, Deanes' argument that the judge erred as a matter of law in considering evidence that did not bear on the trustworthiness of the child's statement at the time it was made has no merit.

Deanes also contends that certain physical evidence relied upon to support the findings was incompetent.

First, he contends the evidence fails to support the finding that the child "consistently described the same basic events" each time she was interviewed. He emphasizes her sometimes contradictory answers and answers that conflicted with other evidence. This argument has no merit.

The child consistently reported the same basic events each time she was asked to talk about them. When she first woke her mother in the night she complained of soreness in the vaginal area, and in answer to her mother's question, "Who messed with you?" she said first "the Monster Man," and then "Danny." In each subsequent account, she complained of soreness in the vaginal area, said it was the "Monster Man" who did it, and/or identified the monster man as "Danny." The child gave the same account on at least five different occasions: to her mother, to Ms. Farmer in the police car, to Ms. Farmer in the police chief's office, to Dr. Revelle in Ms. Farmer's presence, and to Dr. Revelle alone. Also significant is the fact she never recanted her account.

The defendant also contends that this child's accounts of the events are not sufficient to constitute a "description" of the incident as the trial court found as a fact. We disagree. The social worker, testifying as an expert witness, testified that anatomically correct dolls are used by social workers at the Department of Social Services to interview younger children because, by using the dolls, the children can demonstrate what they want to communicate but find hard to put into words. If the child's verbal account was supplemented by her demonstration with the anatomically correct dolls, the child gave a complete account of the assault. In response to Ms. Farmer's question, "Show me what happened to you," the child attempted to demonstrate an act of vaginal intercourse using the male and female dolls by taking off the pants of the doll, putting him on top of the female, and by putting the penis into the vagina of the female doll. She repeated the demonstration in the police chief's office.

The defendant also argues the child's testimony was not trustworthy because the child gave conflicting testimony about the specific location in the house where the incident occurred. As the social worker testifying as an expert witness explained, five-year-old children are often vague or inconsistent about details of an act of abuse.

Defendant also contends that the child's statement that she was wearing a pajama top and panties when she woke her mother complaining is somehow inconsistent with her testimony that "the Monster Man messed with me." The defendant has demonstrated no irreconcilable inconsistency, and we find none.

Second, the defendant contends that the evidence fails to support the judge's finding that "at this child's age, she would have been unable to use the dolls to describe sexual intercourse without some experience." Deanes points out that since the child slept in the same room with her mother and her mother's boyfriend, the sleeping arrangement provided opportunities for the child to be "exposed to" sexual intercourse. This is probably true. However, if this was error, it was harmless, given the other persuasive findings supported by overwhelmingly competent evidence.

Third, Deanes argues that during voir dire the trial judge admitted into evidence three hearsay statements that did not fall under any exception to the hearsay rule. He contends the trial judge improperly relied upon this allegedly incompetent evidence in making his findings of fact and conclusions of law. For this reason, he says the trial judge's conclusions were invalid and should be overturned. Specifically, he objects to three statements by Ms. Farmer: her statement that she had received the first report of the child's rape through an anonymous telephone call to the Department of Social Services, that Deanes' test had come back positive for gonorrhea, and that Deanes had been treated for gonorrhea.

Deanes' complaint has no merit. Defendant made no objection to the first two statements when they were introduced. As to the third, as acknowledged by the defendant, rules of evidence are somewhat relaxed during a voir dire. The judge is presumed to have considered only the competent evidence in determining the ultimate issue. *See State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977). Furthermore, even if these three statements were incompetent, there was plenary other evidence in the record to support the trial judge's finding of trustworthiness.

B. *Probativeness*

[3] Deanes contends that Ms. Farmer's statements were not more probative than other evidence that the State could procure

because the trial judge erred in ruling that the child was an incompetent witness and therefore unavailable to give testimony.

A hearsay statement is admissible under Rule 803(24) only if it "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." N.C.G.S. § 8C-1, Rule 803(24) (1988). The confrontation clause also imposes a requirement of necessity, e.g., that the declarant be unavailable at trial. *Ohio v. Roberts*, 448 U.S. 56, 65, 65 L.Ed. 2d 597, 607; *State v. Smith*, 312 N.C. 361, 323 S.E. 2d 316. As Deanes correctly points out, if the declarant is available at trial, the degree of necessity to admit his or her hearsay statement is greatly diminished. "Usually, *but not always*, the live testimony of the declarant will be the more (if not the most) probative evidence on the point for which it is offered." *State v. Smith*, 315 N.C. at 95, 337 S.E. 2d at 846. Consequently, defendant contends, if the child had been available to testify, her testimony would have been more probative on the issue of Deanes' rape of her than her statement to the social worker would have been.

In *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985), this Court considered what is required for a finding of "unavailability" when the declarant does not testify. In *Fearing*, the parties *stipulated* that a child victim of sexual abuse was not competent to testify. The trial judge did not personally examine the child to determine her competence. The trial court adopted the parties' stipulations as fact, concluded the child was "unavailable," and admitted the evidence of the child's out-of-court statements implicating the defendant. On our own review of the record, we found the procedure flawed, affecting substantial rights of the defendant by the admission of highly prejudicial testimony, and ordered a new trial. *Id.* at 174, 337 S.E. 2d at 555. We noted that underlying our law governing competency is the assumption that a trial judge must rely on his personal observation of the child's demeanor and responses to inquiry at the competency hearing. *See* N.C.G.S. § 8C-1, Rule 104(a) commentary (1988), and 1 Brandis on North Carolina Evidence § 8 (1982); N.C.G.S. § 8C-1, Rule 601 commentary (1988), and 1 Brandis on North Carolina Evidence § 55 (1982). There can be no informed exercise of discretion where the trial judge fails to personally examine or observe the child on voir dire. *See, e.g., State v. Roberts*, 18 N.C. App. 388, 391, 197 S.E. 2d 54, 57, *cert. denied*, 283 N.C. 758, 198 S.E. 2d 728

(1973). We held that the trial judge is not free to base his conclusion that the child is "unavailable" on facts stipulated by the parties.

In *State v. Gregory*, 78 N.C. App. 565, 338 S.E. 2d 110 (1985), *disc. rev. denied*, 316 N.C. 382, 342 S.E. 2d 901 (1986), our Court of Appeals specifically addressed the defendant's confrontation rights under these circumstances. In *Gregory*, the trial judge conducted the required competency hearing and found the child victim failed to meet the competency requirements set forth in N.C.G.S. § 8C-1, Rule 601(b). Under the medical treatment exception, Rule 803(4), the trial court admitted the child's statements to her physician and to her grandmother identifying the defendant as her attacker. On defendant's petition for discretionary review, this Court denied the petition and granted the State's motion to dismiss the petition for want of a substantial constitutional question. As Chief Judge Hedrick wrote for the panel, "The unavailability of the victim due to incompetency and the evidentiary importance of the victim's statements adequately demonstrate the necessity prong of the two prong confrontation clause test." *Gregory*, 78 N.C. App. at 568, 338 S.E. 2d at 112-13.

Under similar circumstances, the Court of Appeals also found no error in the admission under the medical treatment exception of a child victim's out-of-court statements to her mother and to a social worker implicating the defendant when the court found the child incompetent to testify. *State v. Jones*, 89 N.C. App. 584, 367 S.E. 2d 139 (1988).

In the case before us, the requirement of probativeness is clearly met. Before ruling that the child was not competent to testify and therefore unavailable, Judge Griffin conducted a competency hearing. He was able to observe for himself the child's competence to be a witness. During the child's questioning by the prosecutor, the record shows that she could not respond to simple questions about basic facts in her life, and that she was contradictory, uncommunicative, and frightened. Absent a showing that the rulings as to competency could not have been the result of a reasoned decision, there is no abuse of discretion and the ruling must stand on appeal. *State v. Hicks*, 319 N.C. 84, 352 S.E. 2d 424 (1987). The record clearly shows the trial judge's decision was reasoned and that he did not abuse his discretion in finding this

witness incompetent to testify, and thus unavailable. *State v. Gordon*, 316 N.C. 497, 342 S.E. 2d 509 (1986); *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985); *State v. McNeely*, 314 N.C. 451, 333 S.E. 2d 738 (1985); *State v. Jones*, 89 N.C. App. 584, 367 S.E. 2d 139 (1988); *State v. Gregory*, 78 N.C. App. 565, 338 S.E. 2d 110 (1985); N.C.G.S. § 8C-1, Rule 601 (1988).

C. *Interests of Justice*

[4] Finally, Deanes contends that admission of Ms. Farmer's testimony violated his constitutional right to confront his central accuser, and therefore did not serve the interests of justice. He alleges violation of both the sixth amendment guarantee of the United States Constitution and the similar guarantee provided in article I, section 23 of the North Carolina Constitution.

The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. *See Pointer v. Texas*, 380 U.S. 400, 403-05, 13 L.Ed. 2d 923, 926-28 (1965) (making sixth amendment applicable to the states through the fourteenth amendment).

The right of confrontation provided in article I, section 23 of the North Carolina Constitution "must be afforded an accused not only in form but in substance." *State v. Watson*, 281 N.C. 221, 230, 188 S.E. 2d 289, 294, *cert. denied*, 409 U.S. 1043, 34 L.Ed. 2d 493 (1972).

This important guarantee reflects the conviction that a face-to-face confrontation at trial with the witness enhances the truth-seeking process. The witness under oath is impressed with the seriousness of the matter and is subject to a penalty for perjury if he lies. Jury members observe the demeanor of the witness as he gives his statement and responds to cross-examination by the defendant. *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489 (1970). By comparing what they have seen and heard on the witness stand against what they know of human nature, jury members decide if the testimony is worthy of belief. *Mattox v. United States*, 156 U.S. 237, 242-43, 39 L.Ed. 409, 411 (1895).

The general rule against the admissibility of hearsay evidence reflects the same conviction: that face-to-face confrontation

enhances the truth-seeking process. *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L.Ed. 2d 597, 608 (citing *California v. Green*, 399 U.S. 149, 155, 26 L.Ed. 2d 489, 495).

Deanes properly acknowledges that the right to confrontation is not absolute. *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597; *State v. Smith*, 312 N.C. 361, 323 S.E. 2d 316. There are other paths to the truth. Indeed, "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." *Mattox v. United States*, 156 U.S. 237, 243, 39 L.Ed. 409, 411.

Consequently, the courts have never construed the confrontation clause to preclude the introduction of all hearsay statements. *Ohio v. Roberts*, 448 U.S. 56, 63, 65 L.Ed. 2d 597, 606. In *Roberts*, the Supreme Court enunciated a two-part test for determining when the right to confrontation must yield to the admissibility of hearsay statements. The proponent (1) must show the necessity for using the hearsay declaration, i.e., the unavailability of the witness, and (2) must demonstrate the inherent trustworthiness of the declaration. *Roberts*, 448 U.S. at 65, 65 L.Ed. 2d at 607; *Smith*, 312 N.C. 361, 323 S.E. 2d 316. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 4, 806-27 (1985). As we stated in the introduction to this discussion, the *Roberts* test is incorporated in the trustworthiness and probativeness prongs of the test set out in *State v. Smith*, 315 N.C. at 92-97, 337 S.E. 2d at 844-47. Accordingly, since we have found that Judge Griffin correctly concluded that those elements were established and the evidence properly admitted under the residual exception to the hearsay rule, we find no merit in defendant's argument that his confrontation rights were violated.

[5] Upon our own independent review of the record, we are convinced that the findings were supported by competent evidence, that the findings support the conclusions, and that the law was properly applied. This is the first case in which we approve the admission of a child victim's out-of-court statements in evidence against the defendant in a sexual abuse case in which the child did not testify at trial. We emphasize that in approving the admission of the child's statement, we do not establish a per se rule

that a child victim's statement to a social worker is admissible when the child is found not to be competent as a witness and there is some corroboration of the child's statements. The confrontation clause and Rule 803(24) require a case-by-case examination of the facts of each case to ensure that their elements are fully satisfied.

II

[6] In his second assignment of error, Deanes contends that the court should not have allowed Dr. Revelle to testify to the lab test results from the child's vaginal specimen because her statement was inadmissible hearsay. Dr. Revelle testified that the lab (Roche Biomedical Laboratories) called her office the day after she sent the child's specimen and informed her that the culture was positive for gonorrhea. Deanes contends he was prejudiced by the admission of this evidence because the existence of gonorrhea in both the child and the defendant provided crucial physical evidence linking the defendant to evidence of sexual assault upon the child.

We find this argument without merit. Testimony that the child had tested positive for gonorrhea was admitted without objection the next day through the testimony of Peter Huley, the manager of the lab performing the test. Any error was cured by the later introduction of this testimony without objection.

III

[7] In his third assignment of error, Deanes objects to the introduction into evidence of State's Exhibit No. 3A, the laboratory worksheet prepared by Roche Labs confirming the presence of gonorrhea in the child. Deanes argues this is inadmissible hearsay, not within the business records exception, because the records were not prepared *ante litem motam*. His argument is without merit.

In *Sims v. Insurance Co.*, this Court applied the business records exception to hospital records and outlined the requirements for their introduction:

> In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of

> the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam.*

Sims, 257 N.C. 32, 35, 125 S.E. 2d 326, 329 (1962). Furthermore, in *State v. Wood*, 306 N.C. 510, 516, 294 S.E. 2d 310, 313 (1982), this Court indicated that the requirement that the records be prepared *ante litem motam* is an important element of the business records exception.

Black's Law Dictionary (5th ed. 1979) first defines *ante litem motam* in this way: "At [a] time when declarant had no motive to distort [the] truth." The definition then narrows: "Before suit brought, before controversy instituted. Also before the controversy arose."

After considering the foundational requirements and the definition of *ante litem motam*, it is clear the testimony was within the business records exception. As manager of the Roche Labs section performing the tests, Peter Huley was a "qualified witness." He identified State's Exhibit 3A as a computer worksheet documenting the work performed on the specimen. He also testified that the work on the specimen was done and the results recorded promptly by a medical technologist in the regular course of business after the sample was received by the lab on 6 May. Although it is true the lab tests were performed and recorded after Deanes had been arrested and charged with the child's rape, there is absolutely no evidence that anyone at the lab had any knowledge of the criminal prosecution, or any motive to distort the truth if they had known of it. Huley himself testified that he knew nothing of Deanes' prosecution until 9:12 a.m. on the morning he was called to testify. Likewise there was no evidence that the medical technologist who made the tests knew of the charges against Deanes or had any motive to distort the truth.

IV

[8] Finally, Deanes objects to the admission of Dr. Revelle's testimony about the potential long-term effect of untreated gonorrhea in a small child. He maintains the testimony was irrelevant and highly prejudicial.

The prosecutor asked Dr. Revelle, "What happens . . . if a small child has gonorrhea and is not treated?" Dr. Revelle replied:

> Gonorrhea is an infection of the mucous membrane of the body surface. The bacteria reproduces in warm, moist places, and so the most common place that it occurs is in the female vagina or cervix or uterus and in the male penis. Untreated it can spread within the body in those areas and it is quite common for women with untreated gonorrhea, after years of untreated gonorrhea, to have problems with infertility later.

The State concedes the limited relevance of this testimony, but contends the record, taken as a whole, supports the conclusion that these three sentences could not have affected the results of defendant's trial, and therefore, do not constitute prejudicial error. We agree. In view of the overwhelming evidence against the defendant, there is no reasonable possibility that had this evidence not been admitted the result would have been different. N.C.G.S. § 15A-1443(a) (1988).

No error.

NORTH CAROLINA BAPTIST HOSPITALS, INC. v. BEVERLY R. MITCHELL

No. 34PA88

(Filed 8 December 1988)

Attorneys at Law § 3.1; Hospitals § 1; Physicians, Surgeons and Allied Professions § 10— medical services—assignment of personal injury settlement—disbursement of funds—attorney's failure to honor assignment

An attorney who follows the disbursement provisions of N.C.G.S. § 44-50 when disbursing a client's funds from a personal injury settlement cannot be held liable for the client's unpaid debt to a medical service provider who the attorney knew had obtained the client's assignment of all such funds up to the full amount of the client's debt for medical services. In order to ensure that injured parties will retain the incentive to pursue their claims, the legislature intended to provide in N.C.G.S. § 44-50 that the injured party receive some part of the amount recovered for his injury by requiring third parties receiving funds for a personal injury claim to pay no more than 50 percent of the amount recovered, exclusive of attorneys' fees, to service providers.

Justice MEYER dissenting.

Justices WEBB and WHICHARD join in this dissenting opinion.

Justice WHICHARD dissenting.

Justices MEYER and WEBB join in this dissenting opinion.

ON discretionary review of the decision of the Court of Appeals, 88 N.C. App. 263, 362 S.E. 2d 841 (1987), which affirmed judgment dismissing the plaintiff's action entered by *Harrill, J.*, on 16 January 1987, in District Court, FORSYTH County. Heard in the Supreme Court on 13 October 1988.

Turner, Enochs, Sparrow, Boone & Falk, P.A., by Wendell H. Ott and Thomas E. Cone, for the plaintiff appellant.

Henson, Henson, Bayliss & Coates, by Paul D. Coates and Perry C. Henson, for the defendant appellee.

Lacy H. Thornburg, Attorney General, by John R. Corne, Henry T. Rosser, and J. Charles Waldrup, Assistant Attorneys General, for The Division of Vocational Rehabilitation Services and Division of Medical Assistance of the North Carolina Department of Human Resources and The North Carolina Memorial Hospital, amici curiae.

MITCHELL, Justice.

The facts are essentially undisputed in this case. The record reveals that Henry L. Clark was treated at North Carolina Baptist Hospitals, Inc. (hereinafter "the hospital") for injuries he sustained in an automobile accident. Total charges for the medical services he received from the hospital amounted to $27,579.69. Clark executed an assignment[1] to the hospital of all amounts he

1. The assignment read as follows:

In consideration of services rendered and/or services to be rendered by North Carolina Baptist Hospitals, Inc. ("Hospital") to Henry Clark ("Patient"), the undersigned hereby assign to the Hospital all right, title and interest in and to any compensation or payment in any form that (I, -we-) have received or shall receive as a result of or arising out of the injuries sustained by the Patient resulting in (his, -her-) hospitalization, up to the amount necessary to discharge all indebtedness to the Hospital for medical services rendered to the Patient, whenever and wherever rendered. (I, -We-) agree that this Assignment shall not relieve (me, -us-) of any such indebtedness until actually paid. This Assignment is irrevocable and made without prejudice to any rights that (I, -we-) might have to compensation for injuries incurred by the Patient, but (I, -we-) hereby authorize and direct

had "received or shall receive as a result of" his injuries, up to the amount necessary to satisfy his indebtedness to the hospital.

Clark retained the defendant, Beverly R. Mitchell, Esq., as counsel to represent him in his personal injury claim against the driver of the other automobile involved in the accident which caused his injury. The defendant Mitchell received copies of Clark's assignment in favor of the hospital. Thereafter, she settled Clark's claim for $25,000.00, the limit of the other driver's liability insurance policy.

Pursuant to N.C.G.S. § 44-50,[2] Mitchell caused the funds she had received to be distributed as follows: $6,250.00 to herself for legal fees, $5,812.50 to the hospital for medical bills, $3,562.50 for other medical bills, $45.00 to David Martin for investigative work, and the balance of $9,330.00 to Clark. The hospital later obtained a default judgment against Clark for the entire amount of its medical charges plus costs and interest. The hospital received the $5,812.50 paid to it from the funds the defendant had received on behalf of her client Clark, but the balance of the judgment against Clark remained unsatisfied. Consequently, the plaintiff hospital brought this action against the defendant Mitchell seeking damages for her failure to honor the assignment executed by Clark.

---

any person or corporation having notice of this Assignment to pay to the Hospital directly the amount of the indebtedness owed to the Hospital in connection with services rendered to the Patient. (I, -We-) further authorize and direct any person or corporation making such payments to the Hospital to accept and rely upon a written statement from the Hospital as to the amount of such indebtedness.

2. N.C.G.S. § 44-50 states:

Such a lien as provided for in G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise: and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided, further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered.

Upon timely motion by the defendant pursuant to N.C.G.S. § 1A-1, Rule 41(b), the trial court entered judgment dismissing the plaintiff's action. The plaintiff appealed to the Court of Appeals which affirmed the judgment of the trial court. We allowed discretionary review by order entered on 6 April 1988.

The only issue before us is whether an attorney who follows the disbursement provisions of N.C.G.S. § 44-50 when disbursing a client's funds from a personal injury settlement can be held liable for the client's unpaid debt to a medical service provider whom the attorney knew had obtained the client's assignment of all such funds up to the full amount of the client's debt for medical services. Although the dissenters discuss other interesting questions, we consider that issue only and conclude that an attorney cannot be held liable for following the statute in such situations. Accordingly, we affirm the decision of the Court of Appeals.

Noting that a purported assignment of a claim for relief for personal injury is invalid as contrary to public policy, the Court of Appeals focused on the question of whether there is a difference between the assignment of such a *claim* and the assignment of *proceeds* resulting from the claim. That court concluded that any distinction drawn between the assignment of a claim and the assignment of the proceeds of the claim is a mere fiction; therefore, such an assignment of proceeds is a violation of public policy and invalid. After concluding that the assignment was invalid, the Court of Appeals went on to hold that the defendant had complied with the provisions of N.C.G.S. § 44-50 in disbursing the funds she received in settlement of her client's personal injury claim and could not be held liable to the plaintiff hospital. We affirm the decision of the Court of Appeals, but for different reasons.

The plaintiff contends that the Court of Appeals erred in concluding that Clark's assignment of the proceeds of his personal injury claim was invalid. The plaintiff maintains that neither N.C.G.S. § 44-50 nor its companion, N.C.G.S. § 44-49, contains any language which suggests that they provide the exclusive means of recovery of medical expenses where a personal injury claim is involved. Furthermore, argues the plaintiff, these statutes do not contain any language which suggests the invalidity of an assignment made independently of the statutes.

The defendant concedes that a hospital may be able to recover from its own patient for the cost of medical services, independent of the lien statutes. The defendant argues, however, that while the lien statutes may not provide the exclusive method for recovery of medical expenses from an injured party where a personal injury claim or the proceeds of such a claim are involved, N.C.G.S. § 44-50 provides the only mechanism by which to obtain funds from an attorney who has received them for a client in satisfaction of a personal injury claim. We agree.

We conclude that in this case Clark's attorney cannot be held liable to the hospital for failing to honor the assignment. The intent of the legislature controls the interpretation of a statute. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). When the language of a statute is clear and unambiguous, the courts must give the statute its plain and definite meaning; but where a statute is ambiguous or unclear in its meaning, the courts must interpret the language to give effect to the legislative intent. *In Re Banks*, 295 N.C. 236, 239, 244 S.E. 2d 386, 388-89 (1978). A construction of a statute which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without doing violence to the legislative language. *State v. Hart*, 287 N.C. at 80, 213 S.E. 2d at 295.

A pertinent part of N.C.G.S. § 44-50 reads as follows:

> [I]t shall be the *duty* of any person receiving . . . [funds paid for another as satisfaction of a claim for personal injuries] before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, ambulance service and medical attention and/or hospital service, after having received and accepted notice thereof . . . Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered.

(Emphasis added.) This portion of the statute defines the duty of "any person receiving" the funds paid in settlement or compensation of a personal injury claim of another. Although the statute does not make it clear, we conclude that by directing third parties as to how to disburse funds received for personal injury claims and limiting the percentage of the balance of the recovery—after

deducting attorneys' fees—to be paid to those benefitted by the statute, the legislature intended that such third parties pay no more than fifty percent of any such balance to service providers.

Our interpretation of the statute comports with the well established public policy of this state favoring settlements of claims. *See Fisher v. Lumber Co.*, 183 N.C. 485, 111 S.E. 857 (1922); *Carding Specialists v. Gunter and Cooke*, 25 N.C. App. 491, 214 S.E. 2d 233 (1975). An injured party's right to actually take a share of settlement proceeds from a third party who receives them on his behalf provides at least some incentive for him to settle his claim. If an injured party knows that he will never receive any money in compensation, however, he very well may refuse to settle or simply lose interest and fail to exert any effort to do so. In such a situation the hospital and other health care providers will often find themselves left without any compensation for their services. We believe that our interpretation of N.C.G.S. § 44-50 increases the likelihood that such health care providers will receive at least some compensation as a result of their patient having prevailed in an action for the personal injury for which the care was provided.

The plaintiff's argument that the plain language of N.C.G.S. § 44-50 does not prevent an assignment of proceeds of a personal injury claim received by a third party is not unreasonable. When read quite literally, the statute may be so construed. However, where a literal interpretation of the language of a statute would contravene the manifest purpose of the statute, the reason and purpose of the law will be given effect and the strict letter of the statute disregarded. *In Re Banks*, 295 N.C. at 240, 244 S.E. 2d at 389. Here, a strictly literal interpretation would contravene the intent of the legislature which we believe was, in part, to provide that the injured party receive some part of the amount recovered for his injury by requiring third parties receiving funds paid for a personal injury claim to pay no more than fifty percent of the amount recovered, exclusive of attorneys' fees, to service providers.

The defendant in this case received the funds from the settlement on behalf of her client Clark and disbursed them according to the statute. Therefore, she is not liable to the plaintiff hospital for failing to pay the hospital in accord with the terms of her

client's assignment, because her obligation was to follow the statutory formula for distribution of such funds.

For the foregoing reasons, which differ from those given by the Court of Appeals, we conclude that the Court of Appeals was correct in affirming the trial court's judgment dismissing the plaintiff's claim. The decision of the Court of Appeals is, therefore, affirmed.

Affirmed.

Justice MEYER dissenting.

While it is clear that we have done so implicitly, this Court should very explicitly disavow the holding of the Court of Appeals in this case to the effect that any distinction drawn between the assignment of a claim of personal injuries and the assignment of the proceeds of such a claim is a "mere fiction," and therefore an assignment of proceeds is a violation of public policy and thus invalid.

The Court of Appeals was quite correct in holding that a raw claim or the cause of action itself is not assignable. "It seems that few legal principles are as well settled, and as universally agreed upon, as the rule that the common law does not permit assignments of *causes of action* to recover for personal injuries." Annot. "Assignability of claim for personal injury or death," 40 A.L.R. 2d 500, 502 (1955) (emphasis added). However, courts have drawn a distinction between an assignment of the claim or cause of action itself and an assignment of the proceeds of whatever recovery is had from a settlement or an action by the claimant against the tort-feasor. *Id.* at 512; Annot. "Assignability of proceeds of claim for personal injury or death," 33 A.L.R. 4th 82, 88 (1984).

There are very substantial differences between an assignment of a raw claim or cause of action for a personal injury action and the assignment of the proceeds which might be derived from the claim by settlement or by judgment. In an assignment of a raw claim or cause of action for personal injuries, the claimant loses all control of the conduct of settlement negotiations, the right to bring an action against the tort-feasor in his own name, the right to control the litigation, and the right to control the settlement of the lawsuit. This is not true if only the *proceeds* of a claim are assigned.

The important differences between the assignment of the claim and an assignment of the proceeds simply cannot be reasonably adjudged "mere fiction."

We should particularly disavow the statement of the panel below to the effect that the "more reasoned view is that [proceeds of a personal injury claim] are not assignable before judgment," 88 N.C. App. 263, 266, 362 S.E. 2d 841, 843, because the assignment of proceeds is virtually always executed "before judgment."

The majority also errs in concluding that the manifest purpose of the statute is to provide that the claimant shall receive at least a part of any recovery for his injuries. The manifest purpose of the statute in question is to create a lien on the proceeds of the personal injury recovery in the hands of a third person. The statute in no way addresses the public policy question of the right of a person to contract for the disposition of proceeds for the purpose of securing (or reimbursing for) badly needed medical care. Had the legislature chosen to address this public policy question, it would no doubt have specifically authorized such an assignment of proceeds in order to assist injured people in obtaining immediate medical treatment for their personal injuries. If the law did not permit such assignments, we would no doubt see injured parties turned away or at least shuttled out to other treatment facilities, as we now see in the case of indigents. Public policy favors the assignment of proceeds to medical care providers. For a review of numerous cases approving assignments of proceeds to pay hospitals and doctors for medical services, see Annot. "Assignability of proceeds of claim for personal injury or death," 33 A.L.R. 4th 82, 100 (1984).

The United States District Court for the Western District of Virginia, applying Virginia law, examined and upheld as valid an assignment virtually identical to the one in this case. *In re Musser*, 24 Bankr. 913 (W.D. Va. 1982), involved an assignment to a hospital of proceeds which might arise resulting from personal injuries leading to the hospitalization. The court held that this constituted an equitable assignment of a future right which was fully enforceable. In determining that the proceeds of a personal injury action were assignable (at least to the medical care provider), the court relied heavily on the reasoning in *Collins v. Blue Cross of Virginia*, 213 Va. 540, 193 S.E. 2d 782 (1973) (superseded

as to subrogation provisions by statute), which, like *Carver v. Mills*, 22 N.C. App. 745, 207 S.E. 2d 394, *cert. denied*, 285 N.C. 756, 209 S.E. 2d 280 (1974), held that insurers were entitled to assert subrogation claims against subsequent personal injury recoveries. The court noted that the reasons underlying the common law rule against assignment of the cause of action, e.g., the prevention of champerty and maintenance, are absent in the assignment of proceeds. The court observed that the assignment of proceeds differs significantly from an assignment of a cause of action in that the assignment of proceeds is valid only to the extent of the charges for services provided, gives the assignee rights only to proceeds, leaves the debtor in complete control over his personal injury claim, gives the assignee no right to proceed directly against the tort-feasor even if the debtor chooses not to proceed, and gives the assignee no right to force the debtor to proceed against the tort-feasor.

Block v. California Physicians' Service, 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (1966), addressed the same issues in the context of a health insurer's suit for reimbursement out of funds received by its insured through a personal injury action. It is important to note that the insured in that case agreed to reimburse his medical carrier, but the standard "subrogation" language was not used. The agreement merely provided that the insured would "reimburse CPS [California Physicians' Service] to the extent of benefits provided, immediately upon collection of damages by him." *Id.* at 268, 53 Cal. Rptr. at 52. The language is strikingly similar to the assignment in the case at bar.

The law should encourage such assignments rather than discourage them, as the majority has done.

In *Goldwater v. Fisch*, 261 A.D. 226, 25 N.Y.S. 2d 84, *reh'g and appeal denied*, 261 A.D. 1056, 27 N.Y.S. 2d 463 (1941), the hospital brought an action against the attorney based upon his client's assignment of the proceeds of a settlement to cover charges for medical and surgical services. The court held that when the proceeds of the settlement were paid over to the attorney, the equitable title of the hospital for the amount of its claim ripened into legal title, and the attorney, having full knowledge of the hospital's interest, was obligated to pay to the hospital the sum to which it was entitled. If the recipient of

the settlement fund is notified of the assignment, the fact that the recipient has already paid out the funds to the injured party is of no consequence. *See Reddy v. Zurich General Accident & Liability Ins. Co.*, 171 Misc. 69, 11 N.Y.S. 2d 88 (Sup. Ct. 1939).

In *Brinkman v. Moskowitz*, 38 Misc. 2d 950, 238 N.Y.S. 2d 876 (Sup. Ct. 1962), the court held that an attorney who had notice of an assignment to a physician, for medical services rendered, of a portion of the proceeds of his client's claim for personal injuries, was liable to the physician for paying out the moneys in disregard of the assignment.

Another case addressing the identical issues as in the case sub judice is *Bonanza Motors, Inc. v. Webb*, 104 Idaho 234, 657 P. 2d 1102 (Ct. App. 1983), which held that personal injury proceeds held by the successful plaintiff's attorney were subject to the assignment previously executed by the plaintiff to an unrelated third party. The court relied in part upon *Brinkman*. *Bonanza Motors* also addressed the ethical responsibilities of an attorney in such a situation. The pertinent portions of the Code of Professional Responsibility in effect in Idaho at the time were identical to those in effect in North Carolina at the time of the transaction at issue in this case. Idaho Code of Professional Responsibility DR 9-102(B)(4) provided that an attorney should "promptly pay [to the client] . . . as requested . . . the funds . . . in the possession of the lawyer which the client is entitled to receive." The court in *Bonanza Motors* held that this ethical provision did not act to prevent the attorney from honoring the assignment, since the client in that case was not "entitled to receive" the funds which he had already assigned. *Bonanza Motors*, 104 Idaho at 237, 265 P. 2d at 1105. *See also Topik v. Thurber*, 739 P. 2d 1101 (Utah 1987).

In the case sub judice, copies of the assignment were mailed to the defendant on two different occasions, long before the defendant disbursed any funds. The defendant admitted receiving the two packages containing the assignment and admitted having a copy of the assignment in her files. She was thus charged with the duty of paying funds of her client, up to the amount of the hospital charges, to the hospital-assignee according to the terms of the assignment.

Neither N.C.G.S. § 44-50 nor its companion, N.C.G.S. § 44-49, contains any language which suggests that they provide the ex-

clusive remedy for recovery of medical expenses where a personal injury claim is involved. Nor do they contain any language which suggests the invalidity of an assignment made independently of the statutes.

Had the legislature intended to limit recovery of a medical care provider, as opposed to simply providing a limited lien, it could have done so. There is no doubt that the legislature knows how to draft such language when it chooses to do so. For example, just such a limitation has been imposed upon recovery by a medical care provider out of wrongful death proceeds. That statute unambiguously states that a wrongful death recovery "is not liable to be applied as assets . . . except as to . . . reasonable hospital and medical expenses not exceeding one thousand five hundred dollars ($1,500) incident to the injury resulting in death." N.C.G.S. § 28A-18-2(a) (Cum. Supp. 1988). The statutory sections at issue in this case provide no such limitations nor any basis for the inference of such a limitation.

The majority opinion impacts upon governmental programs as well as medical service suppliers in the private sector. The *amici*, North Carolina Memorial Hospital, the Division of Vocational Rehabilitation Services, and the Division of Medical Assistance (Medicare), will be very severely hampered in their attempts to recoup funds expended from the public treasury. In any personal injury case involving medical expenses, the amount of the bills is taken into account in both settlements and jury verdicts. Because of the collateral source rule, whether or not the bill has been paid is irrelevant in determining the patient's damages. It is patently inequitable for a patient-plaintiff to collect all or a portion of his medical expenses in a personal injury claim and not be required to pay that money to the medical use provider. While the Court of Appeals in the case sub judice found a violation of public policy in assigning proceeds of a cause of action, the court failed to note competing public policy considerations regarding a patient's paying his bill or having the rest of society pay it for him. When the patient has money to pay, it is the better public policy to require the patient to do so. Assignment to a health care provider of the proceeds of a personal injury claim prior to recovery is a good and rational public policy to ensure payment of the medical costs and, in the case of a public medical care provider, to

prevent the taxpayer from directly paying for medical services even though the patient-plaintiff has recovered from third parties.

I believe the majority also errs in its conclusion that being able to retain a part of the settlement for himself is the claimant's only incentive to pursue his claim against the tort-feasor. The overwhelming majority of our citizens want to pay their debts for medical care. Even those who do not are motivated to escape lawsuits and judgments against themselves and the subsequent adverse effect on their credit ratings. It is only a small percentage of our citizens who absolutely do not care that have no incentive other than the lien statute to pursue the tort-feasor, even though all the proceeds would go to pay medical bills.

If an attorney for a patient-plaintiff cannot disburse his client's funds by agreement of the parties and does not wish to choose between the lien statute and his client's valid assignment to the medical care provider, he or she can simply deduct his fees and pay the balance into the court or clerk's office.

Admittedly, the attorney in this case acted completely innocently and in good faith. This Court should not, however, permit these "bad facts" to lure it into making "bad law." I vote to find the assignment valid and enforceable against the defendant-attorney who disbursed the funds with full notice and knowledge of the assignment.

Justices WEBB and WHICHARD join in this dissenting opinion.

Justice WHICHARD dissenting.

Under the common law governing assignments, a litigant may, while an action is pending, assign any recovery he may obtain. The assignee becomes the equitable owner of the claim and is entitled to an assignment of the judgment when it is entered. *Fertilizer Works v. Newbern*, 210 N.C. 9, 185 S.E. 471 (1936). A debtor with notice of an assignment has a duty to make payment to the assignee. *Lipe v. Bank*, 236 N.C. 328, 331, 72 S.E. 2d 759, 761 (1952).

> A valid assignment may be made by any contract between the assignor and the assignee which manifests an intention to make the assignee the present owner of the debt. . . . The

> assignment operates as a binding transfer of the title to the debt as between the assignor and the assignee regardless of whether notice of the transfer is given to the debtor. . . . Notice to the debtor is necessary, however, to charge him with the duty of making payments to the assignee. . . . *This duty arises whenever the debtor receives notice of the assignment*, irrespective of who gives it.

Id. (citations omitted) (emphasis added).

The record here establishes the following undisputed facts:

For a valuable consideration recited in the document, defendant's client assigned to plaintiff, a health care provider, all sums he might receive as a result of the injuries that caused his hospitalization, up to the full amount necessary to discharge his indebtedness. The assignment "authorize[d] *and directe[d]*' any person with notice of it to pay such sums directly to plaintiff. (Emphasis added.) When defendant received proceeds from her client's claim for personal injuries that were less than the client's indebtedness to plaintiff, she had notice of the assignment.

Applying the foregoing common law principles governing assignments to these undisputed facts, defendant had a duty to pay the funds in question to plaintiff, and plaintiff is entitled to recover from defendant any loss it has incurred on account of plaintiff's breach of this duty. *See Brinkman v. Moskowitz*, 38 Misc. 2d 950, 238 N.Y.S. 2d 876 (Sup. Ct. 1962) (attorney with notice of assignment to plaintiff, for medical services rendered, of a portion of proceeds of client's claim for personal injuries, liable to plaintiff health care provider for loss resulting from payment of sums in disregard of assignment); *Bonanza Motors, Inc. v. Webb*, 104 Idaho 234, 657 P. 2d 1102 (Ct. App. 1983) (law firm liable to client's creditor for funds relinquished to client in violation of assignment to creditor).

The Court of Appeals opinion, in effect, subordinates the foregoing common law principles governing assignments to the principle that rights of action for torts causing personal injuries are not assignable. *See* 6 Am. Jur. 2d *Assignments* § 37 (1963). The Court of Appeals "believe[d] that the more reasoned view is that such proceeds are not assignable before judgment." *N.C. Baptist Hospitals, Inc. v. Mitchell*, 88 N.C. App. 263, 266, 362 S.E.

2d 841, 843 (1987). I disagree. I believe the more reasoned view distinguishes an assignment of the cause of action itself from an assignment of the proceeds of whatever recovery is obtained in an action, and holds the latter enforceable. *See* Annot. "Assignability of Proceeds of Claim for Personal Injury or Death," 33 A.L.R. 4th 82 (1984), and cases collected therein. An assignment of settlement proceeds is an assignment of future property, not an assignment of an existing cause of action. The reasons underlying the common law rule against assignment of tort claims—*viz*, the prevention of champerty and maintenance, or "trafficking in litigation," and the desirability of allowing the injured party to retain control of the lawsuit and any settlement thereof—thus are not implicated. *See In Re Musser*, 24 Bankr. 913 (W.D. Va. 1982). Nothing else appearing, I would reverse the Court of Appeals for these reasons.

The majority here affirms the Court of Appeals, not on the basis of the common law principle against assignment of tort claims, but on the basis of N.C.G.S. § 44-50. This statute limits the lien established for health care providers in N.C.G.S. § 44-49 to fifty percent of the damages recovered in the settlement of a claim for personal injuries, exclusive of attorneys' fees. N.C.G.S. § 44-50 (1984). The majority bases its decision on the speculative assumption that the manifest purpose of this statute is to insure consumers of health care services a sufficient portion of tort claim recoveries that they will retain the incentive to pursue their claims. I again disagree.

"[N.C.G.S. § 44-49, 50] provide rather extraordinary remedies in derogation of the common law, and, therefore, they must be strictly construed." *Ellington v. Bradford*, 242 N.C. 159, 162, 86 S.E. 2d 925, 927 (1955). "By the rule of strict construction . . . is not meant that the statute shall be stintingly or evenly narrowly construed . . . but it means that *everything shall be excluded from its operation which does not clearly come within the scope of the language used.*" *Seminary, Inc. v. Wake County*, 251 N.C. 775, 782, 112 S.E. 2d 528, 533 (1960) (quoting *State v. Whitehurst*, 212 N.C. 300, 303, 193 S.E. 657, 659 (1937) (emphasis added). *See also Harrison v. Guilford County*, 218 N.C. 718, 722, 12 S.E. 2d 269, 272 (1940); *Biddix v. Henredon Furniture Industries*, 76 N.C. App. 30, 34, 331 S.E. 2d 717, 720 (1985). N.C.G.S. § 44-50 does not, by its express terms, require its application to the exclusion of

more extensive common law contractual rights of assignment. By holding, in effect, that it does, the majority reads into the statute a prohibition that does not "clearly come within the scope of the language used." *Seminary, Inc.*, 251 N.C. at 782, 112 S.E. 2d at 533. This is a marked departure from the strict construction of the statute this Court has mandated. *Ellington v. Bradford*, 242 N.C. at 162, 86 S.E. 2d at 927.

Further, while the majority correctly asserts that "[t]he intent of the legislature controls the interpretation of a statute," I am convinced that its interpretation of N.C.G.S. § 44-50 is contrary to the actual legislative intent. "In seeking to discover [legislative] intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). The statute in question was a Depression Era enactment, passed in 1935. It was entitled "An Act To Create A Lien Upon Recoveries In Civil Actions For Personal Injuries *In Favor Of* Sums Due For Medical Attention And/Or Hospitalization." 1935 N.C. Sess. Laws ch. 121 (emphasis added). The words "in favor of" strongly suggest that the intent of the General Assembly was to provide a new remedy to aid health care providers engaged in the then difficult task of collecting their accounts, not to remove an existing common law right that offered benefits more extensive than those established by the statute. Health care providers almost certainly sought the legislation to establish a floor—not a ceiling—on their recovery from settlement or litigation proceeds in personal injury claims.

I thus am unpersuaded by the reasoning of either the Court of Appeals or the majority here. Because the statute does not expressly abrogate the common law principles governing assignments, I would hold that those principles apply. Those principles, applied to the undisputed facts here, entitle plaintiff to a judgment against defendant as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1983). I thus would reverse the Court of Appeals and remand the case to that court for further remand to the District Court, Forsyth County, for entry of judgment for plaintiff.

I am not unsympathetic with the plight of an attorney caught between the conflicting demands of a client and the client's creditor. When a holder of funds is in doubt as to the validity of con-

flicting claims on those funds, however, the interpleader remedy is available. N.C.G.S. § 1A-1, Rule 22 (1983).

For the reasons expressed, I respectfully dissent.

Justices MEYER and WEBB join in this dissenting opinion.

CAROL HAYNES McLEAN (FISK) v. RUSSELL L. McLEAN, III

No. 55A88

(Filed 8 December 1988)

1. **Divorce and Alimony § 30— equitable distribution—marital property—separate funds contributed—presumption of gift**

A defendant in an equitable distribution action is presumed to have intended a gift to the marital estate of separate funds used in the purchase of a house and lot where the conveyance contained no express statement of separate property intention and the conveyance itself, by titling the property by the entireties, indicated the "contrary intention" to preserving separate property required by the statute. When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed and this presumption is rebutted only by clear, cogent and convincing evidence that a gift was not intended. N.C.G.S. § 50-20(b)(2) (1987).

2. **Divorce and Alimony § 30— equitable distribution—valuation of law practice**

The trial court did not abuse its discretion in an equitable distribution action by determining that a C.P.A.'s testimony would be helpful in valuing a law practice even though the C.P.A. was admittedly unfamiliar with the subject area of sale of law practices in the Asheville area. The C.P.A.'s training and experience gave him knowledge sufficient to render him better qualified than the trier of fact to value an interest in a law practice. The factors set out in *Poore v. Poore*, 75 N.C. App. 414, for valuing a professional practice are not criteria for the admissibility of evidence, but they should enter into the weighing of the evidence presented regarding valuation, as reflected by the findings of fact. Moreover, the judgment here reflects no consideration of goodwill, which should be valued on remand, and the factors listed in *Poore* as relevant are helpful, though not exclusive or absolute.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 88 N.C. App. 285, 363 S.E. 2d 95 (1987), vacating an equitable distribution judgment entered by *Fowler, J.*, on 13 November 1986 in District Court, BUNCOMBE County, and remanding for a new determination of the value of defendant's law practice and classification and

distribution of the parties' property. On 6 April 1988 we allowed defendant's petition for discretionary review of an issue not raised by the dissenting opinion regarding the valuation of his law practice. Heard in the Supreme Court 14 September 1988.

Riddle, Kelly & Cagle, P.A., by Robert E. Riddle, for plaintiff-appellee.

Long, Parker, Hunt, Payne & Warren, P.A., by Robert B. Long, Jr. and William A. Parker, for defendant-appellant.

WHICHARD, Justice.

Plaintiff and defendant were married in 1966, separated in 1984, and divorced in 1985. The issues on appeal relate only to equitable distribution.

The parties owned, among other assets, a house and lot on Camp Branch Road in Haywood County, bought during the marriage and held as tenants by the entirety. The lot was purchased, and the house built, with the following funds: (1) $39,662.38 from the sale proceeds of another house held as tenants by the entirety; (2) a $55,000 loan; (3) construction services rendered in exchange for defendant's legal services; and (4) $75,311.17 paid from defendant's separate funds inherited from his father's estate. The trial court classified this property as marital, and the Court of Appeals affirmed. Judge Greene dissented "from the majority's holding that defendant's use of his separate property to acquire the Camp Branch [Road] property and buildings 'by the entirety' is presumed to be a 'gift' to the marital estate." *McLean v. McLean*, 88 N.C. App. 285, 293, 363 S.E. 2d 95, 101 (1987) (Greene, J., dissenting). Therefore, the only question before us on defendant's appeal of right is whether the Camp Branch Road property properly was classified as marital. N.C.R. App. P. 16(b). Defendant argues that the inherited funds invested in the marital home remained his separate property, and that the Camp Branch Road property thus should be deemed to comprise both marital and separate property elements.

Defendant, a practicing attorney, also owned stock in a professional association engaged in the practice of law. An expert witness valued this interest at $61,910. The trial court classified the interest as marital property and valued it at $35,000. The Court of Appeals vacated the findings with respect to valuation of

defendant's law practice and remanded for a new determination of value. However, it unanimously found no error in the admission of the expert testimony regarding the value of this interest. We allowed discretionary review of this additional issue.

I. Tenancy by the Entirety and the Marital Gift Presumption

[1] The initial step in any equitable distribution action is classification by the trial court of all property owned by the parties as marital or separate, as defined by the statute. N.C.G.S. § 50-20(a) (1987); *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E. 2d 703, 704 (1987); *Mauser v. Mauser*, 75 N.C. App. 115, 117, 330 S.E. 2d 63, 65 (1985). Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties," but does not include property determined to be separate property under N.C.G.S. § 50-20(b)(2). N.C.G.S. § 50-20(b)(1) (1987). Separate property includes

> all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

N.C.G.S. § 50-20(b)(2) (1987).

Following classification, property classified as marital is distributed by the trial court, while separate property remains unaffected. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E. 2d 228, 232 (1987).

As here, a single asset may be acquired by contributions from both separate and marital property. The Court of Appeals has adopted a "source of funds" approach to distinguish between marital and separate contributions in such cases. *Wade v. Wade*,

72 N.C. App. 372, 381-82, 325 S.E. 2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). Under this approach, "when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Id.* at 382, 325 S.E. 2d at 269.

The source of funds rule "would dictate that each party retain as separate property the amount he or she contributed to the down payment, plus the increase on that investment due to passive appreciation." *McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E. 2d 910, 916, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985). However, our Court of Appeals has declined to apply this rule when a spouse uses separate funds to furnish consideration for property conveyed to the marital estate, as demonstrated by titling the property as a tenancy by the entirety. In such cases a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence. *Id.* at 154, 327 S.E. 2d at 916-17.

In upholding the trial court's classification of the Camp Branch Road house and lot as marital property, the majority in the Court of Appeals relied on *McLeod*. Judge Greene, however, dissented. The third sentence of N.C.G.S. § 50-20(b)(2) provides: "Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance." The dissenting opinion focused on this sentence and stated: "To hold that titling property by the entirety *itself* constitutes the necessary express intent [that the property be considered marital] renders the statutory provision a *non sequitur.*" *McLean*, 88 N.C. App. at 294, 363 S.E. 2d at 101 (Greene, J., dissenting). It disagreed with "the majority's erroneous notion of a 'marital gift presumption,'" recognizing *McLeod* as the source. *Id.* This marital gift presumption, it said, contravenes both the express language of N.C.G.S. § 50-20(b)(2) and the source of funds rule underlying *McLeod*. *Id.* at 295, 363 S.E. 2d at 101-02. The opinion noted that in *Johnson v. Johnson*, 317 N.C. 437, 346 S.E. 2d 430 (1986), this Court overruled the basic presumption of marital property from which the *McLeod* marital gift presumption, in part, was derived. It follows, the dissent im-

plied, that this Court also should overrule the marital gift presumption established in *McLeod*. *Id.* at 295, 363 S.E. 2d at 102.

The dissent recognized that N.C.G.S. § 50-20(b)(2) also provides that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." *Id.* at 296, 363 S.E. 2d at 102. While this provision may create a presumption that gifts between the spouses are marital property, the dissent stated it "provides no support for the *McLeod* notion that simply 'titling' property jointly[1] creates a 'gift' to the other spouse in the first place." *Id.* It stated further that the Court of Appeals has "wisely declined to extend the *McLeod* presumption to jointly-held 'personal' property," as to do so would defeat the legislative intent of N.C.G.S. § 50-20(b)(2), and opined that "there is no principled distinction which would justify treating real and personal property so differently under Section 50-20(b)(2)." *Id.*, citing *Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E. 2d 815 (1986).[2] The dissenting opinion would have remanded the case so that plaintiff, not defendant, would be required to show that the conveyance "contains the express intent that the Camp Branch [Road] property was acquired as a gift by defendant to the marital estate." *Id.* at 296-97, 363 S.E. 2d at 102.

The underlying premise of the dissenting opinion is that N.C.G.S. § 50-20(b)(2), which defines separate property, is clear and unambiguous. When that is the case, there is no room for construction. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 426, 298 S.E. 2d 686, 689 (1983). Like the Court of Appeals in *McLeod*, however, we find this premise untenable.

The statute reads, in pertinent part:

> "Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other

1. The property was not simply titled jointly, but rather was titled by the entireties, a unique form of ownership in which title is held by the marital entity. *See infra.*

2. The question presented in *Manes* is not before us, and we express no opinion on how we would resolve it if it were.

> spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

N.C.G.S. § 50-20(b)(2) (1987). Two provisions within this section are pertinent and create ambiguity: the second sentence, or "interspousal gift" provision, and the third sentence, or "exchange" provision.

Under the interspousal gift provision, if the donor wishes his or her separate property to remain separate, the donor must state that intention in the conveyance. If the donor wishes his or her separate property to become the separate property of the donee, the donor also must state that intention in the conveyance. However, under the exchange provision, absent a conveyance expressly stating that the property is marital, the use of separate property to acquire entireties property constitutes merely an exchange and remains separate property.

Difficulty in applying these provisions appears inevitable when they are considered in the juxtaposition of the broad definition of marital property and the expansive definition of separate property within the same statute. As a leading commentator has noted:

> It appears that the North Carolina statute is, to a considerable degree, at war with itself. . . . In effect, the statute indicates preferences for both marital and separate property classifications. . . . It remains for the judiciary to delineate the precise boundaries between the classifications and to effect a reconciliation between the dual legislative purposes.

Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. Rev. 247, 271 (1983) [hereinafter *A Preliminary Analysis*].

This Court has long "adhered to the principle that the legislative intent is a controlling factor in the construction of statutes. 'The object of all interpretations of statutes is to ascertain the

meaning and intention of the Legislature . . . .'" *Realty Co. v. Trust Co.*, 296 N.C. 366, 369, 250 S.E. 2d 271, 273 (1979) (quoting *Kearney v. Vann*, 154 N.C. 311, 314-15, 70 S.E. 747, 749 (1911)). In construing the ambiguity created by the "interspousal gift" and "exchange" provisions of N.C.G.S. § 50-20(b)(2), we thus must consider the intent of the legislature in enacting the Equitable Distribution Act.

Prior to passage of this act, our courts applied common-law title concepts to determine the distribution of property upon divorce. 2 R. Lee, *North Carolina Family Law* § 169.3 (4th ed. Supp. 1985). With the advent of no-fault divorce, dependent spouses lost the "bargaining power" of refusing to consent to a divorce. Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195, 196 (1987) [hereinafter *Partnership*]. The combination of no-fault divorce and a "title only" rule for property distribution sometimes led to unconscionable results. *See, e.g., Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979) (wife worked in home and in husband's closely held corporation for many years but could receive only one-half the marital home upon divorce under prevailing legal theories). Pressure mounted for North Carolina to follow the lead of other states in adopting statutes based on community property or equitable distribution principles. 2 R. Lee, *North Carolina Family Law* § 169.3 (4th ed. Supp. 1985). The General Assembly responded in 1981 by enacting "An Act for Equitable Distribution of Marital Property," codified as N.C.G.S. §§ 50-20, -21. *Id.*

Equitable distribution is based on the idea of marriage as a partnership in which both spouses contribute to the marital economy, whether directly by employment outside the home or indirectly by providing services within the home. *See Smith v. Smith*, 314 N.C. 80, 85-86, 331 S.E. 2d 682, 686 (1985); Sharp, *Partnership*, 65 N.C.L. Rev. at 198-99. "In particular, the concept creates a means for recognition of the contribution of the dependent spouse, who may have sacrificed his or her own career potential for the sake of the other or the marriage itself." Sharp, *Partnership*, 65 N.C.L. Rev. at 199. "[T]hese public policies, coupled with the clear remedial purposes of the statute, make the partnership ideal an eminently suitable 'first principle' for interpretation of the . . . statute by the North Carolina courts." *Id.*

With the foregoing in mind, we must attempt to construe the interspousal gift and exchange provisions so as to avoid ambiguity and effectuate the legislative intent. Were we to construe the exchange provision to include interspousal gifts traceable to separate funds, the exchange provision would swallow the gift provision.

> A literal application of this rule would require that property exchanged for separate property be classified separate even if title to it were taken in the name of the nonowner spouse or by both spouses jointly. Such an interpretation would have the effect of eliminating from marital property any gift between the spouses if the gift property could be traced, through exchanges, to separate property. No jurisdiction has been willing to hold that its legislature could have intended such an extraordinary result.

Sharp, *A Preliminary Analysis*, 61 N.C.L. Rev. at 265.

We, too, do not believe our legislature intended such a result. " 'Exchange' clearly implies that something of value has been received in return. 'Gift,' on the other hand, implies the opposite conclusion. Interpretation of the word 'exchange' to include gifts is a result that the statute does not require and that logic clearly does not recommend." Sharp, *Partnership*, 65 N.C.L. Rev. at 228 n.187. "The integrity of the exchange provisions would not be threatened by a rule that would allow separate property to undergo a theoretically endless number of exchanges and still retain its separate character, so long as it was not *given away.*" *Id.* at 228.

An individual transfer must be considered as either a gift or an exchange. The language of N.C.G.S. § 50-20(b)(2) presupposes a determination whether a transfer was in fact a gift. Common law principles therefore instruct us in determining whether a transfer constitutes a gift.

In making this determination, we consider the intention of the parties. "A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential requisite of a gift inter vivos. . . . [The intention] may be inferred from the relation of the parties and from all the facts and circumstances." 38 C.J.S. *Gifts* § 15 (1943). We therefore look to the facts and the relationship to infer intent.

In *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982), we recognized that "such transfers are normally motivated by love and affection and the desire to make a gift." *Id.* at 53, 286 S.E. 2d at 788. The marital relationship is a confidential one and does not usually entail arm's-length bargaining. It is the intention at the time of the transfer that is germane. *Id.* at 54, 286 S.E. 2d at 788. As plaintiff states in her brief: "People do not normally consider whether the property is marital or separate until the marriage is disintegrated and divorce is imminent. At this point in time, the parties may wish that there was no such thing as marital property, but legally, the intent at the time of the conveyance controls, not how the parties feel later."

We also consider the nature of an estate by the entireties. This estate is a unique form of holding title to real property, available only to married persons.

> [T]enancy by the entirety takes its origin from the common law when husband and wife were regarded as one person . . . . These two individuals, by virtue of their marital relationship, acquire the entire estate . . . . As between them . . . there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relationship to each other, constituting the proprietorship of the whole, and of every part and parcel thereof.

Carter v. Insurance Co., 242 N.C. 578, 579, 89 S.E. 2d 122, 123 (1955). The very nature of the estate strongly suggests that titling property in this manner evidences an intention to make a gift. *See Pascarella v. Pascarella*, 165 N.J. Super. 558, 564, 398 A. 2d 921, 924 (1979).

Thus, considering the nature of the marital relationship and of the entireties estate, we conclude that the marital gift presumption established in *McLeod* is appropriate as an aid in construing N.C.G.S. § 50-20(b)(2). Donative intent is properly presumed when a spouse uses separate funds to furnish consideration for property titled as an entireties estate. *McLeod*, 74 N.C. App. at 154, 327 S.E. 2d at 916-17. This presumption is sufficiently strong that it is, and should be, rebuttable only by clear, cogent,

and convincing evidence.[3] *Id.* Rebuttal of the presumption would then result in application of traditional source of funds analysis.

When property subject to classification is titled as a tenancy by the entirety, therefore, the marital gift presumption controls the initial determination of whether a gift has been made. If a spouse uses separate funds to acquire property titled by the entireties, the presumption is that a gift of those separate funds was made, and the statute's interspousal gift provision applies. Unless that presumption is rebutted by clear, cogent and convincing evidence, the statute dictates that the gift "shall be considered separate property only if such an intention is stated in the conveyance." N.C.G.S. § 50-20(b)(2) (1987).

This interpretation of the statute is not inconsistent with the exchange provision. As stated in *McLeod:* "When property titled by the entireties is acquired in exchange for separate property[,] the conveyance itself indicates the 'contrary intention' to preserving separate property required by the statute." *McLeod,* 74 N.C. App. at 156, 327 S.E. 2d at 918, citing *In re Marriage of Lucas,* 27 Cal. 3d 808, 815, 614 P. 2d 285, 289, 166 Cal. Rptr. 853, 857 (1980) ("The act of taking title in a joint and equal ownership form is inconsistent with an intention to preserve a separate property interest.").

The Court of Appeals relied on several sources in adopting the marital gift presumption in *McLeod.* One was the marital property presumption announced in *Loeb v. Loeb,* 72 N.C. App. 205, 324 S.E. 2d 33 (1985). *McLeod,* 74 N.C. App. at 154, 327 S.E. 2d at 917. In *Loeb,* the Court of Appeals held that the language of N.C.G.S. § 50-20 "creates a presumption that all property acquired by the parties during the course of the marriage is 'marital property.' " *Loeb,* 72 N.C. App. at 209, 324 S.E. 2d at 38. This Court rejected that presumption in *Johnson v. Johnson,* 317 N.C. 437, 346 S.E. 2d 430 (1986), stating:

3. Defendant testified that he contributed his separate property to a tenancy by the entirety only for federal estate tax purposes. The Court of Appeals in *McLeod* left open what constitutes clear and convincing evidence to rebut the presumption of gift when property is placed in a tenancy by the entirety. *McLeod,* 74 N.C. App. at 158 n.2, 327 S.E. 2d at 919 n.2. The court referred, however, to a case holding that the motive of avoiding inheritance tax explains the reason why the gift was made, and does not refute that a gift was made in the first instance. *In re Marriage of Moncrief,* 535 P. 2d 1137, 1138 (Colo. 1975).

> The North Carolina General Assembly, unlike legislatures in [some other] states, did not choose to provide such a presumption by statute, and this Court will not infer one by judicial decision. We believe that the legislature's decision not to provide by statute for a marital property presumption was deliberate. Moreover, we perceive no need for such a presumption, express or implied, in our equitable distribution scheme. Under our statutory scheme, without the aid of any presumption, assets, the classification of which is disputed, must simply be labeled for equitable distribution purposes *either* as "marital" *or* "separate," depending upon the proof presented to the trial court of the nature of those assets.

317 N.C. at 454-55 n.4, 346 S.E. 2d at 440 n.4. *Johnson*, however, did not address the marital *gift* presumption established in *McLeod*. Because marital *property* and marital *gift* presumptions are discrete concepts, *Johnson* does not control the issue here. Moreover, while the marital property presumption is unnecessary under our statutory scheme, *see id.* at 455 n.4, 346 S.E. 2d at 440 n.4, the marital gift presumption established in *McLeod* is necessary to clarify application of otherwise potentially ambiguous provisions of the statute.

Abundant authority and rationale to support the gift presumption remain, even when *Loeb* and the marital property presumption are disregarded. The marital gift presumption is rooted in *Mims*. While the Court there confined its decision to pre-equitable distribution cases, the Court of Appeals acknowledged in *McLeod* that it was "guided by *Mims* in determining the disposition of the entireties property" because "the Court [in *Mims*] was motivated in part by the same concerns that impelled our legislature to enact the equitable distribution statute." *McLeod*, 74 N.C. App. at 153, 327 S.E. 2d at 916. This Court held in *Mims* that "the rule shall be that where a spouse furnishing the consideration causes property to be conveyed to the other spouse, a presumption of gift arises, which is rebuttable by clear, cogent and convincing evidence." *Mims*, 305 N.C. at 53, 286 S.E. 2d at 787. *McLeod* tracked this language in creating a gift presumption rebuttable by "clear, cogent and convincing evidence" in the equitable distribution context. The presumption thus rests on *Mims*, not *Loeb*.

Further, as noted in *McLeod*, the marital gift presumption accords with authority from virtually all other jurisdictions. *McLeod*, 74 N.C. App. at 154, 327 S.E. 2d at 917. The property distribution statutes in some of these jurisdictions differ from our equitable distribution statute. Specifically, many contain a presumption that property acquired after the marriage is marital property. *See, e.g.*, 19 Me. Rev. Stat. Ann. § 722A(3) (1981).[4] We nevertheless find the reasoning of the courts in some of these jurisdictions instructive. For example, in *Carter v. Carter*, 419 A. 2d 1018 (Me. 1980), the Supreme Judicial Court of Maine specifically referred to the common law in stating: "That some couples chose to put property in joint tenancy even though one spouse had paid all of the purchase price from separate funds represented a recognition of the partnership nature of marriage by those couples before the law itself adopted that theory." *Id.* at 1021.

Iowa's equitable distribution statute, like ours, contains no presumption that property acquired during marriage is marital. *See* 39 Iowa Code Ann. § 598.21 (West 1981). In *In re Marriage of Butler*, 346 N.W. 2d 45 (Ia. App. 1984), the husband used his separate funds to construct a home titled in joint tenancy with the wife. The court held that a gift of a one-half interest is presumed when one party furnishes consideration for property taken in joint tenancy. *Id.* at 47. It emphasized that the husband had, in purchasing the home and furniture, "made the money available *to the marital unit* for its unrestricted use and benefit." *Id.* (emphasis added).

Especially when, as here, the marital home is titled by the entireties, the gift presumption is most likely to effectuate the intention of the parties as well as the partnership ideal which underlies the Equitable Distribution Act.

4. Maine's statute reads in part:

3. Acquired subsequent to marriage. All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is *presumed to be marital property* regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection 2. 19 Me. Rev. Stat. Ann. § 722(A)(3) (1981) (emphasis added).

For the foregoing reasons, we hold that *McLeod* was decided correctly, and we adopt the marital gift presumption established therein for interpretation and application of N.C.G.S. § 50-20(b)(2). When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed. This presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended.

The conveyance here contained no express statement of separate property intention. N.C.G.S. § 50-20(b)(2) (1987). By titling the property by the entireties, "the conveyance itself indicates the 'contrary intention' to preserving separate property required by the statute." *McLeod*, 74 N.C. App. at 156, 327 S.E. 2d at 918. Defendant thus is presumed to have intended a gift to the marital estate of his separate funds used in the purchase. The Court of Appeals was correct in stating that "[w]hether defendant succeeded in rebutting the presumption of gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court's discretion," *McLean*, 88 N.C. App. at 290, 363 S.E. 2d at 98-99, for it is the trial court that must find the evidence convincing. *See Draughon v. Draughon*, 82 N.C. App. 738, 739-40, 347 S.E. 2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E. 2d 107 (1987). It was also correct in finding competent evidence to support the trial court's findings, and in thus declining to disturb the trial court's rulings. This aspect of the Court of Appeals opinion is therefore affirmed.

II. VALUATION OF DEFENDANT'S LAW PRACTICE

[2] Defendant next argues that the trial court erred in allowing improper evidence of the value of his law practice and in making its findings of fact, conclusions of law, and orders regarding such value. Defendant specifically excepts to the admission of a C.P.A.'s testimony regarding the value of the law practice. The trial court received the C.P.A. as an expert and allowed him to testify, over objection, that he valued the law practice at $61,910. Defendant argues that because the C.P.A. did not base his valuation on the criteria set forth in *Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266, *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985), his opinion should not have been admitted.

The Court of Appeals correctly noted that the standard for admissibility of an expert's opinion is whether it " 'will assist the

trier of fact to understand the evidence or to determine a fact in issue.' " *McLean*, 88 N.C. App. at 291, 363 S.E. 2d at 99-100, citing N.C.G.S. § 8C-1, Rule 702. Defendant complains that while Rule 702 provides the proper standard, the Court of Appeals failed to analyze whether the opinion testimony here was in fact helpful to the trier of fact.

The C.P.A. testified that he examined corporate tax returns of the professional association covering a three year period and based his valuation on those documents. He did not have access to defendant's individual tax returns. He testified that he used the most conservative approach possible to evaluate the worth of the professional association. He tried to value the "hard assets" of the business and used a "very, very low" multiple to value its goodwill and intangible assets. On cross-examination he testified that he knew of no sales of law practices in the Asheville area during the preceding ten years. He did not discuss the nature of the practice with defendant, nor did he consider defendant's type of work when valuing the practice. He admitted that the value was based on finding a willing buyer. In assessing the firm's accounts receivable, he did not consider the age of the accounts. In attempting to depreciate certain assets, he called his figure a "pot shot." The C.P.A. testified that he did not determine defendant's age, health, professional reputation, or length of time in practice when making the valuation. He did not gauge the "comparative professional success" of defendant's law practice against other law practices in the area. Finally, he testified that he knew the plaintiff and worked for her current husband.

The foregoing is all relevant in considering the expert witness' credibility, but it does not render his opinion testimony inadmissible. The factors detailed in *Poore*, discussed below, relate to the weight to be accorded such evidence, not to its admissibility. The determination of admissibility of expert opinion testimony is within the sound discretion of the trial court, and the admission of such testimony will not be reversed on appeal unless there is no evidence to support the finding that the witness possesses the requisite skill. *State v. Bullard*, 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984); *State v. King*, 287 N.C. 645, 658, 215 S.E. 2d 540, 548-49 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1209 (1976). "Once expertise is demonstrated, the test of admissibility is helpfulness." 1 Brandis on North Carolina

Evidence § 132, at 590 (3d ed. 1988). If the witness is better qualified than the trier of fact to form an opinion, that witness may render an opinion regarding the subject matter. *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E. 2d 598, 604 (1985); 1 Brandis on North Carolina Evidence § 132. The witness need not be experienced with the identical subject area in a particular case. *Bullard*, 312 N.C. at 140, 322 S.E. 2d at 376; *see State v. Phifer*, 290 N.C. 203, 213, 225 S.E. 2d 786, 793 (1976), *cert. denied*, 429 U.S. 1123, 51 L.Ed. 2d 573 (1977).

While admittedly unfamiliar with the specific subject area of sale of law practices in the Asheville area, the C.P.A.'s training and experience gave him knowledge sufficient to render him better qualified than the trier of fact to value an interest in a law practice. The trier of fact made the determination that the witness' testimony would be helpful, and we find no error or abuse of discretion in that determination. *See* 1 Brandis on North Carolina Evidence § 133, at 595 ("A finding . . . that the witness is qualified will not be reversed unless there was no competent evidence to support it or the judge abused his discretion.").

The trial court used a "return on investment" approach to arrive at the figure $35,412 as the net market value of defendant's professional association. It then rounded off the figure to $35,000. The Court of Appeals vacated the findings with respect to the valuation of defendant's law practice because "there was no evidence before the court to support the rate of return used by the court in making its calculations or to indicate that such a method would yield an accurate valuation." *McLean*, 88 N.C. App. at 292, 363 S.E. 2d at 100. Defendant asks us to instruct the trial court to consider on remand the factors set forth in *Poore*.

In *Poore* the Court of Appeals considered the problem of valuing a solely-owned dental practice for equitable distribution purposes. The court noted that there is no single best approach to the problem of valuing an interest in a professional practice, and that an appellate court's task "is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest." *Poore*, 75 N.C. App. at 419, 331 S.E. 2d at 270, citing *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985). It acknowledged that "valuation of each individual practice will depend on its particular facts and cir-

cumstances," and directed that trial courts should consider the following components of the practice: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Id.* On remand, the trial court should consider these factors in making its calculations. The factors are not criteria for the admissibility of evidence, but they should enter into the weighing of the evidence presented regarding valuation, as reflected by the findings of fact.

The equitable distribution judgment here reflects no consideration of goodwill, other than noting that the court chose a return on investment approach in part "because of the difficulty in arriving at a good will value." In *Poore* the court discussed the problem of appraising goodwill and suggested various approaches, including market value, capitalization of excess earnings, and average gross annual income. *Id.* at 421-22, 331 S.E. 2d at 271-72. "In ordering a distribution of marital property, a court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied." *Id.* at 422, 331 S.E. 2d at 272. We agree that goodwill should be valued, but we join the Court of Appeals in cautioning trial courts "to value goodwill 'with great care, for the individual practitioner will be forced to pay the ex-spouse "tangible" dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements.' " *Id.* at 421, 331 S.E. 2d at 271 (quoting *Dugan v. Dugan*, 92 N.J. 423, 435, 457 A. 2d 1, 7 (1983)). The factors listed in *Poore* as relevant in valuing goodwill—age, health, reputation of the practitioner, nature of the practice, length of time in existence, profitability, and comparative professional success—are helpful, though not exclusive or absolute.

Affirmed.

MYERS & CHAPMAN, INCORPORATED v. THOMAS G. EVANS, INCORPORATED, THOMAS G. EVANS AND BRENDA EVANS, INDIVIDUALLY

No. 140PA88

(Filed 8 December 1988)

1. **Fraud § 3— application for payment—knowledge, information and belief—representation for fraud purposes**

Language in a subcontractor's notarized application for payment certifying "that to the best of his knowledge, information and belief" work has been completed according to the contract and the payments applied for were then due constituted a "representation" which is actionable for fraud if scienter is present.

2. **Fraud § 4— intent to deceive—reckless indifference or concealment of material fact insufficient**

While the concept of a statement "made with reckless indifference as to its truth," or one "recklessly made without knowledge as a positive assertion" or words of like import, or the concept of "concealment of a material fact" may satisfy the "false representation" element of fraud, those concepts do not satisfy the element of a statement "made with intent to deceive."

3. **Fraud § 4— intent to deceive**

Without the element of intent to deceive, the required scienter for fraud is not present, since the term "scienter" embraces both knowledge and an intent to deceive. To the extent that statements of the elements of fraud in prior decisions omit the essential element of the intent to deceive in a definition of fraud, they are disavowed.

4. **Fraud § 12— knowledge and intent to deceive—insufficient evidence**

The evidence was insufficient to support a jury finding that the individual defendant intentionally committed a fraud in the submission of applications to plaintiff for payment for specialty items purportedly purchased and stored in a bonded warehouse for installation by defendant's company in a construction project but which later could not be found where the evidence showed that defendant did not know whether the specialty items had actually been purchased and stored when he submitted the application for payment and that he had neither knowledge nor intent to deceive.

5. **Corporations § 15; Negligence § 7— application for payment—gross negligence by corporate officer**

The evidence was sufficient for the jury on the issue of defendant corporate officer's gross negligence in submitting to plaintiff contractor sworn applications for payment to the corporate subcontractor for specialty items purportedly purchased and stored in a bonded warehouse for installation in a construction project but which later could not be found where defendant certified "to the best of his knowledge, information and belief" that the items had been purchased and stored; defendant did not know whether the specialty items had actually been purchased and stored at the time he signed and swore

to the applications for payment; and defendant relied upon a handwritten application prepared by the subcontractor's project manager but failed to question the project manager about the specifics in the application for payment.

6. **Corporations § 13— corporate directors not guarantors of agents—instruction not required**

The trial court was not required to instruct the jury on whether corporate directors are guarantors or insurers of their agents where defendant directors were being sued for their own alleged personal misrepresentations and not for alleged misrepresentations of their employee.

7. **Corporations § 13— directors and officers—liability to third parties—instructions**

The trial court erred in giving the jury an instruction which suggested that corporate directors and managing officers are chargeable with an omniscient knowledge of the company's affairs and are liable for damages to third parties resulting from simple negligence.

8. **Public Officers § 9— notary public—no liability for misrepresentations in notarized instrument**

Where the female defendant acted only in her capacity as a notary and not as a corporate officer in signing an application for payment, she is not liable for misrepresentations made in the application.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 89 N.C. App. 41, 365 S.E. 2d 202 (1988), affirming in part and reversing in part the judgment entered by *Burroughs, J.*, at the 9 February 1987 session of Superior Court, MECKLENBURG County, and awarding the individual defendants a new trial. Heard in the Supreme Court 11 October 1988.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and Samuel D. Walker, for plaintiff-appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Fred T. Lowrance, for defendant-appellees.

Miller, Johnston, Taylor, Allison and Hord, by James W. Allison, for The Carolinas Branch, Associated General Contractors of America, amicus curiae.

MEYER, Justice.

On 14 December 1984, Myers & Chapman, Inc., plaintiff general contractor, entered into a written subcontract with corporate defendant Thomas G. Evans, Inc. (hereinafter "Evans, Inc."), to

furnish and install the heating, ventilating and air conditioning system for a shopping center in High Point, North Carolina. The shopping center, known as Westside Plaza, included a Food Lion grocery, an Eckerd drug store and several smaller shops. The original contract price of $104,500 was later increased to $113,865. The contract called for Evans, Inc., to submit periodic "Applications for Payment" to plaintiff general contractor as the work progressed. Each payment application was signed by individual defendant Thomas Evans, was in the following form and contained the following statement:

> The undersigned Contractor certifies that to the best of his knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by him for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.
>
> CONTRACTOR: Thomas G. Evans, Inc.
>
> By: _____ Date: _____

Each payment application was notarized by individual defendant Brenda Evans. The notary certificate was signed by her in her capacity as a notary public. Defendants Thomas Evans and his wife, Brenda, were the sole directors and officers of defendant Evans, Inc.

The controversy centers on Application for Payment No. 2, which Evans, Inc., submitted to plaintiff general contractor on 25 April 1984. This Application requested payment in the amount of $33,227 for equipment purportedly ordered and stored in a local bonded warehouse for eventual installation in the construction project. The amount requested included $11,247 worth of specialty items—principally small, sophisticated electronic devices—which later could not be found. The typed Application for Payment No. 2 delivered to plaintiff was based upon a handwritten application prepared by William Jay Gould, defendants' estimator and project manager. Gould's application, in turn, relied upon a written confirmation of receipt of goods issued by the warehouse to which the equipment had been shipped for storage. In May 1984, plaintiff paid Evans, Inc., for all the materials claimed to

have been purchased and stored and which were reflected in Application for Payment No. 2. In Application for Payment No. 3, submitted on 22 June 1984, Evans, Inc., recertified that the specialty items had been purchased and stored.

In August 1984, Thomas Evans decided to wind up his firm's business. Since the work on the Westside Plaza shopping center was still ongoing, Evans, Inc., contracted with Custom Comfort, Inc., to finish the job. Plaintiff general contractor, defendant subcontractor Evans, Inc., and Custom Comfort, Inc., all agreed that the project would be completed by Custom Comfort, Inc., for the monetary balance remaining on the contract between plaintiff general contractor and Evans, Inc. After Custom Comfort, Inc., began work, it was unable to locate the $11,247 in specialty items purportedly stored in the bonded warehouse and already paid for by plaintiff. Plaintiff reordered the specialty items, paid for them a second time, and brought suit to recover its loss.

The case against the individual defendants was tried on theories of (1) intentional fraud and (2) gross negligence such as to permit a fraud to be committed on plaintiff. At trial, plaintiff strove to prove that Thomas and Brenda Evans, by filing Applications for Payment Nos. 2 and 3, falsely represented to plaintiff that $11,247 in specialty items had been purchased and stored, that the Evanses knew that the representations were untrue at the time made, or that the representations were made in reckless disregard of whether they were true or not. At the conclusion of the trial, the court submitted nine issues to the jury. The issues submitted to the jury and its responses thereto, were as follows:

> 1. Is the defendant Thomas Evans, Inc., liable to the plaintiff for unjust enrichment?
>
> ANSWER: Yes
>
> 2. Did the individual defendants, Thomas G. Evans or Brenda Evans, commit a fraud by submitting the payment application of April 20, 1984 or June 22, 1984 to Myers & Chapman, Inc.?
>
> ANSWER: Thomas G. Evans yes
>
> Brenda Evans no

3. Did Thomas G. Evans or Brenda Evans act with such gross negligence as officers and directors of Thomas G. Evans, Inc., so as to permit a fraud to be committed on Myers & Chapman, Inc.?

ANSWER: Thomas G. Evans yes
Brenda Evans yes

4. Did Thomas G. Evans or Brenda Evans submit an application for payment to Myers & Chapman, Inc., knowing it to be false[?]

ANSWER: Thomas G. Evans no
Brenda Evans no

5. Did Thomas G. Evans or Brenda Evans act in such a grossly negligent way, in the submission of the application for payment so as to permit a fraud to be committed on Myers & Chapman, Inc.?

ANSWER: Thomas G. Evans yes
Brenda Evans yes

6. Was the conduct of Thomas G. Evans or Brenda Evans in commerce or did it affect commerce?

ANSWER: Thomas G. Evans yes
Brenda Evans yes

7. ***Answer this issue ONLY if the answer to any portion of issue #2, 3, 4 or 5 was "No"***. Did the conduct of Thomas G. Evans or Brenda Evans mislead or deceive Myers & Chapman, Inc.?

ANSWER: Thomas G. Evans yes
Brenda Evans yes

8. What amount, if any, is the plaintiff entitled to recover for compensatory damages?

ANSWER: $11,731

9. ***Answer this issue ONLY if you answered any portion of issue #2, 3, 4 or 5 "Yes"***. What amount, if any, is the plaintiff entitled to recover for punitive damages?

ANSWER: Thomas G. Evans	$1.00
Brenda Evans	$1.00

On the basis of these jury findings, the trial court stated in its judgment:

> That the jury's findings and evidence support the conclusions that the actions of the defendants caused or allowed a false application and certificate for construction payments to be given to the plaintiff; that said action was fraudulent and that the application and certificate was submitted under circumstances such that the defendants' actions were grossly negligent; that the conduct of the defendants misled and deceived the plaintiff; and that said action by the defendants took place in commerce and affected commerce.

Plaintiff elected not to pursue the jury's punitive damages award. Because the trial court concluded that defendants' actions constituted an unfair and deceptive trade practice, it trebled the compensatory damages of $11,731 awarded by the jury to a total of $35,193 and awarded attorney fees to plaintiff Myers & Chapman, Inc., in the amount of $10,000 plus costs of $531.00. The judgment on the total amount of $45,724 plus interest was entered jointly and severally against the corporate defendant and the individual defendants. Defendants appealed.

The Court of Appeals addressed two issues: (1) whether the evidence supported the jury's finding that individual defendants Thomas and Brenda Evans committed intentional fraud by submitting the payment applications (issue 2), and (2) whether the trial court's instruction on gross negligence so as to permit a fraud (issues 3 and 5) was defective. The Court of Appeals concluded that the language in Applications for Payment Nos. 2 and 3 did not constitute a "representation" of any kind and that the trial court's instruction on the two issues of gross negligence was erroneous. The Court of Appeals reversed the trial court on the intentional fraud issue (issue 2) and awarded a new trial to the individual defendants on the gross negligence issues (issues 3 and 5) because of the trial court's error in the jury instructions. The court found no error in the trial as to corporate defendant Evans, Inc. This Court granted plaintiff's petition for discretionary review.

I.

We first address the issue of whether the evidence supported the jury's finding that defendant Thomas Evans intentionally committed fraud. Relying on *Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 127 S.E. 2d 759 (1962), the Court of Appeals disposed of this issue by concluding that since the disputed payment applications made no representations of past or existing facts, the language in the applications only stated an opinion or recommendation and was therefore not actionable. We disagree. In *Myrtle Apartments*, the plaintiff owner sought to recover the cost of a new boiler which it alleged it had been induced to install in its apartment building by the defendant insurer's false representation that the old boiler was defective and needed replacing. *Id.* The representation was contained in a letter to the plaintiff from defendant's engineer, in which he stated that the boiler's general condition was poor. He therefore "recommended that [the] boiler be replaced with a new or better one of standard construction as soon as [the] heating season [was] over." *Id.* at 50, 127 S.E. 2d at 760. The Court held that the engineer's report was a *recommendation* for a new boiler on the basis of the engineer's examination, that is, nothing more than the statement of an opinion, which could not constitute fraud. *Id.* at 52, 127 S.E. 2d at 761.

[1] The language in the Application for Payment documents in the case sub judice is very different. Here, the contractor "*certifie[d]* that to the best of his knowledge, information and belief": (1) the work had been completed according to contract; (2) he had paid for work, the payment for which he had previously applied for and received from the Owner; and (3) current payments applied for were then due. (Emphasis added.) Moreover, each Application for Payment was subscribed and sworn to before a notary public. Such solemn documents bear no comparison to a mere recommendation contained in an unsworn letter. Indeed, as the *amicus curiae* brief of the Carolinas Branch, Associated General Contractors of America, Inc., points out, the most significant feature of the Application for Payment is that it allows parties to the construction transaction to rely upon its representations that work has been done for which payment is now due. Sworn statements inducing such reliance by one party and action based upon that reliance by the other are representations and can obviously constitute a fraud. We conclude that the language in

Applications for Payment Nos. 2 and 3 constitutes a "representation" and is actionable if scienter is present.

Since the Court of Appeals held that plaintiff could not prove a representation, it concluded that, ipso facto, plaintiff could not prove a fraud, inasmuch as a representation is one of the essential elements of an action for fraud. Because we hold that the language common to both Applications for Payment Nos. 2 and 3 is a representation which is actionable if scienter is present, we now review the evidence presented at trial to determine whether it was sufficient to support the jury's finding that defendant Thomas Evans committed a fraud.

Plaintiff Myers & Chapman, Inc., strenuously argues that the jury's fraud verdict passes muster because Thomas Evans "made exact, and exactly false, representations about purchased equipment" and because "[h]e failed to disclose that he had no knowledge." Relying on *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974), plaintiff contends that Thomas Evans' sworn statement had specificity sufficient under the circumstances to deceive plaintiff. We disagree. The record evidence before us distinguishes this case from *Ragsdale*. There, the defendant corporate directors' counterclaim for fraud was sufficient to overcome a motion for judgment on the pleadings where they alleged, inter alia, that the plaintiff former president falsely represented to them that the business was a "gold mine" and a "going concern," when he knew that the corporation's cash funds had decreased, that $20,000 had been borrowed for the corporation, that a corporate demand note was delinquent, that the corporate working capital was depleted and that corporate income was inadequate to pay operating expenses. *Id.* at 138, 209 S.E. 2d at 500-01. In *Ragsdale*, the plaintiff allegedly made the representations when he had personal knowledge that they were false. In contrast to *Ragsdale*, we find nothing in the record of the case before us to support the contention that Thomas Evans made the representations in Applications for Payment Nos. 2 and 3 based on his personal knowledge that they were false. No evidence exists to show that Thomas Evans had any knowledge, information or belief that the specialty items were not in the warehouse. In fact, as the transcript reveals, he had *no* knowledge about them at the time he swore to the statements in Applications for Payment Nos. 2 and 3. At trial, while plaintiff's attorney was ques-

tioning Thomas Evans as an adverse witness on the subject of his pretrial deposition, the following colloquy occurred:

> Q. Then I asked you the next question. [Reading.]
>
> "QUESTION: Did you have any knowledge on which to base that certificate?"
>
> And what was your answer there?
>
> A. I don't recall.
>
> Q. [Reading.]
>
> "ANSWER: No."
>
> So, while you told me you were telling me the truth, under oath on that date, and when I asked you whether you had any knowledge at all on which to base this certificate, where you swore that upon information and belief certain things have happened, you told me, under oath, on September 8, 1985, that you had no knowledge to base that certificate on; didn't you?
>
> A. That's correct.

Moreover, as the Court of Appeals correctly noted, although the jury found in answer to issue 2 that Thomas Evans had committed a fraud, the same jury found, in response to issue 4, that Thomas and Brenda Evans did not knowingly submit a false Application for Payment to plaintiff. In other words, the jury found no knowledge of the falsity of the statement made, which is an essential element of fraud. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494.

[2, 3] Plaintiff argues that because it proved conscious and reckless ignorance of the truth, it has satisfied the "knowledge" element and has thus proved fraud. Plaintiff implies that in this circumstance, it is unnecessary to prove an intent to deceive because intent may be inferred by reckless indifference to the truth. This argument appears to be based on language in recent cases from this Court. *See, e.g., Britt v. Britt*, 320 N.C. 573, 579, 359 S.E. 2d 467, 471 (1987); *Johnson v. Insurance Co.*, 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980); *Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 92, 261 S.E. 2d 99, 103 (1980). In *Odom*, the essential elements of fraud were defined as follows:

> To make out an actionable case of fraud plaintiff must show: (a) that the defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false *or made it recklessly without any knowledge of its truth and as a positive assertion*; (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Odom, 299 N.C. 86, 91-92, 261 S.E. 2d 99, 103 (emphasis added). While the concept of a statement "made with reckless indifference as to its truth," or one "recklessly made without knowledge as a positive assertion" or words of like import, or the concept of "concealment of a material fact" have been held to satisfy the element of "false representation," those concepts do not satisfy the element of a statement "made with intent to deceive." Without the element of intent to deceive, the required scienter for *fraud* is not present. The term "scienter" embraces both knowledge *and* an intent to deceive, manipulate or defraud. Black's Law Dictionary 1207 (5th ed. 1979). *See, e.g., Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E. 2d 494, 500; *Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 52, 127 S.E. 2d 759, 761; *Foster v. Snead*, 235 N.C. 338, 339-40, 69 S.E. 2d 604, 606 (1952) (representation must be made with fraudulent intent); *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E. 2d 202, 205 (1951) (third essential fact needed to establish actionable fraud is intent to deceive); *Ward v. Heath*, 222 N.C. 470, 472, 24 S.E. 2d 202, 205 (1943) (material elements of fraud include intent to deceive).

In *Myrtle Apartments*, the Court stated that in order to constitute fraud

> there must be false representation, known to be false, or made with reckless indifference as to its truth, *and it must be made with intent to deceive.*

Myrtle Apartments, 258 N.C. 49, 52, 127 S.E. 2d 759, 761 (emphasis added). Plaintiff itself relies on *Ragsdale*, which correctly defines the elements of fraud as follows:

> While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud

> which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) *made with intent to deceive*, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (emphasis added). *Britt*, *Johnson* and *Odom* may be interpreted to have expanded the definition of fraud to the point where the essential element of the defendant's intent to deceive is only implicitly recognized at best. To the extent that the statements of the elements of fraud in *Britt*, *Johnson*, *Odom* and other cases omit the essential element of the intent to deceive in a definition of fraud, they are hereby disavowed.

[4] The record and transcript in the case sub judice reveal that Thomas Evans had neither knowledge *nor* intent to deceive plaintiff when he signed and swore to Applications for Payment Nos. 2 and 3. He had no scienter. We therefore affirm the Court of Appeals, but not for the reasons stated in its opinion. We hold that the evidence presented to the jury was insufficient to support a finding that Thomas Evans intentionally committed a fraud.

[5] We are satisfied, however, that the same evidence was sufficient to support the submission of the issues to the jury based on Thomas Evans' gross negligence in subscribing and swearing to Applications for Payment Nos. 2 and 3.

As discussed above, an Application for Payment is a solemn document. It is intended to induce reliance in two ways: (1) it has the formal elements of trustworthiness, since it is a sworn statement that must be notarized, and (2) its language requires the submitting contractor to certify expressly that the work has been done. The *amicus curiae* notes that such documents keep the overall cost of a construction project down because the contractor need not spend time and money checking work with which he may not be familiar and as to which he may not have the same expertise as the subcontractor. The documents also speed payment to the party who does the work. The contractor's reliance upon a sworn Application for Payment protects the small subcontractor who often needs fast payment because he lacks the means to finance the contractor. In short, the content and form of the document employed here imply some knowledge on the part of the ap-

plicant that the work has been done. One who has *no* knowledge cannot certify that work *has been done* "to the best of his knowledge, information and belief."

The record and transcript in the case sub judice demonstrate that knowledge was neither had nor sought by the applicant. By his own testimony, defendant Thomas Evans admitted that when he signed and swore to the Applications for Payment, he had no knowledge of the breakdown of equipment for which payment was sought. He did not know whether the specialty items had actually been purchased and stored in the bonded warehouse. He asked no questions of his estimator and project manager, William Jay Gould. Defendant argues that he had no reason to ask any specific questions of Gould, since the application filled out by Gould in his own handwriting was the latter's representation to Thomas Evans as to work done and materials stored as of that date. He asserts, correctly, that officers and directors of corporations are permitted to rely on a trusted employee. *Minnis v. Sharpe*, 202 N.C. 300, 162 S.E. 606 (1932). *See also Air Traffic Conf. of America v. Marina Travel*, 69 N.C. App. 179, 316 S.E. 2d 642 (1984). He points out that the evidence at trial from both plaintiff and defendants was to the effect that Gould was known to be honest and trustworthy. We agree with the Court's statement in *Minnis* that:

> Directors are not . . . insurers of the honesty and integrity of the officers and agents. Neither are they required to personally supervise all the details of business transactions.

Minnis, 202 N.C. at 303, 162 S.E. at 607. The Court went on to state, however, that:

> "Directors and managing officers of a corporation are deemed by the law to be trustees, or *quasi*-trustees, in respect to the performance of their official duties incident to corporate management and are therefore liable for either wilful or negligent failure to perform their official duties."

Id. (quoting *State v. Trust Co.*, 192 N.C. 246, 248, 134 S.E. 656, 657 (1926)). In *Minnis*, the Court found no error in the following portion of the trial court's instruction to the jury:

> "The directors are liable if they suffer the corporate property to be lost by gross inattention to the duties of their trust and are not relieved of liability because they have no actual knowledge of wrong doing if that ignorance is the result of gross negligence."

Id. See Mills v. Mills, 230 N.C. 286, 52 S.E. 2d 915 (1949) (corporate president could be held individually liable for a fraudulent statement by the corporation if he was consciously ignorant of whether a material fact was true or false).

Where a sworn Application for Payment to the effect that work has been done "to the best of [the contractor's] knowledge, information and belief" is submitted, some knowledge on the part of the signatory is implied. This knowledge is easily obtainable by the simple expedient of questioning the project manager in charge of the particular construction job. In the light of the salutary purposes of the Application for Payment, Thomas Evans' total lack of knowledge and his failure to inquire of Gould concerning the specifics in the Applications for Payment to which he subscribed and swore was sufficient evidence to support the submission to the jury of the issues as to gross negligence. If the applicant truly has *no* knowledge, he should refrain from certifying that the work has been done. If, as here, he certifies that work has been done (or, as in this case, that items had been purchased and stored) "to the best of his knowledge, information and belief," such certification implies knowledge on his behalf and is sufficient to take the case to the jury on the issue of gross negligence.

II.

We turn now to review the trial court's instruction to the jury on whether the individual defendants acted with such gross negligence as to permit a fraud. The Court of Appeals concluded that it was both incomplete and inaccurate. We disagree in part.

[6] The trial court took its instruction on the issue almost verbatim from *Minnis v. Sharpe*, 202 N.C. 300, 162 S.E. 606, but omitted the following limiting language from that decision:

> Directors are not guarantors of the solvency of a corporation, nor are they insurers of the honesty and integrity of the officers and agents. Neither are they required to personally supervise all the details of business transactions. . . .

. . . .

> Ordinarily, of course, directors would not be charged with notice by virtue of desultory, occasional or disconnected acts of mismanagement or fraudulent transactions, but in cases where mismanagement and fraud has been persistently and continuously practiced for substantial periods of time a jury must determine whether the directors, in the exercise of that degree of care which the law imposes, should have known of such practices and that persons dealing with the corporation would be injured thereby.

Id. at 303, 162 S.E. at 607. The Court of Appeals concluded that these passages should have been included in the trial court's instructions to the jury. This conclusion is in error. The quoted passages pertain to vicarious liability of directors for the acts of agents and employees. Here, defendants were being sued for their own alleged personal misrepresentations, not the alleged misrepresentations of their project manager. The representations made in Applications for Payment Nos. 2 and 3 were those of Thomas Evans, not the project manager, William Jay Gould. The trial court was not required, therefore, to instruct the jury on whether directors are guarantors or insurers of their agents.

[7] The trial court gratuitously added the following to its instruction:

> It is immaterial whether the defendants, Mr. or Mrs. Evans[,] were cognizant of the fact that the equipment was not stored as certified. The law charges them with actual knowledge of the company's affairs and holds them responsible for damages sustained by others by reason of their negligence, fraud or deceit.

As the Court of Appeals correctly determined, this portion of the instruction was erroneous because it suggested to the jury that directors and managing officers are chargeable with an omniscient knowledge of the company's affairs and are liable for damages to third parties resulting from simple negligence. This is not the law in North Carolina. *See Minnis v. Sharpe*, 202 N.C. 300, 162 S.E. 606. This portion of the Court of Appeals' opinion is affirmed.

[8] The trial court's instructions and, concomitantly, the issues submitted to the jury concerning Brenda Evans contained a further flaw. The record and transcript reveal that Brenda Evans signed Applications for Payment Nos. 2 and 3 only in her capacity as a notary. In so doing, she was not acting in the capacity of an officer of Evans, Inc., or certifying the applications individually. Apparently she had no knowledge that she was an officer of the corporation until this suit was filed. There is no evidence that she had the responsibility of verifying the Applications for Payment or that she made any attempt to do so. A notary is not liable for damages where the notarization itself is correct, regardless of whether the representation in the document notarized is true or false. *See* 58 Am. Jur. 2d *Notaries Public* § 23 (1971). A notary does not swear to the truth of the information in the document being notarized. *Saevoff v. Steffen*, 123 Wash. 226, 212 P. 158 (1923). *See also Nelson v. Comer*, 21 N.C. App. 636, 205 S.E. 2d 537 (1974). Since Brenda Evans acted only in her capacity as a notary, we hold that she should not have been included as a named individual defendant in the issues submitted to the jury or in the trial court's instructions on those issues.

The result is as follows: since the evidence presented at trial was insufficient to support the jury's finding that Thomas Evans committed an intentional fraud by submitting Applications for Payment Nos. 2 and 3 to plaintiff, a new trial on this issue is not warranted. Accordingly, because of the absence of fraud, plaintiff's claim of an unfair trade practice under N.C.G.S. § 75-1.1 is without basis. Since the evidence was sufficient, however, to support the jury's finding of gross negligence on the part of Thomas Evans individually, that portion of the Court of Appeals decision stands. Because Brenda Evans acted only in her capacity as a notary, she should not have been a named individual defendant in the issues submitted to the jury or in the trial court's instructions on those issues. That portion of the judgment is therefore vacated. The case is remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

STATE OF NORTH CAROLINA v. KENNETH ODELL HUCKS AND GENERAL SAM MILLER

No. 542A86

(Filed 8 December 1988)

1. **Constitutional Law § 40— murder—guilty plea—second counsel not appointed—error per se**

The trial court erred in a prosecution for first degree murder by accepting a guilty plea and conducting the sentencing hearing without appointing additional counsel in a timely manner pursuant to N.C.G.S. § 7A-450(b1) after defendant was charged with murder. N.C.G.S. § 7A-450(b1) is clearly mandatory and its mandate is directed to the trial court; when a trial court acts contrary to a statutory mandate, its error is not waived by defendant's failure to object at trial. The Supreme Court declined to engage in any kind of harmless error analysis.

2. **Criminal Law § 92— murder—charges against two defendants joined—one subsequent guilty plea—trial of one and sentencing of another with same jury—error**

The trial court abused its discretion in a prosecution for first degree murder by denying defendant Hucks' motion to sever where Hucks and Miller were being jointly tried for the same capital offense; Miller changed his plea to guilty after the jury was impaneled; the court denied Hucks' renewed motion for severance; and the court proceeded with the jury simultaneously considering the sentencing of Miller and the guilt or innocence of Hucks. Hucks was entitled to have the evidence against him weighed objectively and attentively and to have his guilt or innocence determined beyond a reasonable doubt by a jury that was not distracted by the heavy burden imposed by our capital punishment statutes for Miller's benefit.

APPEALS of right by the defendants from judgments entered by *Bowen, J.*, at the 7 July 1986 Criminal Session of Superior Court for ROBESON County, sentencing defendant General Sam Miller to death and defendant Kenneth Odell Hucks to life imprisonment for murder in the first degree. Heard in the Supreme Court on 12 September 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, and Staples S. Hughes, Assistant Appellate Defender, for the defendant appellant Miller.

Donald W. Bullard for the defendant appellant Hucks.

MITCHELL, Justice.

The defendants were brought to trial upon proper indictments charging them with first degree murder and entered pleas of not guilty. The charges against the defendants were joined for trial over timely objections. After a jury was impaneled, the defendant General Sam Miller changed his plea to one of guilty as charged. Over the objection of the defendant Kenneth Odell Hucks, the proceeding in the trial court was thereafter conducted as a trial of Hucks on his plea of not guilty and as a simultaneous sentencing proceeding for Miller. The jury found Hucks guilty as charged. Neither Hucks nor the State presented any additional evidence during the subsequent sentencing proceeding against Hucks.

Miller testified on his own behalf for sentencing purposes after the verdict was returned against Hucks. The jury then recommended death for Miller and life imprisonment for Hucks, and judgments were entered accordingly by the trial court on 18 July 1986. The defendants appealed to this Court as of right.

As we conclude that reversible errors occurred in the trial court, each defendant must receive a new trial. Only a partial summary of the evidence presented in the trial court is necessary in light of the issues we find determinative on appeal.

The State's evidence tended to show that General Sam Miller came to North Carolina on or about 29 September 1985. Arriving in Fayetteville in a stolen automobile, he met Kenneth Odell Hucks, and the two became temporary partners in crime. On the afternoon of 5 October 1985, the defendants Miller and Hucks were traveling through Robeson County in the automobile stolen by Miller. Miller parked the car near a jewelry store owned and operated by Earl Allen in the town of St. Pauls. The defendants walked over to the store and began looking in the display window. A customer inside the store saw them looking in and also saw Hucks enter the store, stay momentarily, and then join Miller outside. The customer then left the store, but saw both defendants enter the store as she was driving away.

Allen had just spoken by telephone with his wife and was alone in the store when the defendants entered at around 3:45 p.m. Miller, armed with a .32-caliber pistol, demanded Allen's

money from the cash register. Allen refused Miller's demand, and Miller raised the pistol and fired a bullet into Allen's forehead. After Allen fell to the floor mortally wounded, Miller took more than $1,000 from Allen's pockets and the cash register, while Hucks stuffed hundreds of dollars worth of watches from a display case into paper bags. Allen died six days later from the gunshot wound to his brain, never regaining consciousness.

The defendants also were identified by two other witnesses who walked into the store just moments after the shooting and saw the defendants coming from behind a counter. Allen was found by these witnesses on the floor behind the counter. One of the witnesses then went after the defendants and saw them get in a car and drive away.

Miller was arrested early the next morning after he ran a roadblock and wrecked the car he was driving in an ensuing high-speed chase. Hucks was arrested after Miller assisted investigators in locating him. Each defendant still had proceeds of the jewelry store robbery in his possession when arrested.

APPEAL OF MILLER

[1] Miller was initially charged with felonious assault and armed robbery. At his first appearance on those charges in District Court on 6 October 1985, he was found indigent and an attorney was appointed to represent him. That appointment was renewed after Miller was charged with first degree murder by a warrant issued on 11 October 1985, after Allen's death. Miller never received nor requested the appointment of additional counsel to assist him in this capital case.

On appeal, Miller assigns as error the failure to appoint additional counsel on his behalf in a timely manner. We agree that allowing the capital case against Miller to proceed without the appointment of additional counsel to assist him violated the mandate of N.C.G.S. § 7A-450(b1). This denial of Miller's statutory right to additional counsel was prejudicial error per se. Therefore, his plea of guilty must be stricken, the verdict and judgment against him vacated and a new trial held.

N.C.G.S. § 7A-450(b1), applicable to indictments returned on or after 11 July 1985, provides in pertinent part: "An indigent person indicted for murder may not be tried where the State is

seeking the death penalty without an assistant counsel being appointed in a timely manner." The indigent defendant Miller was indicted on 10 March 1986 for first degree murder and brought to trial on 8 July 1986. A jury was impaneled, the defendant entered a guilty plea and a sentencing proceeding resulting in a sentence of death was held, all without the appointment of assistant counsel. Such critical stages of a capital prosecution certainly fall within the statute's mandate that an indigent cannot be tried for his life without timely appointment of assistant counsel.

The statute gives a right to assistant counsel which is not to be confused with the fundamental right of criminal defendants to effective assistance of counsel guaranteed by our state and federal constitutions. On its face, the statute provides a right to counsel in addition to constitutional requirements, and reflects a special concern for the adequacy of legal services received by indicted indigents who face the possibility of the death penalty. There is no reason to believe, however, that the statute embodies such a different and limited notion of assistance of counsel that it would not apply to all of the post-indictment critical stages of a criminal prosecution to which the more basic and limited constitutional right to effective assistance applies.

Any reasonable notion of timely assistance of counsel must recognize that a criminal defendant's case can be won or lost before trial. The State's interest in a fair, adequate and error-free criminal process also attaches well before the actual trial. The defendant's counsel, whether one or the two which the General Assembly has seen fit to require for indigent defendants in capital cases, must have a reasonable amount of time in which to investigate and prepare a defense. *See State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). N.C.G.S. § 7A-450(b1) therefore mandates appointment of assistant counsel "in a timely manner" which ensures under the particular circumstances of a case that both attorneys representing the indigent defendant have time to effectively prepare for trial. In most cases, that mandate would require appointment of assistant counsel as soon as practicable after indictment of the indigent defendant on a capital charge.

The trial transcript and record on appeal in this case reveal no discussions of N.C.G.S. § 7A-450(b1) and are devoid of any request for assistant counsel by the defendant or offer by the trial

court to appoint assistant counsel. While possible explanations for those omissions are not at issue, we note that subsection (b1) of the statute was still relatively new when this case arose and that prior to its effective date questions concerning the appointment of additional counsel generally arose upon a motion by the defendant and were within the trial court's discretion. Moreover, subsection (b1) of the statute, as previously discussed, does not expressly indicate when the trial court's duty to appoint assistant counsel arises.

The State in this case contends that the absence of any discussion relating to the appointment of assistant counsel amounts to the defendant's waiver of the statutory mandate by failure to assert it at trial. The State, in its brief, equates the mandate of N.C.G.S. § 7A-450(b1) with statutory rights which have been held waived when not asserted by defendants at trial, including the right to a polling of the jury, N.C.G.S. § 15A-1238, to joinder, N.C.G.S. § 15A-926, and to discovery, N.C.G.S. § 15A-902 and § 15A-903. Those statutes, however, are easily distinguished from N.C.G.S. § 7A-450(b1), because they expressly require a motion by the defendant before he is entitled to the rights they guarantee. There is no such requirement contained in the language of N.C.G.S. § 7A-450(b1).

Nor is this case controlled by *State v. Tindall*, 294 N.C. 689, 242 S.E. 2d 806 (1978), cited by the State, in which we held that a trial court has no obligation to assist a defendant when he has attempted to use the wrong statutory procedure for compelling the attendance of out-of-state witnesses. Unlike the mandatory appointment of assistant counsel in this case, the procurement of witnesses is clearly an area where the trial court has no reason to act until it is prompted to do so by the litigants.

The statutory mandate at issue in this case also does not come under the broadly stated rule found in *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, *reh'g denied*, 451 U.S. 1012 (1981), where we held that the defendant had waived his right to make an opening statement to the jury by not raising the issue at trial, even though N.C.G.S. § 15A-1221(a)(4) provided that a defendant "must be given the opportunity" to make such a statement. In that case we stated:

> It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. . . . It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. . . . In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court.

301 N.C. at 291, 271 S.E. 2d at 294 (citations omitted).

McDowell is distinguishable from the present case. Unlike the mandate contained in the statute before us in this case, the terms of the statute in *McDowell* required only an "opportunity" for a defendant to make an opening statement to the jury and, thereby, made an opening statement an option to be chosen or rejected by the defendant. It remained the defendant's responsibility to decide whether to make an opening statement. There was no mandate in that statute that a defendant "may not be tried" without an opening statement.

In contrast, N.C.G.S. § 7A-450(b1) is clearly mandatory, and its mandate is directed to the trial court. It states simply but unequivocally that an indigent facing a possible death penalty may not be tried unless an assistant counsel has been appointed in a timely manner. The statute requires the trial court to appoint assistant counsel as a matter of course when an indigent is to be prosecuted in a capital case. It neither expressly nor impliedly places any responsibility on the defendant to ask for assistant counsel.

When a trial court acts contrary to a statutory *mandate*, the error ordinarily is not waived by the defendant's failure to object at trial. *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985). We also have recognized that a trial court sometimes has a duty to act *sua sponte* to avoid statutory violations; for example, the trial court must exclude evidence rendered incompetent by statute, even in the absence of an objection by the defendant. *State v. McCall*, 289 N.C. 570, 223 S.E. 2d 334 (1976). In so holding, we have viewed such mandatory statutes as legislative enactments of public policy which require the trial court to act, even without a request to do

so, much like the public policy favoring fair and error-free capital trials which is served by N.C.G.S. § 7A-450(b1).

We have said in *McDowell* and elsewhere, however, that any right, constitutional or otherwise, can be waived if the waiver is made knowingly and intelligently. A defendant must be allowed under the Sixth Amendment to reject representation by counsel, *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975), and also to refuse the benefit of assistant counsel provided for by N.C.G.S. § 7A-450(b1). However, there was no such refusal here.

The State would have us infer waiver in the present case from the defendant's silence. Given the mandatory nature of the statute and the public policy it serves, we can find no prerequisite duty of the indigent defendant to request assistant counsel in this capital case and cannot infer waiver of the requirement of assistant counsel from the defendant's silence.

The State next contends that even if the mandate of the statute was violated, the error could not have been prejudicial and, therefore, a new trial is not required. We decline to engage in any kind of harmless error analysis under N.C.G.S. § 15A-1443(a) or § 15A-1443(b) in this case. We can only guess what difference a second attorney might have made to this defendant in the preparation of his defense, in his decision as to whether to change his plea to guilty and in the level of representation he received before the trial court. We are especially reluctant to engage in such speculation where, as here, the legislature has chosen to remove that question from the discretion of the courts, changing well established prior practice.

This appeal presents a problem similar to that which this Court faced in a series of cases culminating in the rule last explained in *State v. Mitchell*, 321 N.C. 650, 365 S.E. 2d 554 (1988). In those cases, it was held that a trial court's refusal to allow all of a defendant's attorneys to participate in final arguments to the jury violated N.C.G.S. § 84-14, deprived the defendant of a substantial right, and resulted in potential prejudice which was beyond adequate measurement. We indicated that we could only have speculated as to what effect arguments by additional attorneys might have had, and we declined to do so. We concluded that the reasons against such speculation were common to all cases where the capital defendant had been deprived of his sub-

stantial legal right to have all of his counsel address the jury and held that such error constituted "prejudicial error per se." 321 N.C. at 659, 365 S.E. 2d at 559. In this case, where the defendant was deprived of his substantial legal right to assistant counsel not only during closing arguments but at all stages of the capital prosecution, our speculation would be even more unreliable than that which we refused to undertake in *Mitchell.*

For the foregoing reasons, we conclude that the failure to appoint additional counsel for the defendant Miller in a timely manner violated the mandate of N.C.G.S. § 7A-450(b1) and was prejudicial error per se. The trial court erred in accepting Miller's guilty plea and in conducting the sentencing proceeding against him, as the defendant had been denied the level of assistance of counsel required by the statute. Therefore, Miller's guilty plea must be stricken, the judgment sentencing him to death vacated and his case remanded for a new trial.

APPEAL OF HUCKS

[2] The first degree murder charges against Hucks and Miller were joined for trial upon the prosecutor's motion pursuant to N.C.G.S. § 15A-926. Hucks objected and made a timely motion for severance, which was denied. After the jury was impaneled and Miller was permitted to change his plea from not guilty to guilty, with the jury removed from the courtroom, Hucks again moved for severance and a mistrial. Those motions were denied.

Hucks also objected to informing the jury of Miller's guilty plea, while Miller and the prosecutor insisted that the jury had to be so instructed if the cases against the defendants were to be considered simultaneously by the jury as a sentencing proceeding against Miller and a trial to determine the guilt or innocence of Hucks. Hucks continued to request severance and argued that he could not receive a fair trial from such a proceeding. The trial then proceeded after the trial court instructed the jury that Miller had entered a plea of guilty to the first degree murder for which both defendants were charged and that the jury was to simultaneously consider the evidence to be introduced as weighing upon both the appropriateness of death or life imprisonment for Miller and upon the issue of the guilt or innocence of Hucks.

On appeal, Hucks argues that failure to sever after Miller entered his guilty plea so tainted the proceedings against Hucks that a fair trial became impossible. We agree.

The initial joinder of Miller and Hucks for trial was proper under N.C.G.S. § 15A-926(b)(2)(a), which provides for such joinder upon motion of the prosecutor "[w]hen each of the defendants is charged with accountability for each offense." The joinder in this case complied with that statute, as each of the defendants was charged with the first degree murder of Allen. Moreover, public policy and concern for efficient administration of justice compel joinder under such circumstances as the rule rather than the exception. *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986).

N.C.G.S. § 15A-927(c)(2), however, requires the trial court, upon motion, to grant a severance of defendants when necessary to promote a fair determination of the guilt or innocence of one or more defendants. No matter how strong the public policy interests in joinder, they cannot stand in the way of a fair determination of guilt or innocence. *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982).

The trial court's decision as to whether to grant a motion for severance under the statute is an exercise of discretion, and its ruling will not be disturbed on appeal unless the defendant demonstrates an abuse of discretion which effectively deprived him of a fair trial. *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). On the peculiar facts presented by this appeal, we must conclude that such an abuse occurred.

When Miller changed his plea from not guilty to guilty after the jury had been impaneled, the trial court was presented with a novel dilemma not resolved by our statutes. A jury had already been impaneled for the trial and sentencing of both defendants for the same murder, and most of the State's evidence would be the same as to both defendants. Severing the cases against the two defendants at that point would have required essentially two duplicate proceedings, at considerable expense of judicial resources and public inconvenience.

The trial court's dilemma was not resolved by N.C.G.S. § 15A-2000 or § 15A-2001. While N.C.G.S. § 15A-2000(a)(2) provides that "[i]f the defendant pleads guilty, the sentencing pro-

ceeding shall be conducted before a jury *impaneled for that purpose*," (emphasis added) that language does not require the impaneling of a new jury for sentencing purposes when a defendant pleads guilty after a jury has been impaneled to pass upon his guilt or innocence. Nor was that the intent of the separate provisions of N.C.G.S. § 15A-2001 for guilty pleas and impaneling juries for the purpose of sentencing in capital cases. The mere fact that a defendant pleads guilty after a jury has been impaneled to determine his guilt or innocence in a capital case does not, standing alone, make it error for the same jury to be used for the sentencing proceeding against him.

Here, the trial court attempted to conserve judicial resources by using one jury while simultaneously conducting the sentencing proceeding against Miller and the trial of Hucks on his plea of not guilty. The trial court attempted to overcome any prejudice to Hucks arising from Miller's guilty plea by giving the following instruction to the jury:

> Members of the jury, you will not allow the development in the case of State versus General Sam Miller to affect you in any way in your deliberation and your determination of the case between the State and Kenneth Odell Hucks.

Given the unique situation involved, however, the trial court's instruction was inadequate to guarantee that Hucks would receive a fair determination of his guilt or innocence by an unbiased and adequately attentive jury.

An instruction similar to that given by the trial court is appropriate in a non-capital joint criminal trial when one defendant pleads guilty. Under those circumstances, however, the case against the co-defendant pleading guilty will be *entirely* removed from the consideration of the jury without informing the jury of the guilty plea, since the jury has no function in sentencing in non-capital cases. *See N.C.P.I.*, Criminal, 101.41 (1979). Here, however, two defendants were being jointly tried for their lives for the same murder, and the jury was told at the outset that Hucks' co-defendant had entered a plea of guilty. The jury was then required to determine whether one admittedly guilty co-defendant should live or die and, on the same evidence, simultaneously determine the guilt or innocence of the other. Such a

proceeding was hopelessly tainted against Hucks who had entered a plea of not guilty and maintained his innocence.

Hucks was entitled to have the evidence against him weighed objectively and attentively and to have his guilt or innocence determined beyond a reasonable doubt by a jury that was not distracted by the heavy burden imposed by our capital punishment statutes for Miller's benefit. The uniqueness of the jury's life-or-death function in a capital sentencing proceeding has led to the requirement that the trial court conduct "a *separate* sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." N.C.G.S. § 15A-2000(a)(1) (1983) (emphasis added). We have recognized that such a proceeding places upon the jury the heavy responsibility of subjectively assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. *State v. Goodman*, 298 N.C. 1, 34, 257 S.E. 2d 569, 590 (1979).

Due to the unique and distinct factors the jury was required to consider as to each co-defendant, it could not adequately fulfill its duties to both of them in the simultaneous proceedings. The cases against the defendants should have been severed, with one of the cases removed from the concern of the jury, and another jury impaneled for either Miller's sentencing or Hucks' trial.

We conclude that since the defendants were being jointly tried for the same capital offense when Miller changed his plea to guilty, the trial could not continue as both a sentencing proceeding as to Miller and as a trial to determine the guilt or innocence of Hucks. Therefore, on these peculiar facts, we conclude that the trial court abused its discretion by denying Hucks' motion to sever made after Miller changed his plea to guilty. Since we have concluded for the foregoing reasons that the trial court's actions in failing to sever after Miller's guilty plea and in informing the jury of that plea denied Hucks his opportunity for a fair determination of his guilt or innocence by an unbiased jury, Hucks must receive a new trial.

Each defendant has raised additional issues on appeal. Because the issues we have previously decided herein are dispositive, it is unnecessary to address those additional issues.

For the foregoing reasons, each defendant must receive a new trial.

New trial.

STATE OF NORTH CAROLINA v. MERRITT WILLIAMS DRAYTON

No. 529A87

(Filed 8 December 1988)

1. **Homicide § 15.5— murder prosecution—testimony as to cause of death—relevant**

The trial court did not err in a first degree murder prosecution by allowing a pathologist to testify regarding the victim's death by asphyxiation, even though the jury found defendant guilty on the theory of felony murder, because the case was submitted on both felony murder and premeditated and deliberate murder and the testimony was relevant for the purpose of showing the manner and means by which the killing was carried out.

2. **Criminal Law § 135.7— murder—instructions on sentencing procedure—no error in context**

The trial court did not err in a first degree murder prosecution by instructing the jury that "this [sentencing] proceeding may be conducted before you and most likely will or another jury." When the instruction is read in its full context, the jury could only gather that a sentencing hearing would not be held until and unless the defendant was first convicted of murder in the first degree and that, if a sentencing hearing was required, it would most likely be conducted before them.

APPEAL by defendant from judgment sentencing him to life imprisonment for conviction of murder in the first degree, said judgment imposed by *Freeman, J.*, at the 27 July 1987 session of Superior Court, FORSYTH County. Heard in the Supreme Court 10 October 1988.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

Upon a proper bill of indictment, defendant was tried and convicted of murder in the first degree and sentenced to life imprisonment. We conclude that defendant had a fair trial and find no error.

The state's evidence showed that on 10 December 1985 Blanche Bryson was sixty-five years old and lived alone in Winston-Salem. She owned a television set which she kept in the den of her home. She also owned a 1972 Buick Skylark automobile. On 10 December 1985, the date on which she was last seen alive, she had attended a social club meeting with several of her friends. At the club meeting $350 was collected and given to Mrs. Bryson for the club's expenses in connection with a Christmas party that had been planned for later that month.

Mrs. Harper was to go by Mrs. Bryson's house later that evening to pick her up to go to a party. Sometime around 7:30 Mrs. Harper and her husband went to Mrs. Bryson's home. As they arrived, they saw Mrs. Bryson's Buick Skylark car backing out of the driveway. As the car entered the street, it swerved on the road and Mrs. Harper wondered who was driving the car. She thought that Mrs. Bryson was having car trouble and attempted to follow the car but lost sight of it. She went on to the party and found that Mrs. Bryson was not there. Mrs. Harper thereupon attempted to call her, but the line was busy. Mr. and Mrs. Harper returned to the Bryson home and noticed that Mrs. Bryson's car was not there. After knocking on the door and receiving no answer, they went to the home of a neighbor and explained what had happened. The neighbor, Bernice Black, called Jeffrey Bryson, Mrs. Bryson's son. Mrs. Black and the Harpers went to Mrs. Bryson's home to meet Jeffrey. Jeffrey had a key to the house and he opened the door and found the body of his mother lying facedown on the living room floor. Mrs. Black, a private-duty nurse, checked Mrs. Bryson's pulse and said, "I think she's dead." Jeffrey described the condition of the house as looking as if someone had just ransacked it. Things were out of place and had been knocked over. The kitchen floor was littered and the TV had been moved from the den to the middle of the hallway. Being unable to get a dial tone on his mother's telephone, Jeffrey went to a neighbor's home and called the police, who arrived shortly thereafter.

About 9:38 that evening, Officer J. W. Pegram found Mrs. Bryson's Buick Skylark, containing, among other things, several clothing items, parked about a mile from her residence.

Officer J. D. Cook testified that when he arrived at the victim's house Mrs. Bryson's body was lying on the floor with an electrical cord wrapped around her neck. Dr. Wilson Russell, who performed the autopsy, testified that her death was caused by strangulation. Sergeant T. A. Freeland found a brown toboggan near Mrs. Bryson's body.

Several months later Detective Theresa Hicks received a message from the defendant, who was at that time in the Forsyth County Jail on unrelated charges. She and another officer went to the jail and the defendant told her that he wanted to talk with her about the Bryson murder. After being given his constitutional warnings, the defendant made an incriminating statement in which he detailed how he and a man known as the "Lieutenant" broke into the Bryson home for the purpose of stealing. They moved the TV from the den into the hallway and were preparing to take it from the dwelling when Mrs. Bryson entered the house. The Lieutenant grabbed Mrs. Bryson and threw her to the floor. While the defendant held Mrs. Bryson's hands and arms, the Lieutenant proceeded to choke her with an electrical cord. They hurriedly left the scene after the Lieutenant went through Mrs. Bryson's pocketbook and took something from it. The defendant left his brown toboggan in Mrs. Bryson's house.

[1] The defendant presents two issues for our determination. First he contends that the court committed reversible error by allowing the pathologist, Dr. Russell, to give the following testimony:

Q. Did you determine a cause of death?

A. Yes.

Q. What was that?

A. Cause of death is asphyxia due to ligature strangulation.

Q. Now, tell us what that means in layman's terms.

A. Okay. That means that the deceased died as a result of lack of oxygen because of obstruction of airway passages—airway and/or vascular passages from the neck. . . .

. . . .

Q. How long would it take a person, though, to die?

MR. MAUNEY: Objection.

MR. REDDEN: I object, Your Honor.

COURT: Overruled.

WITNESS: Overruled?

A. It would—that—again, I can't really say, but that would take—it may take a few more minutes.

MR. MAUNEY: Move to strike, Your Honor, if he can't really say.

COURT: Motion allowed.

Q. In this period while the person was being strangled, what would the body be going through during that period?

MR. MAUNEY: Objection.

COURT: Overruled. Go ahead.

A. Well, again that's—that's hard to say. The body would be —physiologically would be going through—

MR. MAUNEY: Again move to strike, Your Honor.

COURT: Motion denied. Go ahead.

A. The body would be going through the effects of a decreasing lack of oxygen which has variable effects on a person.

Q. Would there be any pain associated with that?

MR. MAUNEY: Objection.

COURT: Overruled.

A. Just from the sheer lack of oxygen probably not pain but a tremendous sense of anxiety or—

MR. MAUNEY: Object and move to strike, Your Honor, as not responsive.

COURT: Overruled. Go ahead.

Q. Go ahead.

A. A sense of urgency, frenzy, anxiety from the effects of lack of oxygen probably.

Defendant contends that this testimony is completely irrelevant to any issue properly before the jury and therefore he should be awarded a new trial. However, we conclude that the admissibility of this testimony is controlled by *State v. Prevette*, 317 N.C. 148, 345 S.E. 2d 159 (1986). In *Prevette*, similar testimony was offered. This Court found that the manner and means by which the killing was carried out, including the force used and its brutal circumstances, constituted substantial evidence to be considered by the jury in determining whether the killing was premeditated and deliberated. *Prevette* was a case also involving the killing of the victim by asphyxiation, the victim being tightly bound hand and foot at the time.

While it is true that in the instant case the jury found the defendant guilty upon the theory of felony murder, the case was submitted to the jury on both the felony murder theory and premeditated and deliberate murder. The testimony of Dr. Russell was competent and admissible and was relevant for the purpose of showing the manner and means by which the killing was carried out with respect to the issue of whether the killing was a premeditated and deliberate murder. *State v. Prevette*, 317 N.C. 148, 345 S.E. 2d 159.

[2] Last the defendant argues that the trial judge erred in his charge to the jury. The challenged instruction is:

> Now, as I've told you before, the Defendant is charged with first-degree murder; and in the event that the Defendant is convicted of murder in the first-degree, the Court will conduct a separate sentencing proceeding to determine whether the Defendant should be sentenced to death or life in prison.
>
> This proceeding may be conducted before you and most likely will or another jury. It will be conducted, if necessary, as soon as practical after any verdict of guilty of first-degree murder is returned. If that time comes, you will receive separate sentencing instructions.

The defendant argues that the judge in the above instructions expressed an opinion, in violation of N.C.G.S. § 15A-1232. We disagree. Challenges to the trial court's instructions require the appellate court to review the charge contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. *State v. McWilliams*, 277 N.C. 680, 178 S.E. 2d 476 (1971). Here the court inadvertently used the words "and most likely will" in the sentence: "This proceeding may be conducted before you and most likely will or another jury." However, when the quoted portion of the charge is viewed in its full context, we conclude no error was committed by the trial judge. In the first sentence the judge instructed the jury: "*[I]n the event* that the Defendant is convicted of murder in the first-degree, the Court will conduct a separate sentencing proceeding . . . ." Further, immediately after the critical sentence the court stated: "*If that time comes*, you will receive separate sentencing instructions." The court then stated: "It will be conducted, *if necessary*, as soon as practical after any verdict of guilty of first-degree murder is returned." (Emphases added.) We conclude that when the challenged instruction is read in its full context it is clear that the jury could only gather from these instructions that a sentencing hearing would not be held until and unless the defendant was first convicted of murder in the first degree. Further, the words "and most likely will" could only mean to the jurors that if a sentencing hearing was required, it would most likely be conducted before them.

No error.

DENNIS P. TURLINGTON v. ROSA D. McLEOD, GRACE MATTHEWS, FRED McLEOD, LOUISE McLEOD, JOHN SEYMOUR, KAREN SEYMOUR, RONNIE LEE, JUNE ELLEN LEE, MAYLON AVERY, FLOSSIE AVERY, MIKE JOHNSON, KATHY JOHNSON, HARRY MATTHEWS, DEBBIE MATTHEWS, MACKIE WHITE, BETTY BYRD WHITE, CRAIG MATTHEWS, AND DENISE CURRIN MATTHEWS

No. 206PA88

(Filed 8 December 1988)

Highways and Cartways § 12.1— cartway proceeding—meaning of standing timber—cutting for firewood

The term "standing timber" as used in the cartway statute, N.C.G.S. § 136-69, encompasses all growing trees, including trees suitable only for firewood. Therefore, the statute provides for cartways for the purpose of cutting and removing firewood from property to which there is no other access from public roads.

ON discretionary review of the decision of the Court of Appeals, 89 N.C. App. 515, 366 S.E. 2d 542 (1988), vacating a judgment entered 17 October 1986 by *Stephens, J.*, in the Superior Court, HARNETT County. Heard in the Supreme Court on 11 October 1988.

Stewart and Hayes, by Gerald W. Hayes, Jr. and Vernon K. Stewart, for the petitioner appellant.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for the respondent appellee.

MITCHELL, Justice.

The question presented by this case is whether the cartway statute, N.C.G.S. § 136-69*, employs the general meaning of "tim-

* N.C.G.S. § 136-69 states in pertinent part:

If any person, firm, association, or corporation shall be engaged in the cultivation of any land or the cutting and removing of any standing timber . . . to which there is leading no public road or other adequate means of transportation . . . such person, firm, association, or corporation may institute a special proceeding . . . and if it shall be made to appear to the court necessary, reasonable and just that such person shall have a private way to a public road or watercourse or railroad over the lands of other persons, the court shall appoint a jury of view of three disinterested freeholders to view the premises and lay off a cartway, tramway, or railway of not less than 18 feet in width . . . and

ber" and thereby provides for cartways for purposes of cutting and removing firewood from property to which there is no other access from public roads. We conclude that it does. Therefore, we reverse the decision of the Court of Appeals.

The facts are not in dispute. The trial transcript and record on appeal show that the petitioner owns a tract of land of about 21 acres in Harnett County that is surrounded by the lands of the respondents and fronts on no public road. Rosa D. McLeod, the only respondent to perfect an appeal of the judgment of the trial court in this proceeding, owns a tract that lies between rural paved road 2009 and the petitioner's property. The bulk of the McLeod tract lies on the southern side of the petitioner's property. Although the exact distance is not clearly established by the transcript or record, it evidently is less than 100 feet from the petitioner's property to 2009 across Rosa McLeod's property. The lands of the other respondents lie to the north between the petitioner's property and rural paved road 2008, which is about 2,000 feet from the petitioner's property.

The petitioner purchased his property in 1978. At about that time, he obtained permission from Rosa McLeod's late husband, Harvey McLeod, to cross the McLeod property from 2009 to tend hogs on his property. The petitioner built a road over the McLeod property, which he continued to use even after his hog farming ceased in 1980. Harvey McLeod died in 1979. In 1984, Rosa McLeod terminated the petitioner's license to use her property, and complained of too much noise, traffic and litter generated by the petitioner and other users of his property. During some periods since then, the petitioner has had permission from some of the other respondents to use their property for access between his property and rural paved road 2008.

In 1984, the petitioner initiated a cartway proceeding pursuant to N.C.G.S. § 136-68 and § 136-69 involving this same property and Rosa McLeod. The trial court in that action determined that the petitioner was not then entitled to a cartway because he was not using his property for any of the purposes specified by N.C.G.S. § 136-69 and because at that time he had permission

assess the damages the owner or owners of the land crossed may sustain thereby, and make report of their findings in writing to the clerk of the superior court.

from other landowners to use their property as means of access. That judgment was affirmed on appeal. *Turlington v. McLeod*, 79 N.C. App. 299, 339 S.E. 2d 44, *disc. rev. denied*, 316 N.C. 557, 344 S.E. 2d 18 (1986).

The petitioner initiated the present cartway proceeding in the Superior Court, Harnett County, with the filing of a new petition in June 1986. A jury found that the petitioner was entitled to cartway access to his property over the lands of one or more of the respondents. Judgment was entered on that verdict, directing the Clerk of Superior Court for Harnett County to appoint a "jury of view" for laying out the cartway according to the requirements of N.C.G.S. § 136-69.

Only the respondent Rosa McLeod perfected an appeal. She contended, contrary to the jury's verdict, that the petitioner was not using his property for any of the permitted purposes under the statute and that he had access to a public road from his property. The Court of Appeals rejected the respondent's argument that the evidence introduced at trial was insufficient to show that the petitioner's property was without access to a public road. There was sufficient competent evidence at trial to support that finding, the Court of Appeals concluded. The respondent does not raise that issue before this Court, and there is no need for us to address it further.

In addressing the respondent's remaining argument, the Court of Appeals relied on evidence, not disputed on appeal, that most of the marketable timber had been sold from the petitioner's property years before. Some oak and hickory trees suitable only for firewood remain, which the petitioner occasionally fells and saws into firewood as needed by customers. The Court of Appeals, addressing a novel question, concluded that the term "standing timber" as used in the cartway statute does not include trees that are suitable only for firewood. Therefore, it concluded, the evidence of the petitioner's land use presented at trial was insufficient to entitle him to a cartway under the statute, since cutting and removing firewood was the only significant use claimed. Accordingly, the Court of Appeals vacated the trial court's judgment in favor of the petitioner. From that decision, the petitioner sought discretionary review by this Court pursuant to N.C.G.S. § 7A-31, which was allowed by order of the Court dated 30 June

1988. The only question brought forward for our review is whether the Court of Appeals erred in its narrow interpretation of the term "standing timber" as used in N.C.G.S. § 136-69.

The Court of Appeals concluded that since the cartway statute infringes on the common law rights of adjacent property owners, it must be strictly construed. Accordingly, the Court of Appeals applied a narrow definition of the term "timber" drawn from several sources which have limited that term to large trees suitable for cutting into building materials. To strictly construe the cartway statute, the Court of Appeals reasoned, the limited definition of "timber" found in those sources should be applied under the statute. We disagree.

The question presented is one of statutory interpretation, and we are guided by well-settled principles. In the construction of statutes, our primary task is to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise. *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E. 2d 12 (1973). It is equally clear that in our interpretation of statutes in derogation of the common law and of statutes which infringe upon the common law property rights of others, we must strictly construe their terms to encompass no more than is expressly provided. *Candler v. Sluder*, 259 N.C. 62, 130 S.E. 2d 1 (1963). It also is well settled, however, that the rule requiring strict construction does not mean that such statutes are to be stintingly construed to provide less than what their terms would ordinarily be interpreted as providing. Strict construction of statutes requires only that their application be limited to their express terms, as those terms are naturally and ordinarily defined. *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E. 2d 269 (1940). *See also* 82 C.J.S. *Statutes* § 393 (1953). Our task then is to give effect to the legislative intent embodied in the cartway statute by giving its terms their natural and ordinary meanings.

In ordinary usage, the term "timber" includes "growing trees or their wood." Webster's Third New International Dictionary 2394 (1976). *See also* The American Heritage Dictionary of the English Language 1345 (1969). We apply that definition here according to the previously stated principles of statutory construction. Therefore, we conclude that the trees which remain standing

on the petitioner's property are "timber" as that term is ordinarily used and that the petitioner is entitled to a cartway to enable him to cut and remove that standing timber for firewood.

This Court has similarly applied the ordinary and broad definition of the term "cultivation" in determining the scope of another type of land use for which the owner of land is provided access to a public road under the cartway statute. In doing so, we recognized that the statute should be strictly construed and that "cultivation" in a narrow sense means breaking the soil as with a plow. Nevertheless, this Court held that in the ordinary sense in which the term "cultivation" was used in the cartway statute, it included gathering any kind of crop, including apples from trees. *Candler v. Sluder*, 259 N.C. at 65, 130 S.E. 2d at 4. We so held notwithstanding that the apples were simply harvested for family and friends and were not sold commercially.

The respondent and the Court of Appeals base their narrow definition of "timber" on cases and other sources of definitions which we do not find persuasive in the context of our cartway statute and the facts of this case. Among those sources relied upon is the restricted definition of "timber" found in Black's Law Dictionary 1653 (rev. 4th ed. 1968), which would limit the term to trees suitable for producing building materials. That definition was drawn from a distinguishable context, however, and we also note that the word "timber" has been omitted from the current edition of that compilation of words and terms having special legal significance. *See* Black's Law Dictionary (5th ed. 1979).

The Court of Appeals also relied upon *People v. Bolling*, 140 Mich. App. 606, 364 N.W. 2d 759 (1985), in which the Michigan Court of Appeals overturned the felony conviction of a man who had cut down a seven-foot tree from a windbreak on another person's property to use as a Christmas tree. The decision was based on a strict construction of Michigan's timber act, which made it a felony to steal from the property of another "any tree, trees, timber, wood . . ." having a value of more than twenty-five dollars.

The Michigan Court of Appeals—noting that the defendant could have been prosecuted under no less than three Michigan misdemeanor theft statutes—reasoned that the timber act must be narrowly construed for the benefit of the criminal defendant

and accordingly gave narrow effect not only to the term "timber" but to all the other terms in the statute. The terms "any tree," "trees" and "wood" were interpreted as meaning only "timber." The court then looked to cases which defined the term "timber" as it is used in the context of commercial timber contracts and to other cases borrowing the definition from that context. Those cases generally limited the term "timber" to trees suitable for building materials. The court adopted that limited definition for use in the criminal act before it and found that the Christmas tree theft was not covered by the statute.

The *Bolling* court was dealing with peculiar circumstances in a criminal context, and the case is distinguishable from this case on those and other counts as well. Additionally, the court's analysis in *Bolling* was inadequate. The *Bolling* court borrowed the narrow definition of "timber" from the commercial contractual context for application in a criminal statute as if the same meaning of the term was necessarily intended in those different contexts. In our view, the *Bolling* court did not adequately consider whether the public policies and legislative intent underlying the criminal statute might warrant applying a different definition of the term "timber" than that accepted by timber dealers in commercial timber contracts. We believe that statutory interpretation of the term "timber" in differing contexts requires distinguishing legislative intents and other considerations as they might differ in those contexts. 54 C.J.S. *Logs and Logging*, § 2 (1987) ("timber" can have enlarged or limited meaning according to the situation in which it is employed). That was the admonition of *U.S. v. Schuler*, 27 F. Cas. 978 (C.C.D. Mich. 1853) (No. 16,234), also cited in *Bolling*, in which the federal circuit court in Michigan applied a narrow definition of the term "timber" in a federal statute, after ascertaining a congressional intent to use the term as it was used in a commercial context, as the statute was directed against illicit commerce between timber cutters and traders.

The other cases and sources relied upon by our Court of Appeals in this case, like most of those relied upon in *Bolling*, construe the term "timber" in the context of "timber" contracts, "timber" deeds and the "timber" industry, and give the term "timber" the narrow definition applied to it in that industry. It is in that commercial contractual context that the great bulk of cases construing the term have been decided. *See, e.g., Byrd v.*

Sexton, 161 N.C. 569, 77 S.E. 697 (1913) (conveyance of "timber" passes title to all trees capable of being sawed into merchantable lumber); *Wiley v. Broaddus & Ives Lumber Co.*, 156 N.C. 210, 72 S.E. 305 (1911) ("all timber" language in contract did not include worthless timber but only such pine and gum as could be sawed into boards for ordinary purposes).

When interpreting private contracts for the sale of timber, a court must give effect to any trade usage and special definitions of terms understood by both parties, as it is such understanding of the parties that defines the contract, its scope and its enforceability. In the commercial contractual context, "timber" ordinarily may very well have a restricted meaning that excludes firewood, as contractual exploiters of timberland generally have not been in the business of selling firewood. It is another matter, however, to determine the definitions of terms as used in general legislative enactments such as the cartway statute. Such determinations call for broader considerations of public policy and general legislative intent concerning all citizens. As previously noted, interpreting such statutory terms requires according them the definitions ordinarily given them by the general public. *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E. 2d 12 (1973).

Furthermore, when a statute on its face reveals the legislative intent and purpose, its terms are to be given meaning consistent with that intent and purpose. *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968). Our conclusion that the term "standing timber" as used in the cartway statute includes all growing trees is consistent with the legislative intent and purpose which we draw from the face of the cartway statute. The statute, originally enacted in 1798 and amended several times over its long history to provide access for additional types of uses of otherwise inaccessible property, reflects a general legislative policy favoring the practical use of property and its natural resources which otherwise could not be put to such use for lack of road access. The respondent, in her brief, argues that the legislature had a more grandiose intent to open up "large tracts of timber" for construction purposes. The language of N.C.G.S. § 136-69 shows otherwise. It provides that, "If *any person*, firm, association, or corporation shall be engaged in the cultivation of *any* land or the cutting and removing of *any* standing timber, . . ." they may qualify for a cartway. (Emphasis added.) Those

provisions clearly encompass the small landowner, the small harvester of crops and the small timber cutter.

We conclude that the legislature did not intend that only owners of land with timber suitable for construction should be able to realize the practical use and value of their property. Nor do we believe that the legislature intended the cartway statute to favor the cultivator of a small plot of land or the harvester of apples or nuts over the harvester of firewood, a commodity of some economic significance. Allowing this petitioner to make practical use of his property by granting him access to it from a public road for cutting and removing firewood is consistent with the intent of the cartway statute. As we have indicated, that intent is revealed by the statutory language itself and by the various land uses for which the statute provides access.

For the foregoing reasons, we conclude that the petitioner's evidence at trial that he was engaged in cutting and removing firewood from his property was sufficient evidence of use to entitle him to cartway access as provided by N.C.G.S. § 136-68 and § 136-69. Therefore, we reverse the Court of Appeals and remand for reinstatement of the judgment of the trial court.

Reversed.

IN THE MATTER OF LYNETTE H., A MINOR CHILD

No. 252PA88

(Filed 8 December 1988)

Insane Persons § 13— statute defining mental illness as applied to minor—order declaring unconstitutional—entered without jurisdiction

The Court of Appeals erred by affirming a trial court order declaring unconstitutional the statute which governs voluntary admission and discharge of minors from facilities for the mentally ill, N.C.G.S. § 122C-3(21)(ii), where the trial court had already concluded the case or controversy by finding the respondent not mentally ill. The announcement of that determination in open court constituted an entry of judgment, even if a formal written order was not filed until later, and the State lost its right to appeal by failing to give timely notice; furthermore, the trial court then had no case or controversy before it and no jurisdiction to enter the order declaring the statute unconstitutional.

In re Lynette H.

ON discretionary review and appeal of right pursuant to N.C.G.S. § 7A-30(1) from a decision of the Court of Appeals, 90 N.C. App. 373, 368 S.E. 2d 452 (1988), which affirmed an order entered by *Leonard, J.*, in District Court, WAKE County, on 6 August 1987, *nunc pro tunc*, 28 January 1987, declaring N.C.G.S. § 122C-3(21)(ii), the statute which defines "mental illness" as applied to minors, unconstitutional on the ground of vagueness. Heard in the Supreme Court 14 November 1988.

Lacy H. Thornburg, Attorney General, by Wilson Hayman, Assistant Attorney General, for the State, appellant.

Elisabeth P. Clary for respondent-appellee.

Sumner & Hewes, by William E. Sumner and David A. Webster, and Roberts Stevens & Cogburn, P.A., by William Clarke and Glenn S. Gentry, for The Highland Clinic, amicus curiae.

Hunton & Williams, by Christopher G. Browning, Jr., for The North Carolina Civil Liberties Union Legal Foundation, amicus curiae.

Deborah Greenblatt for Carolina Legal Assistance, Inc., amicus curiae.

Abigail English for National Center for Youth Law, amicus curiae.

Albert J. Singer for Durham Child Advocacy Commission, amicus curiae.

Katherine S. Holliday and Anna C. Stowe for The Children's Law Center, amicus curiae.

Jordan, Price, Wall, Gray & Jones, by William R. Shenton, Stephen R. Dolan and Steven Mansfield Shaber, for The North Carolina Hospital Association, amicus curiae.

Adams, McCullough & Beard, by Renee J. Montgomery, for The North Carolina Charter Hospitals, amici curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Julian D. Bobbitt, Jr. and Thomas B. Haller, Jr., for North Carolina Medical Society, North Carolina Psychiatric Association, North Carolina Psychological Association, North Carolina Council of Child and Adolescent Psychiatry, North Carolina Alliance for

the Mentally Ill, National Association of Social Workers—North Carolina Chapter, American Academy of Child and Adolescent Psychiatry, amici curiae.

WHICHARD, Justice.

This is a special proceeding to determine whether the respondent, a minor, is mentally ill and in need of treatment. On 24 January 1987 respondent's parents requested her admission to Holly Hill Hospital, a mental health facility in Wake County (hereafter "the facility"), pursuant to N.C.G.S. § 122C-221 to -224, the statutes governing voluntary admission and discharge of minors from facilities for the mentally ill. A qualified physician determined that respondent suffered from a mental illness and was in need of treatment. She then was admitted to the facility on a temporary basis at the request of her parents. Admission at the request of a minor's parents is a voluntary admission under N.C.G.S. § 122C-221.

On 27 January 1987, within the required ten day period, the District Court, Wake County, held a hearing to determine whether the minor respondent was mentally ill and in need of further treatment at the facility. N.C.G.S. § 122C-223 (1986). The court found that the evidence presented at the hearing did not support a finding of mental illness as defined in N.C.G.S. § 122C-3(21). It specifically ruled in open court as follows: "After a full hearing, this Court finds as a fact that the Respondent is not suffering from a mental condition as defined by Section 122C-3(22) [sic]." The court stated: "I will find that that [*i.e.*, respondent's behavior depicted by the evidence] does not constitute any type of . . . is not due to a mental condition." The State did not enter notice of appeal, either by oral notice at the hearing or by written notice filed within ten days thereof. *See* N.C.G.S. § 1-279 (1983); N.C.R. App. P. 3.

On 6 August 1987, over six months following the hearing, the trial court signed a document entitled "Memorandum Opinion and Order." A notation on the order, following the 6 August 1987 date and apparently in the trial judge's handwriting, states: "Nunc pro tunc Jan. 28, 1987." This order declares that the statutory definition of mental illness as applied to minors, N.C.G.S. § 122C-

3(21)(ii),[1] "must fail for vagueness." It recites that the statute "fails to give . . . a standard that protects against arbitrary and discriminatory action." It further recites: "Minors would therefore be treated differently depending on the draw of the Judge or, for that matter, the attending physician. Such probability is inherently unfair." The State entered notice of appeal from the 6 August 1987 order.

On appeal, the Court of Appeals affirmed the order. *In re Lynette H.*, 90 N.C. App. 373, 368 S.E. 2d 452 (1988). The State entered notice of appeal, pursuant to N.C.G.S. § 7A-30(1), on the ground that the decision of the Court of Appeals involves a substantial constitutional question. It simultaneously petitioned for discretionary review. On 28 July 1988 we allowed discretionary review. For reasons that follow, we now vacate the opinion of the Court of Appeals and remand the case to that court with instructions to vacate the 6 August 1987 order.

As noted, on 27 January 1987 the trial court ruled in open court that respondent was not mentally ill within the meaning and intent of that term as used in N.C.G.S. § 122C-3(21)(ii). Upon that determination, respondent was entitled to be released from the facility.[2] N.C.G.S. § 122C-223(b) (1986) ("If the court finds that these requirements [*i.e.*, mental illness and need for further treatment] have not been met, it *shall* order that the minor be released." (Emphasis added.)). The announcement of that determination in open court constituted entry of judgment for purposes of determining when notice of appeal had to be given, even if a

1. This statute provides:

> "Mental illness" means: . . . (ii) when applied to a minor, a mental condition, other than mental retardation alone, that so lessens or impairs the youth's capacity either to develop or exercise age appropriate or age adequate self-control, judgment, or initiative in the conduct of his activities and social relationships as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

N.C.G.S. § 122C-3(21)(ii) (1986).

2. The record is not altogether clear as to whether respondent was in fact released at this time. The "Statement of the Proceedings" states that upon making the determination that the evidence did not support a finding of mental illness, the trial court "entered a verbal order discharging respondent from [the facility]." Counsel for the State stated in oral argument that respondent was in fact discharged at this time; counsel for respondent did not dispute this assertion.

formal written order was not filed until a later date. *In re Moore*, 306 N.C. 394, 400, 293 S.E. 2d 127, 130-31, *reh'g denied*, 306 N.C. 565 (1982), *appeal dismissed sub nom. Moore v. Guilford County Dept. of Social Services*, 459 U.S. 1139, 74 L.Ed. 2d 987 (1983); *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 706, 318 S.E. 2d 348, 352 (1984); N.C.G.S. § 1A-1, Rule 58 (1983). The State neither gave oral notice of appeal at the hearing nor filed a written notice of appeal within ten days following the ruling. By thus failing to give timely notice, the State lost its right to appeal—N.C.G.S. § 1-279 (1983); N.C.R. App. P. 3—and the Court of Appeals had no jurisdiction to hear the case. "Failure to give timely notice of appeal in compliance with [N.C.] G.S. 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E. 2d 98, 99-100 (1983).

Further, the trial court's ruling that respondent was not mentally ill within the meaning and intent of the statute, announced in open court on 27 January 1987, concluded the case or controversy between the State and the respondent. As noted, upon that determination respondent was entitled to be released from the facility. N.C.G.S. § 122C-223 (1986). The court thus had no case or controversy before it and no jurisdiction to enter the subsequent order, on wholly different grounds from those announced in open court, declaring the statute unconstitutional.

Because the court had concluded the case or controversy by finding the respondent not mentally ill, thus entitling her to release from the facility, the subsequent order was, in effect, a mere declaratory judgment on the constitutionality of the statute. "[T]his Court has held on a number of occasions that Courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E. 2d 59, 61 (1984). "[A]n actual controversy [is] a 'jurisdictional prerequisite' for a proceeding under the Declaratory Judgment Act . . . . [T]he . . . Act does not 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Id.* at 234, 316 S.E. 2d at 61-62 (quoting *Tryon v. Power Co.*, 222 N.C. 200,

204, 22 S.E. 2d 450, 453 (1942)). Having concluded the case or controversy by finding the respondent not mentally ill, the trial court lacked jurisdiction in this proceeding to declare N.C.G.S. § 122C-3(21)(ii) unconstitutional. Its order of 6 August 1987 thus should be vacated.

For the foregoing reasons, the opinion of the Court of Appeals is vacated. The cause is remanded to the Court of Appeals with instructions to vacate the 6 August 1987 order of the District Court, Wake County.

Vacated and remanded.

JACQUELIN S. ALLSUP v. GUY L. ALLSUP, JR.

No. 102PA88

(Filed 8 December 1988)

1. **Divorce and Alimony § 21.8; Parent and Child § 10— URESA—due process right to hearing**

The Uniform Reciprocal Enforcement of Support Act does not allow foreign support orders to become effective automatically at the time of registration without a hearing in violation of the due process rights of support obligors since "registration" requires (1) the filing of documents described in N.C.G.S. § 52A-29, and (2) the confirmation after twenty days, during which time the obligor may petition the court to vacate the registration or for other relief, as described in N.C.G.S. § 52A-30(b), and the foreign support order does not become enforceable until the obligor has had an ample opportunity to exercise his due process right to a hearing and the confirmation step is completed.

2. **Divorce and Alimony § 21.8— URESA—retroactive modification of foreign orders—failure to raise question before confirmation**

The Uniform Reciprocal Enforcement of Support Act as applied did not violate respondent's due process right to be heard on the question of whether alimony arrearages due under South Carolina orders should be modified retroactively under South Carolina law to reflect his changed financial circumstances where respondent was afforded a full hearing on a petition to vacate registration of the South Carolina orders, but the modification request was not filed until more than a year after the hearing on his petition and the confirmation of the orders. Any right to a hearing on retroactive modification was waived by respondent's failure to assert his rights under the law of South Carolina while the orders retained their foreign characteristics prior to confirmation.

ON respondent's petition for discretionary review of a decision of the Court of Appeals, 88 N.C. App. 533, 363 S.E. 2d 883 (1988), which affirmed in part and reversed in part the order of *Bissell, J.*, entered 29 December 1986 in District Court, MECKLENBURG County. Heard in the Supreme Court 10 October 1988.

Petree Stockton & Robinson, by J. Neil Robinson, for petitioner-appellee.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Barbara J. Hellenschmidt, for respondent-appellant.

MARTIN, Justice.

The sole issue for review in this alimony case is whether the registration and enforcement provisions of the Uniform Reciprocal Enforcement of Support Act (URESA) violate the due process rights of support obligors. We hold that they do not and therefore affirm the Court of Appeals.

Summarized as briefly as possible, the record reveals the following pertinent facts:

South Carolina Proceedings

The parties to this suit were divorced in South Carolina on 29 November 1979. At that time the Darlington County Family Court entered an order granting Mr. Allsup custody of the couple's two minor children and requiring him to pay Mrs. Allsup $600 per month in alimony. Mrs. Allsup, a paraplegic, was required to forward to Mr. Allsup as child support the Social Security payments she received on behalf of the two children due to her disability.

On 6 April 1981 the parties appeared at a hearing for reconsideration of the alimony awarded. In the interim Mr. Allsup had moved to North Carolina. By order entered 15 April 1981, the court adopted a private agreement between the parties reducing the alimony payment to $209.69 per month and allowing Mrs. Allsup to retain all Social Security payments instead of forwarding them.

On 9 October 1984, a hearing was held on motions filed by Mrs. Allsup seeking an increase in the amount of the alimony and seeking to have Mr. Allsup held in contempt for failure to comply

with the terms of the 1981 order. By an order dated 13 October 1984, the court directed Mr. Allsup to pay $1,120 in arrearages and to increase the monthly alimony payment by $280 to reflect the decrease in Mrs. Allsup's Social Security benefits that had occurred when the elder of the couple's two children reached majority. The order further directed Mr. Allsup to increase the alimony payment again when the younger child reached majority.

The court held another hearing on 9 November 1984 with respect to Mrs. Allsup's renewed motion for a finding of contempt and issuance of a bench warrant. Mr. Allsup did not appear at the hearing. His counsel of record did appear, advising the court that he appeared only because the motion papers had been served upon him, but that he was not in a position to accept service for Mr. Allsup. By order of 15 November 1984, the court ruled that service was valid and held Mr. Allsup in contempt. The court further found that Mrs. Allsup was entitled to receive $1,605 in support arrearages.

North Carolina Proceedings

On 13 March 1985, pursuant to N.C.G.S. § 52A-29, Mrs. Allsup submitted to the Mecklenburg County Clerk of Court a Notice of Registration of the four South Carolina support orders detailed above. On 2 April 1985 Mr. Allsup filed a petition requesting that registration of the orders be vacated on statutory and constitutional grounds.

The Mecklenburg County District Court entered an order dated 10 July 1985 which denied the petition to vacate and confirmed registration of the orders. Mr. Allsup filed a motion to vacate the 10 July order, contending that he had not received notice of a hearing. The motion was granted in an ex parte order dated 24 July. However, following a hearing on 12 August 1985, the court confirmed the registration.

Thereafter the parties conducted informal discovery and Mrs. Allsup filed motions with the court requesting that alimony arrearages be reduced to judgment and Mr. Allsup be held in contempt. Mr. Allsup filed a motion to modify the alimony obligation on 7 August 1986. The matters came on for hearing on 20 August. In an order dated 29 December 1986, the court held that the South Carolina support orders were properly registered and were

entitled to full faith and credit and enforcement in North Carolina. The court entered judgment in the amount of $11,829 for arrearages and ordered Mr. Allsup to begin paying $769.69 per month in alimony, an amount reflecting the fact that Mrs. Allsup no longer received Social Security payments on behalf of the children. Mrs. Allsup's motion for contempt was denied and Mr. Allsup's motion for modification was ordered to be determined at a future hearing.

The Court of Appeals affirmed the trial court in pertinent part, holding that although the South Carolina orders were technically not entitled to full faith and credit, they were enforceable in North Carolina under principles of comity; thus, the trial judge's error in enforcing them under full faith and credit principles was a harmless one.

[1] On this appeal respondent-appellant Mr. Allsup contends that inasmuch as the URESA statute required no hearing prior to registration of the South Carolina support orders in North Carolina, he was deprived of the due process of law as guaranteed by the fourteenth amendment to the United States Constitution and by the law of the land clause of the North Carolina Constitution.

The stated purpose of the Uniform Reciprocal Enforcement of Support Act is "to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto." N.C.G.S. § 52A-2 (1984). It was drafted in order to address the problems created by recalcitrant obligors who avoid enforcement of their support obligations by roving from state to state. Every state and organized territory of the United States has adopted some form of the Act. North Carolina first enacted URESA in 1951 as Chapter 52A of the General Statutes. A substantially revised version of the statute, which added the registration and enforcement sections at issue on this appeal, was enacted in 1975 as sections 52A-26 through 52A-30.

Under this statutory scheme, registration and enforcement are entirely separate procedures. *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E. 2d 584 (1980); *Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E. 2d 633 (1977). Upon registration, the foreign support order may be enforced in the same manner as a support order issued by a court of this state. N.C.G.S. § 52A-30(a) (1984). An obligee seeking to register a foreign support order in North Caro-

lina submits to the clerk of court certified copies of the order and other pertinent information. The clerk transmits a notice of registration and a copy of the support order to the obligor by certified or registered mail. N.C.G.S. § 52A-29 (1984). The obligor then has twenty days after the mailing of notice in which to petition the court to vacate the registration or for other relief. If he fails to petition, the registered support order is confirmed. N.C.G.S. § 52A-30(b) (1984).

In mounting his constitutional attack, Mr. Allsup argues that these provisions allow foreign support orders to become effective automatically at the time of registration, without a hearing as to their validity or the obligations they impose. This argument fails to perceive that "registration" actually takes place in two stages: (1) the filing of documents described in section 52A-29, and (2) the confirmation of registration after twenty days as described in section 52A-30(b). The foreign support order does not become effective and enforceable until the confirmation step is completed.

We reach this conclusion by applying standard principles of statutory construction. In seeking to discover and give effect to legislative intent, an act must be considered as a whole and none of its provisions deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose. *Martin v. Thornburg*, 320 N.C. 533, 359 S.E. 2d 472 (1987); *Town of Atlantic Beach v. Young*, 307 N.C. 422, 298 S.E. 2d 686, *appeal dismissed*, 462 U.S. 1101, 77 L.Ed. 2d 1328 (1983). Were the order effective upon the mere filing of the documents, there would be no reason to include the confirmation provision. *See State ex rel. Greebel v. Endsley*, 269 Ind. 174, 379 N.E. 2d 440 (1978) (interpreting a version of URESA similar to North Carolina's); *Monson v. Monson*, 85 Wis. 2d 794, 271 N.W. 2d 137 (Wis. Ct. App. 1978) (construing statute identical to N.C.G.S. § 52-30).

The procedure outlined above thus provided ample opportunity for Mr. Allsup to exercise his due process right to a hearing. The South Carolina support orders, although filed, could not become effective until confirmed, and confirmation could not take place until the twenty-day period for petitions had elapsed. Such a scheme does not on its face violate due process.

[2] Nor did URESA as applied in this case violate respondent's due process rights. Mr. Allsup contends that he was not afforded an opportunity to be heard on the question of whether the alimony arrearages due under the South Carolina orders should be modified retroactively to reflect his changed financial circumstances. He maintains that South Carolina law permits such retroactive modification, while North Carolina law does not, and therefore insists that URESA's transubstantiation of the South Carolina orders into North Carolina orders pursuant to N.C.G.S. § 52A-30(a) deprived him of the potential right to modify his support obligation. We disagree.

It is not necessary under the circumstances of this case to determine whether North Carolina law prohibits retroactive modification. Even assuming that retroactive modification became unavailable when the South Carolina orders were confirmed and transformed into North Carolina orders, respondent is not entitled to relief because he failed to request such modification while the orders retained their foreign characteristics, that is, prior to confirmation.

The record demonstrates that Mr. Allsup filed a petition to vacate registration within the twenty-day statutory time period after Mrs. Allsup filed the orders in North Carolina. However, Mr. Allsup apparently did not attend a hearing prior to confirmation of the orders on 10 July 1985. The record is unclear as to whether a hearing was in fact scheduled and what steps, if any, were taken to provide him with notice. Mr. Allsup subsequently contended that he had not received notice of any hearing and, on that basis, he obtained an order setting confirmation aside. He was then afforded a full hearing on 12 August on his petition to vacate registration. At that time he had an opportunity to attack the validity of the South Carolina orders and to raise any defenses available to him, which he apparently, albeit unsuccessfully, did. More significantly, he also had the opportunity at that hearing to request other relief, such as modification of the support obligation imposed by the orders. This he failed to do. His petition to vacate did not include a request for retroactive modification, and no request was made during the confirmation hearing. In fact, the modification request was not filed until August of 1986, more than a year after the hearing on his petition and the confirmation of the orders. Thus, under the facts of this

case, any right to a hearing on retroactive modification was waived by Mr. Allsup's failure to assert his rights under the law of South Carolina prior to confirmation. Due process requires only that the obligor be provided the opportunity to assert his rights in timely fashion. An obligor who sleeps on his rights may lose them.

We hold that the URESA provisions at issue comport with the due process requirements of the federal and state constitutions. The decision of the Court of Appeals is hereby

Affirmed.

THELMA H. McLAURIN AND ELEANOR RUTH McRORIE v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY, SEABOARD SYSTEM RAILROAD, INC., AND LANDON A. SCARBOROUGH

No. 605PA87

(Filed 8 December 1988)

1. **Adverse Possession § 16.1— protection of railroad property from adverse possession—use for railroad purposes not required**

The statute protecting a railroad from loss of land by adverse possession, N.C.G.S. § 1-44, does not require that a railroad actually use the land but only that the railroad obtain the land for its use for a railroad purpose.

2. **Railroads § 3— abandonment of right-of-way—statute inapplicable to land owned in fee**

The statute providing that a railroad is presumed to have abandoned a right-of-way if it removes its tracks from the right-of-way and does not make any railroad use of the right-of-way for seven years, N.C.G.S. § 1-44.1, refers only to the abandonment of easements and has no application to land owned in fee simple.

3. **Adverse Possession § 16.1— statute protecting railroad property from adverse possession—use by individual**

An individual may take advantage of N.C.G.S. § 1-44 to show that a railroad had not lost land by adverse possession at the time it conveyed the land to him.

4. **Railroads § 3— power to sell railroad property**

A railroad has the power to sell for nonrailroad purposes real property which it acquired for railroad purposes.

ON discretionary review of the decision of the Court of Appeals reported at 87 N.C. App. 413, 361 S.E. 2d 95 (1987), which affirmed in part and reversed in part the order of dismissal entered by *Davis (James C.), J.*, at the 13 October 1986 Civil Session of Superior Court, ANSON County. Heard in the Supreme Court 11 October 1988.

The plaintiffs filed this action in the Anson County District Court on 13 August 1986, seeking a declaration that they had become by adverse possession fee simple owners of two tracts of land titled to the defendant Winston-Salem Southbound Railway Company (Southbound). The plaintiffs alleged in their complaint that they owned by deed tracts of land adjacent to the land at issue and that they had tended to and cared for the land at issue for over 30 years, as was "known to the whole community." The plaintiffs further alleged that the defendant Southbound "has never used that said property for any right-of-way, depots, stationhouse, or place of landing." They alleged that defendant Seaboard System Railroad, Inc. once maintained a railroad track on the land at issue, but the track has been abandoned for more than seven years. They alleged that the defendant Scarborough claimed an interest in the land through a deed from Seaboard.

Defendant Southbound answered, alleging ownership by deed of the tracts at issue, alleging that defendant Landon Scarborough had offered to buy the land, requesting dismissal for failure to state a claim, and counterclaiming for wrongful assertion of title. Defendant Scarborough answered, alleging ownership of some of the land by deed acquired from defendant Seaboard System Railroad, Inc. and requesting dismissal for failure to state a claim. Defendant Seaboard did not answer and a default judgment was entered against it on 29 September 1986.

Defendants Southbound and Scarborough moved to transfer the action to superior court. The superior court allowed the motion to transfer and granted a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

The plaintiffs appealed. After the defendants were served with the plaintiffs' proposed record on appeal, they moved to dismiss the appeal for failure to give proper notice of appeal. Judge Fetzer Mills signed an order denying this motion on 28 January 1987. The defendants appealed this order.

The Court of Appeals affirmed the order of transfer, reversed the order of dismissal, and affirmed the order denying the motion to dismiss the appeal. On 9 March 1988 we allowed defendants' petition for discretionary review.

Henry T. Drake for plaintiff appellees.

Thomas, Harrington & Biedler, by Larry E. Harrington, for defendant appellee Landon A. Scarborough.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for defendant appellant Winston-Salem Southbound Railway Company.

Patton, Boggs & Blow, by C. Allen Foster, Eric C. Rowe and Julie A. Davis, for Amicus Curiae North Carolina Railroad Company.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr. and Nancy K. Plant, for Amicus Curiae Southern Railway Company.

Maupin, Taylor, Ellis & Adams, by Charles B. Neely, Jr. and Gilbert C. Laite III, for Amicus Curiae CSX Transportation, Inc.

WEBB, Justice.

[1] The principal question presented by this appeal deals with the interpretation of N.C.G.S. § 1-44 which provides:

> No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right-of-way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right-of-way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

The Court of Appeals held that if a railroad does not use, or plan in good faith to use, the land for the purpose set forth in the statute it forfeits the protection of the statute. The plaintiffs alleged that Winston-Salem Southbound Railway Company "has never used that said property for any right-of-way, depots, station house, or place of landing" and under this allegation, the Court of Appeals held it was error to dismiss the action.

We disagree with the interpretation of the Court of Appeals. The plain words of the statute do not require that a railroad actually use the land but that the railroad "obtained for its use" the land for a railroad purpose. The plaintiffs have not alleged that the land was not obtained for any of the uses specified in the statute and their complaint must fail.

N.C.G.S. § 1-44 was enacted in 1854. It has been interpreted in many cases. *See Keziah v. R.R.*, 272 N.C. 299, 158 S.E. 2d 539 (1968); *Withers v. Manufacturing Co.*, 259 N.C. 139, 129 S.E. 2d 886 (1963); *Muse v. R.R.*, 149 N.C. 443, 63 S.E. 102 (1908); *R.R. v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906); *Purifoy v. R.R.*, 108 N.C. 101, 12 S.E. 741 (1891). These cases establish that when a railroad acquires land for railroad purposes the land is dedicated to a public use. N.C.G.S. § 1-44 protects the railroad from loss of the land by adverse possession. We have said it would be bad public policy to require railroads to police all the lands they own to guard against claims by adverse possession. In one case we said, "A permissive use of part of [the railroad's land] by another, when no present inconvenience results to the company, is not a surrender of rights of property, and, indeed, to expel an occupant under such circumstances, would be a needless and uncalled for injury." *R.R. v. McCaskill*, 94 N.C. 746, 754 (1886).

[2] We do not agree with the Court of Appeals that N.C.G.S. § 1-44 should be read in pari materia with N.C.G.S. § 1-44.1 and that by so reading the statutes we must hold that N.C.G.S. § 1-44 does not prevent a railroad from losing by adverse possession land it owns in fee simple. N.C.G.S. § 1-44.1 provides that if a railroad removes its tracks from a right-of-way and does not replace them for seven years and does not make any railroad use of the right-of-way during that time it is presumed to have abandoned the right-of-way. We do not believe the General Assembly intended that if a railroad does not use for railroad purposes land it owns in fee simple that it has abandoned that land. We do not know of any landowner that has been so treated. We believe N.C.G.S. § 1-44.1 refers to the abandonment of easements. It has no application to land owned in fee simple.

The Court of Appeals distinguished *Withers v. Manufacturing Co.*, 259 N.C. 139, 129 S.E. 2d 886, by saying the railroad in that case had used the property for railroad purposes. This Court

did say in holding that N.C.G.S. § 1-44 protected the railroad from losing its land by adverse possession that the railroad "had held and used the property in its public transportation business." *Id.* at 140, 129 S.E. 2d at 887. We did not say that if the land had not been used for a railroad purpose N.C.G.S. § 1-44 would not apply.

The plaintiffs alleged that the defendant Landon A. Scarborough held certain land through a deed from the defendant Seaboard System Railroad, Inc. The defendant Scarborough's title depends on the title of Seaboard. We have held that a railroad is protected from a claim of adverse possession by N.C.G.S. § 1-44. Seaboard had a good title to the land at the time it was conveyed to Scarborough and under the allegations of the complaint the plaintiffs had not obtained a title by adverse possession against Scarborough.

[3] The plaintiffs, relying on *Saddle Club v. Gibson*, 9 N.C. App. 565, 176 S.E. 2d 846 (1970), argue that the defendant Scarborough does not have standing to take advantage of N.C.G.S. § 1-44. *Saddle Club* has no application to this case. This Court in that case held that a person who has title to land which is subject to a highway easement may recover for a trespass by a third party on that part of the easement which is not being used for a highway. Scarborough may take advantage of N.C.G.S. § 1-44 to show Seaboard had not lost the land by adverse possession at the time it was conveyed to him.

[4] The plaintiffs contend that N.C.G.S. § 62-220 lists the powers of railroads and nowhere in those powers is the right to sell real property. They contend a railroad does not have the power to sell for a nonrailroad purpose property it acquired for a railroad purpose. The plaintiffs have not cited any authority for this proposition. More than 140 years ago it was held in an opinion written by Chief Justice Ruffin, *State v. Rives*, 27 N.C. (5 Ired.) 297 (1844), that land used by a railroad for a railroad purpose may be sold by the railroad. Assuming that the plaintiff has standing to raise this issue, we hold we are bound by *Rives* to hold a railroad has the power to sell property which has been acquired for railroad purposes.

The defendants contend in this appeal that the plaintiffs did not properly give notice of an appeal from the Superior Court of Anson County. The plaintiffs contend that it was error to transfer

the case from the District Court to the Superior Court of Anson County. We hold, for the reasons stated in the opinion of the Court of Appeals, that the plaintiffs gave a proper notice of appeal from superior court and it was not error to transfer the case from the district court to superior court.

The opinion of the Court of Appeals is affirmed as to its affirmance of the order of transfer and order denying the motion to dismiss the appeal. The opinion of the Court of Appeals is reversed as to its reversal of the order of dismissal, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Anson County for reinstatement of the order of dismissal.

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA v. BARRY EUGENE ALSTON

No. 555PA86

(Filed 8 December 1988)

Constitutional Law § 34— armed robbery—possession of firearm by felon—not double jeopardy

Defendant was not twice put in jeopardy for the same offense in violation of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States where defendant's first trial for armed robbery ended in a mistrial when the jury could not agree on a verdict, defendant was tried and acquitted for possession of a weapon by a previously convicted felon based upon a pistol found in defendant's automobile three hours after the robbery, and defendant was then tried again and convicted on the charge of armed robbery. The test is whether a rational jury could have granted its verdict in the possession trial on an issue other than the possession of a firearm at the time of the alleged armed robbery.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 82 N.C. App. 372, 346 S.E. 2d 184 (1986), finding no error in the judgment entered by *Brannon, J.*, at the 26 August 1985 Criminal Session of Superior Court, DURHAM County. Heard in the Supreme Court 13 September 1988.

The defendant was charged in separate indictments with armed robbery, N.C.G.S. § 14-87, and possession of a firearm by a previously convicted felon, N.C.G.S. § 14-415.1. The defendant's motion to sever the cases for trial was allowed on 26 March 1985. The State's evidence at the trial for armed robbery showed that at approximately 12:30 a.m. on 10 December 1984 the defendant robbed a convenience store using a .38 caliber pistol. The jury could not agree on a verdict and a mistrial was allowed.

The defendant was then tried for the possession of a weapon by a previously convicted felon. The State's evidence showed at this trial that the defendant was driving an automobile when he was stopped by officers at approximately 3:30 a.m. on 10 December 1984. The officers searched the defendant's automobile and found a .38 caliber pistol similar to the one which had been used in the robbery. The jury found the defendant not guilty of the charge of possession of a firearm by a previously convicted felon.

The State then put the defendant on trial for the second time on the charge of armed robbery. The defendant pled double jeopardy at this trial. His plea of double jeopardy was overruled and the defendant was convicted as charged.

The defendant was sentenced to twenty years in prison and the Court of Appeals found no error. We allowed the defendant's petition for discretionary review.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.

Craig B. Brown for defendant appellant.

WEBB, Justice.

The only question raised by this appeal is whether the charge of armed robbery should have been dismissed because the defendant was twice put in jeopardy for the same offense in violation of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. In *Benton v. Maryland*, 395 U.S. 784, 23 L.Ed. 2d 707 (1969), the United States Supreme Court held that the double jeopardy clause of the Fifth Amendment is made applicable to the states by the Fourteenth Amendment.

In *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469 (1970), the United States Supreme Court held that collateral estoppel is a part of the Fifth Amendment's guarantee against double jeopardy. In defining collateral estoppel the Supreme Court said, "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443, 25 L.Ed. 2d at 475. The Supreme Court said that if a previous judgment of acquittal was based upon a general verdict and that judgment is pled to estop collaterally the litigation of an ultimate fact in a subsequent case the court must determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444, 25 L.Ed. 2d at 475. *See also State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977).

Our Court of Appeals, relying on *Ohio v. Johnson*, 467 U.S. 493, 81 L.Ed. 2d 425, *reh'g denied*, 468 U.S. 1224, 82 L.Ed. 2d 915 (1984) and *Jeffers v. United States*, 432 U.S. 137, 53 L.Ed. 2d 168, *reh'g denied*, 434 U.S. 880, 54 L.Ed. 2d 164 (1977), held the defendant waived his double jeopardy claim by moving that the cases be severed for trial. We affirm the Court of Appeals but not for the reasons stated in its opinion. We hold that the State was not estopped from litigating an ultimate fact in the armed robbery case by the finding of not guilty in the case of the possession of a firearm by a felon. It is not necessary to reach the question of whether the defendant waived a constitutional right.

Using the test promulgated in *Swenson* we hold that a rational jury could have grounded its verdict of not guilty in the case of the possession of a firearm by a felon other than on the issue the defendant wants to foreclose in the armed robbery case. The defendant wants to foreclose the State from proving that he had in his possession a firearm at the time of the alleged armed robbery. The jury in the possession of a firearm case could have found that the State had not proved he had a firearm in his possession at that time without determining whether he had a firearm in his possession three hours earlier at the time of the alleged armed robbery. Collateral estoppel does not apply.

The defendant argues that the evidence in both trials was the same. The clerk at the convenience store testified at both

trials that the defendant had a .38 caliber pistol in his possession at the time of the robbery. He did not testify as to whether the defendant had a pistol in his possession at the time he was stopped three hours later. The defendant argues that the State offered proof that the defendant had a .38 caliber pistol in his possession at the time of the robbery and three hours later and the jury in the possession case found he did not have a pistol in his possession at either time. The defendant argues the State is bound by this finding of an ultimate fact.

The State may have used identical evidence at all three trials and the jury in the trial for possession of a firearm by a previously convicted felon may have found the defendant did not possess a firearm at the time of the armed robbery, but neither of these is the test. The test is whether a rational jury could have grounded its verdict in the possession trial on an issue other than the possession of a firearm at the time of the armed robbery. We hold that a rational jury could have done so.

The defendant attempts to assign error to the failure of the State to furnish him with a transcript of the trial on the charge of possession of a firearm by a convicted felon. He did not raise this question in the Court of Appeals and we do not consider it. N.C.R. App. P. 16(a). In light of our decision in this case the defendant was not prejudiced by the failure of the State to furnish him a copy of the transcript.

Affirmed.

LORIS M. PIEPER, PETITIONER v. GARY L. PIEPER, RESPONDENT

No. 303PA88

(Filed 8 December 1988)

Parent and Child § 10— URESA—obligor in N. C.—support imposable under N. C. law

Only duties of support imposable under North Carolina law could be enforced through our URESA against respondent obligor where respondent's presence in North Carolina during the time for which support was sought was established by statutory presumption and by an uncontested finding in the trial court's order of dismissal. N.C.G.S. § 52A-8.

ON discretionary review of a decision of the Court of Appeals, 90 N.C. App. 405, 368 S.E. 2d 422 (1988), affirming judgment of *Johnston, J.*, entered 29 July 1987 in District Court, MECKLENBURG County, dismissing petitioner's action brought under the Uniform Reciprocal Enforcement of Support Act, N.C.G.S. § 52A-1, *et seq.* Heard in the Supreme Court on 14 November 1988.

Lacy H. Thornburg, Attorney General, by T. Byron Smith, Assistant Attorney General, for petitioner appellant.

Petree Stockton & Robinson, by David B. Hamilton and Peter E. Lane, for respondent appellee.

PER CURIAM.

We affirm the result reached by the Court of Appeals but conclude that its supporting reasoning is overly broad. The Court of Appeals reasoned that since the out-of-state (Iowa) enforcement order could not have been rendered in North Carolina it cannot be enforced here under our Uniform Reciprocal Enforcement of Support Act (URESA). The Court of Appeals said, "Only support decrees that could have been rendered under the laws of our State can be enforced via URESA in North Carolina." 90 N.C. App. at 407, 368 S.E. 2d at 424.

North Carolina's version of URESA provides in part:

> Duties of support applicable under this Chapter are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown.

N.C.G.S. § 52A-8. Under this statute it is the law of the "state where the obligor was present during the period or any part of the period for which support is sought" that controls what duties of support may be enforced in North Carolina. The statute further establishes a presumption that the obligor was present in the responding state.

In this case petitioner made no allegation or contention at trial regarding respondent obligor's presence during the legally

material times provided for in the statute. The presumption that he was present in North Carolina during these times thus prevails. Further, there is an uncontested finding in the trial court's order of dismissal that respondent obligor "has been a resident of North Carolina since 1975." This period of time covers the legally material times provided for in the statute. It is for this reason that only duties of support imposable under North Carolina law may be enforced through our URESA against this respondent obligor. For this reason the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. RODNEY WILLIAM ROWLAND

No. 162PA88

(Filed 8 December 1988)

ON discretionary review of the decision of the Court of Appeals, 89 N.C. App. 372, 366 S.E. 2d 550 (1988), awarding defendant a new trial on an indictment charging him with attempted robbery with a dangerous weapon. The appeal to the Court of Appeals was from a judgment of imprisonment entered by *Gray, J.*, on 12 March 1987 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 15 November 1988.

Lacy H. Thornburg, Attorney General, by David R. Minges, Assistant Attorney General, for the State, appellant.

Marc D. Towler, Assistant Public Defender, for defendant, appellee.

PER CURIAM.

Discretionary review improvidently allowed.

PROCESS COMPONENTS, INC. v. BALTIMORE AIRCOIL CO., INC.

No. 244PA88

(Filed 8 December 1988)

ON discretionary review of a decision of the Court of Appeals, 89 N.C. App. 649, 366 S.E. 2d 907 (1988), upholding a judgment entered by *Allen (C. Walter), J.*, on 25 June 1987, in Superior Court, MECKLENBURG County, awarding treble damages to plaintiff under N.C.G.S. § 75-1.1. Heard in the Supreme Court 15 November 1988.

William D. Acton, Jr., and Frank B. Aycock, III, for plaintiff-appellee.

Moore & Van Allen by Charles E. Johnson; and Greene & Michael by Robert J. Greene, Jr., for defendant-appellant.

PER CURIAM.

Affirmed.

D. W. WARD CONSTRUCTION COMPANY, INC. v. DOLPH O. ADAMS AND JEAN S. ADAMS

No. 277PA88

(Filed 8 December 1988)

ON discretionary review of the decision of the Court of Appeals reported at 90 N.C. App. 241, 368 S.E. 2d 31 (1988) ordering a new trial. The original trial was before *Fountain, J.*, at the 19 January 1987 Session of Superior Court, DURHAM County. Heard in the Supreme Court 16 November 1988.

Pulley, Watson, King & Hofler, P.A., by R. Hayes Hofler, III and Judith V. Siegel, for plaintiff appellee.

Randall, Yaeger & Jervis, by John C. Randall, for defendant appellants.

PER CURIAM.

Discretionary review improvidently allowed.

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
OSCAR LLOYD	)	

No. 577A85

(Filed 18 November 1988)

UPON receipt and consideration of the mandate of the Supreme Court of the United States in this cause, issued 3 October 1988, the following order was entered and is hereby certified to the Superior Court, CHEROKEE County:

> On 3 October 1988 the Supreme Court of the United States vacated our opinion reported at 321 N.C. 301, 364 S.E. 2d 316 (1988), and remanded this cause for reconsideration in light of *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988). Upon such reconsideration, for the reasons set forth in our opinion in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), we continue to adhere to our opinion reported at 321 N.C. 301, 364 S.E. 2d 316 (1988). Therefore, the mandate of that opinion is hereby reinstated.
>
> Done by the Court in conference, this the 17th day of November, 1988.
>
> WHICHARD, J.
> For the Court

EXUM, C.J., and FRYE, J., dissent for the reasons stated in Exum, C.J.'s dissenting opinions in *State v. McKoy*, 323 N.C. 1, 49, 372 S.E. 2d 12, 42 (1988), and *State v. Allen*, 323 N.C. 208, 235, 372 S.E. 2d 855, 871 (1988).

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

CAMPBELL v. LLOYD

No. 485P88.

Case below: 91 N.C. App. 444.

Petition by defendant (Danny Carl Lloyd) for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

CHANDLER v. U-LINE CORP.

No. 497P88.

Case below: 91 N.C. App. 315.

Petition by third-party defendant for discretionary review pursuant to G.S. 7A-31 denied and stay dissolved 8 December 1988.

DAVIS v. CITY OF ARCHDALE

No. 468P88.

Case below: 91 N.C. App. 288.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

E. F. CRAVEN CO. v. WATT PROPERTIES CO.

No. 494P88.

Case below: 91 N.C. App. 444.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

EVANS v. APPERT

No. 495P88.

Case below: 91 N.C. App. 362.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

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

GARRETT v. TEACHERS' & STATE EMPLOYEES' RETIREMENT SYSTEM

No. 484P88.

Case below: 91 N.C. App. 409.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

GRIFFIN v. ROYAL CROWN BOTTLING CO.

No. 480P88.

Case below: 91 N.C. App. 585.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

HAMPTON v. SIMMONS (SIMONDS)

No. 546P88.

Case below: 91 N.C. App. 586.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

HOFFMAN v. SMITH

No. 478P88.

Case below: 91 N.C. App. 288.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

IN RE TEAGUE

No. 475P88.

Case below: 91 N.C. App. 242.

Motion by the Attorney General to dismiss appeal for failure to show a substantial constitutional question allowed 8 December 1988. Petition by Teague for writ of certiorari to the North Carolina Court of Appeals denied 8 December 1988.

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

IN THE MATTER OF APPEAL FROM CIVIL PENALTY

No. 543A88.

Case below: 92 N.C. App. 1.

Petition by Department of Natural Resources for writ of supersedeas and temporary stay denied 1 December 1988. Petition by Department of Natural Resources pursuant to G.S. 7A-31 and App. Rule 16(b) for discretionary review as to additional issues allowed 5 December 1988. Motion by Attorney General for reconsideration of petition for writ of supersedeas allowed and supersedeas allowed 8 December 1988.

McLAIN v. WILSON

No. 471PA88.

Case below: 91 N.C. App. 275.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1988.

MANNING v. FLETCHER

No. 492PA88.

Case below: 91 N.C. App. 393.

Petition by defendant (Farm Bureau) for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1988.

MURDOCK v. EAST COAST OIL CO.

No. 459P88.

Case below: 91 N.C. App. 288.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

PIEDMONT FORD TRUCK SALE v. CITY OF GREENSBORO

No. 394PA88.

Case below: 90 N.C. App. 692.

Petition by plaintiffs for writ of supersedeas and temporary stay of the judgment of the Court of Appeals denied 8 December 1988.

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

REID v. DURHAM HERALD CO.

No. 395P88.

Case below: 90 N.C. App. 771.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

ROSBY v. GENERAL BAPTIST STATE CONVENTION

No. 421P88.

Case below: 91 N.C. App. 77.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

SHORE v. BROWN

No. 470P88; 470PA88.

Case below: 91 N.C. App. 288.

Petition by defendants and third-party plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988. Petition by third-party defendant (General Motors Corp.) for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988. Petition by third-party defendant (LMCC) for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1988.

STATE v. BARNHARDT

No. 561P88.

Case below: 92 N.C. App. 94.

Petition by defendant for writ of supersedeas and temporary stay denied 8 December 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

STATE v. CHAPMAN

No. 429P88.

Case below: 91 N.C. App. 169.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

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

STATE v. COLLINS

No. 510P88.

Case below: 91 N.C. App. 445.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 8 December 1988.

STATE v. ELLIOTT

No. 321P88.

Case below: 90 N.C. App. 610.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 dismissed 8 December 1988.

STATE v. EMERY

No. 383P88.

Case below: 91 N.C. App. 24.

Petition by the Attorney General for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

STATE v. HENSLEY

No. 473P88.

Case below: 91 N.C. App. 282.

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 December 1988. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

STATE v. PEARSON

No. 238P88.

Case below: 89 N.C. App. 620.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 8 December 1988.

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

STATE v. PETERSON

No. 511P88.

Case below: 91 N.C. App. 586.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

STATE v. SMITH

No. 521P88.

Case below: 91 N.C. App. 586.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

STATE v. SPENCE

No. 477PA88.

Case below: 91 N.C. App. 288.

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1988.

STATE v. TATE

No. 458P88.

Case below: 91 N.C. App. 288.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

TURNER v. DUKE UNIVERSITY

No. 526A88.

Case below: 91 N.C. App. 446.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 8 December 1988.

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

U v. DUKE UNIVERSITY

No. 474P88.

Case below: 91 N.C. App. 171.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

WARFIELD v. HICKS

No. 424P88.

Case below: 91 N.C. App. 1.

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

WYATT v. NASH JOHNSON & SONS FARMS

No. 472P88.

Case below: 91 N.C. App. 255.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1988.

PETITION TO REHEAR

HALL v. CITY OF DURHAM

No. 16PA88.

Case below: 323 N.C. 293.

Petition by defendants to rehear denied 8 December 1988.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION v. NORTH CAROLINA NATURAL GAS CORPORATION

No. 660A87

(Filed 4 January 1989)

1. **Gas § 1— natural gas rates—gas-in-kind retained from transportation customers—consideration as transportation revenues**

The Utilities Commission's finding and conclusion that the value of gas-in-kind retained by a natural gas company from T-1 transportation customers as a line loss and compressor fuel charge should be included in the IST mechanism as transportation revenues was not arbitrary and capricious and was supported by the evidence in view of the entire record.

2. **Gas § 1; Utilities Commission § 21— natural gas rates—line loss and compressor fuel charge—refund not retroactive ratemaking**

The Utilities Commission's order requiring a natural gas company to refund to certain customers the monies collected pursuant to a two percent line loss and compressor fuel charge previously assessed against its transportation customers did not constitute retroactive ratemaking in excess of the Commission's statutory authority.

3. **Gas § 1; Utilities Commission § 24— natural gas rates—inclusion of collected line loss charges in IST—no impairment of contract—no due process violation**

The Utilities Commission's order requiring that monies collected by a natural gas company pursuant to a line loss and compressor fuel charge be included in the IST does not amount to an impairment of contract in violation of Art. I, § 10, cl. 1 of the U. S. Constitution or an unlawful taking of property other than by the law of the land or without due process in violation of Art. I, § 19 of the N. C. Constitution.

APPEAL by North Carolina Natural Gas Corporation (NCNG) pursuant to N.C.G.S. § 7A-29(b) from the Utilities Commission's (Commission) Final Order On Further Hearing entered on 25 September 1987 in Docket No. G-21, Sub 255. Heard in the Supreme Court 12 September 1988.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and Gisele L. Rankin, Staff Attorney, for the Public Staff—North Carolina Utilities Commission, appellee.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy and Jeffrey N. Surles, for North Carolina Natural Gas Corporation, appellant.

EXUM, Chief Justice.

The questions presented on this appeal are whether: (1) the Commission's finding and conclusion that the value of gas-in-kind retained by NCNG should be treated as revenues is arbitrary or capricious and unsupported by the evidence in view of the entire record; (2) the Commission's order requiring NCNG to refund to certain customers the monies collected pursuant to a line loss and compressor fuel charge previously assessed from other customers constitutes retroactive ratemaking in excess of the Commission's statutory authority; and (3) the Commission's order requiring that monies collected pursuant to a line loss and compressor fuel charge be included in the IST[1] amounts to an unconstitutional impairment of contract and an unlawful taking of property other than by the law of the land or without due process in violation of the North Carolina and United States Constitutions.[2] We affirm the Commission's order.

I.

NCNG is a franchised public utility providing natural gas service in south central and eastern North Carolina to residential, commercial and industrial customers. NCNG also provides wholesale service to municipalities which, in turn, serve their own mix of customers from industrial to residential. Finally, NCNG provides transportation service for customer owned gas (gas purchased from suppliers other than NCNG but "transported" by NCNG over its lines) to certain large industrials. All of NCNG's natural gas supply, including customer owned gas, is delivered to it by Transcontinental Gas Pipeline Corporation (Transco).

1. The Industrial Sales Tracker (IST) is a deferred account established to protect NCNG's margins (i.e., tariff price for gas less the cost of gas and gross receipts tax) on sales to customers who have the capability to use alternative fuels. *See State ex rel. Utilities Comm. v. N.C. Textile Manufacturers Assoc., Inc.*, 313 N.C. 215, 226, 328 S.E. 2d 264, 271 (1985). The IST compares the total margin earned under negotiated rates and transportation rates with an allowed margin based on anticipated sales. The IST then requires margin in excess of the allowed margin to be refunded to non-IST customers or a deficit margin charged to such customers by way of an annual true-up. *Id.* In addition, the IST specifically provides that transportation revenues collected pursuant to Rate Schedule T-1 are to be accounted for in the IST true-up.

2. More specifically, at issue here are the contracts clause under article I, § 10, of the United States Constitution and the law of the land clause under article I, § 19 of the North Carolina Constitution.

NCNG has separate retail rate schedules for residential, commercial and small industrial, industrial process, and other commercial and industrial customers.[3] Industrial customers with alternate fuel capability may be served under negotiated Rate Schedules S-1 and SM-1.[4] NCNG also has two transportation rate schedules, T-1 and T-2, under which it transports customer owned gas.[5]

Before these proceedings Rate Schedule T-1 contained the following paragraph:

1. Availability

This rate schedule is available at the Company's discretion to any industrial boiler customer who:

. . . .

(3) enters into a service agreement with the company. The service agreement shall state the total entitlement volume and the average daily entitlement volume to be delivered in each seasonal period. Customer's entitlement volume shall be the volume of gas received from Transco for Customer's account, less line loss volumes.

Transportation Rate Schedule T-2 had a similar provision:

1. Availability

This rate schedule is available at the Company's discretion to any interruptible commercial or industrial customer

3. These schedules include: Rate Schedule 1—Residential; Rate Schedule 2—Commercial and Small Industrial; Rate Schedule 3A and 3B—Industrial Process Uses; Rate Schedule 4A—Other Commercial and Industrial Non-IST customers; Rate Schedule 4B—Other Commercial and Industrial IST customers; Rate Schedule 5A—Boiler Fuel Non-IST customers; Rate Schedule 5B—Boiler Fuel IST customers; Rate Schedule 6A—Large Boiler Fuel Non-IST customers; Rate Schedule 6B—Large Boiler Fuel IST customers.

4. Rate Schedule S-1 is a negotiated rate charged to industrials served by NCNG. Rate Schedule SM-1 is a negotiated rate charged to municipalities for gas destined to be resold by the municipalities to their respective industrial customers with alternate fuel capability.

5. Rate Schedule T-1 is the transportation rate applicable to boiler fuel industrial volumes. Rate Schedule T-2 is the transportation rate applicable to non-boiler fuel industrial volumes.

> which meets the criteria set forth in North Carolina Utilities Commission Rule 60-19.2 for Priorities 2.8, 3, 4 and 5 . . . which:
>
> . . . .
>
> (3) enters into a service agreement with the Company. The service agreement shall state the maximum hourly and daily demand volume and the total entitlement volume. Customer's entitlement volume shall be the volume of gas received from Transco for customer's account less compressor fuel and line loss volumes.

NCNG entered into standard service agreements with customers being charged under the T-1 and T-2 rate schedules. The customer contracts included the following language:

> NOW, THEREFORE, for and in consideration of the mutual covenants and agreements hereof and other good and valuable considerations, the Company and Customer have agreed and do hereby covenant and each agrees with the other as follows, to wit:
>
> . . . .
>
> 3. Customer's 'entitlement volume' shall be the volume of gas received from Transco for Customer's account, less 2% to be retained by Company for compressor fuel and line loss volumes.
>
> 4. Company agrees to accept Customer's gas from Transco and deliver Customer's 'entitlement volume' to Customer.

Rate Schedule T-1 was initially proposed by NCNG in September 1975 and was "allowed to become effective as filed" by Commission action on 29 September 1975. In June 1983 NCNG proposed certain changes to Rate Schedule T-1 and by Commission order of 6 January 1984, the Commission found "that the T-1 rate proposed by the Company is just and reasonable."

Rate Schedule T-2 was proposed by NCNG in May 1985. By order of 30 May 1985 the Commission provided that Rate Schedule T-2 "be accept[ed] for filing effective June 15, 1985." Rate Schedule T-2, however, was never established as just and reasonable.

The dates relevant to this proceeding are from 1 October 1984 through 30 September 1986. During this period of time NCNG charges to its transportation and negotiated sales customers include $921,974, which consists of: (1) $438,920, which is the value of gas retained by NCNG that represents two percent of Rate Schedules T-1 and T-2 customers' transported volumes, and (2) $483,054, which is a two percent charge on negotiated sales of spot market gas to customers served under Rate Schedules S-1 and SM-1.

On 10 November 1986 the Commission issued a "Final Order" pursuant to a general rate case which stated in part:

> 19. The language in Rate Schedules T-1 and T-2 on which N.C.N.G. has relied to impose a 2% allowance for compressor fuel and line loss volumes in its transportation service and negotiated sales should be deleted from those tariffs as of the date of this Order. A further hearing will be held to decide the disposition of the monies collected pursuant to this allowance in the past. . . .
>
> IT IS, THEREFORE, ORDERED as follows:
>
> . . . .
>
> 5. That N.C.N.G. shall, as of the date of this Order, terminate the 2% line loss and compressor fuel charge currently being assessed customers for transportation service and negotiated sales.

On 5 December 1986 the Commission scheduled a further hearing pursuant to the Final Order of 10 November 1986. The purpose of the hearing was to address the issue of how to handle the proceeds collected pursuant to NCNG's two percent line loss and compressor fuel charge assessed customers for transportation service and negotiated sales. A hearing panel consisting of Commissioner Ruth E. Cook, presiding, and Commissioners Edward B. Hipp and Sarah Lindsay Tate heard testimony and reviewed evidence in Raleigh on 3 March 1987. The panel entered a "Recommended Order On Further Hearing" on 19 May 1987, with Commissioner Cook dissenting in part and concurring in part.[6]

6. Commissioner Cook concurred with the majority order requiring NCNG to refund the two percent allowance collected by it for transportation service under

The order included the following three significant conclusions and findings of fact:[7]

> 5. . . . Rate Schedule T-1 was established as just and reasonable by the Commission and NCNG should be allowed to retain the funds received under its T-1 tariff.
>
> 6. . . . Rate Schedule T-2 was not established as just and reasonable and the 2% allowance retained as gas-in-kind by NCNG pursuant to transportation service under Rate Schedule T-2 was unjust and unreasonable. NCNG must refund the monies collected pursuant thereto. The value of gas-in-kind retained by NCNG under its T-2 tariff should be treated as transportation revenues and flowed through the IST to be refunded to the non-IST customers on the system during October 1, 1984, through April 30, 1986, and also during the month of September 1986, the time period during which these 2% retentions occurred.
>
> 7. Rate Schedules S-1 and SM-1 contain no language authorizing an allowance for lost and unaccounted for gas and compressor fuel on negotiated sales. The $483,054 cost imputed into the IST on sales of spot market gas should be flowed back through the IST and should be refunded to the non-IST customers on the system during November 1, 1985, through

Rate Schedule T-2 and negotiated sales under Rate Schedules S-1 and SM-1. She "strongly dissent[ed]," however, from the majority's findings and conclusion allowing NCNG to retain the two percent allowance collected by it for transportation service under Rate Schedule T-1. Commissioner Cook equates this allowance to an over-recovery arising "as a result of the Majority's willingness to allow NCNG to interpret its T-1 tariff to a degree that, . . . far exceeds the bounds of reasonableness." In addition, she states the majority's conclusion "allows NCNG to totally disregard the provisions of NCNG's . . . []IST[] rider."

7. In this and other orders of the Commission referred to in this opinion the Commission's summary of evidence, findings of fact, and conclusions of law are mixed together in portions of the orders denominated "Findings of Fact" and "Evidence and Conclusions for Findings of Fact." Throughout this opinion we have tried to distinguish between and denominate findings and conclusions on the basis of the distinctions we drew in *State ex rel. Utilities Comm. v. Public Staff*, 322 N.C. 689, 693, 370 S.E. 2d 567, 570 (1988) and *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 351-52, 358 S.E. 2d 339, 346 (1987). As this Court noted in *Eddleman*, "[a]s long as 'each link in the chain of reasoning' appears in the Commission's order, mislabeling is merely an inconvenience to the courts." *Eddleman*, 320 N.C. at 352, 358 S.E. 2d at 346.

September 30, 1986, the time period during which these cost imputations occurred.

Carolina Utility Customers Association, Inc. (CUCA), NCNG, and Public Staff duly filed exceptions to the hearing panel's Recommended Order On Further Hearing. The full Commission held oral arguments on the exceptions on 27 July 1987.

The Commission entered its "Final Order On Further Hearing" on 25 September 1987. The Commission concluded "[t]he $483,054 cost imputed into the IST on sales of spot market gas [under Rate Schedules S-1 and SM-1] should be flowed back through the IST and should be refunded to the non-IST customers on the system during November 1, 1985, through September 30, 1986, the time period during which these cost imputations occurred." In addition, the Commission found "[t]he value of gas-in-kind retained by NCNG under its T-1 and T-2 tariffs in the amount of $438,920 should be treated as transportation revenues and flowed through the IST to be refunded to the non-IST customers on the system during the time period during which these 2% retentions occurred." Commissioner Cook concurred in part and dissented in part.[8] Commissioner Hipp also dissented.[9]

NCNG filed a "Motion For Partial Stay Of Final Order On Further Hearing" which was granted by the Commission on 26 December 1987. NCNG now appeals from the Commission's Final Order On Further Hearing, but only as to the validity of the required refund of the two percent monies collected pursuant to Rate Schedule T-1.[10]

8. Commissioner Cook concurred in the decision of the Commission to refund the two percent monies collected pursuant to Rate Schedule T-1 through operation of the IST. She dissented, however, on "the majority's failure to recognize the validity of the Public Staff's argument that the language in Rate Schedule T-1 is too vague to establish the 2% retention of gas-in-kind by NCNG."

9. Commissioner Hipp dissented because he believes the majority's order "interferes with contracts lawfully entered into between the gas company as a transportation carrier of gas and its shippers under [the T-1] tariffs approved by the Commission, and therefore deprives the company of property without due process of law."

10. In compliance with the Commission's order NCNG has refunded or distributed through the IST the value of gas retained under Rate Schedule T-2 and the cost imputed for line loss on negotiated sales under Rate Schedules S-1 and SM-1 for a total of $607,032. NCNG does not appeal those portions of the order.

II.

On appeal, NCNG presses three basic contentions. First, NCNG argues the Commission's finding and conclusion that the value of gas-in-kind retained by NCNG under its T-1 tariff should be treated as transportation revenues is arbitrary and capricious and unsupported by the evidence as a whole. Second, NCNG argues the Commission's order requiring refund of monies collected pursuant to a two percent line loss and compressor fuel charge it assessed its customers on Rate Schedule T-1 constitutes retroactive ratemaking in excess of the Commission's statutory authority. Last, NCNG argues the Commission's order also amounts to an impairment of contract and an unlawful taking of property other than by the law of the land or without due process in violation of the North Carolina and United States Constitutions. We will treat these arguments seriatim.

A.

[1] NCNG contends on this appeal that the finding and conclusion of the Commission that revenues to be refunded under the IST include the value of gas retained from T-1 transportation volumes to cover line losses is arbitrary or capricious and unsupported by evidence in view of the entire record. Public Staff responds that "[b]ased on the evidence and the language of the tariffs in question, the Commission properly concluded that a reasonable and representative allowance for compressor fuel and lost and unaccounted for gas volumes was included in NCNG's rates during the period in question and that, since the IST rider was a part of NCNG's rate structure approved at that time, it was proper to flow the value of the gas retained, which amounted to an overcharge, into the IST." We agree with Public Staff.

In determining the appropriate disposition of the two percent monies collected by NCNG pursuant to Rate Schedule T-1 the Commission relied heavily on the testimony of Public Staff witness Eugene H. Curtis, Jr. and the language of the IST tariff. During the hearings held in March 1987, for the express purpose

NCNG has not, however, paid to the IST $314,942 which constitutes the value of gas retained on T-1 volumes. This amount is the subject of NCNG's present appeal. Carolina Utilities Customers Association, Inc. (CUCA) chose not to join in this appeal.

of the resolution of the two percent issues, Public Staff witness Curtis testified that at the time involved in this proceeding, transportation revenues collected from T-1 customers flowed through the IST to benefit all non-IST customers. He explained that the two percent gas volumes retained by NCNG from T-1 customers are eventually sold and converted to dollars received by NCNG. He concluded that these dollars should be treated as transportation revenues and flowed through the IST. In addition, during the hearings held in August 1986, involving the Company's overall general rate increase application, Public Staff witness Curtis testified that NCNG had provided no basis on which the two percent retained gas volumes could be justified in terms of cost. He further explained that it was the Public Staff's position that there was no reason to add this cost to the T-1 transportation customers' bills because the T-1 rate itself included the cost of providing service to these customers. Curtis again concluded that any additional recoveries of dollars or retained gas should flow to the customers of NCNG through the IST.

The Commission also closely examined the language of the IST provision. The Commission found that the original IST, approved by Commission order effective 12 December 1983, provided that "[t]he transportation revenues collected pursuant to Rate Schedule No. T-1 . . . will be refunded in the IST true-up." The Commission also found the revised IST, effective 1 May 1986, provided in pertinent part, "[a]ll revenues less gross receipts tax received by the Company for transportation service to customers . . . will be included in the IST deferred account." In addition, the Commission found that in Docket No. G-21, Sub 235, the Commission established the base rates which were in effect during the time period at issue in this proceeding. In that docket, the Commission had included a "reasonable and representative" allowance for compressor fuel and lost and unaccounted for gas volumes and the approved rates were designed to allow the Company to recover these costs. Furthermore, the Commission found the IST mechanism to be a part of NCNG's rate structure approved at that time.

N.C.G.S. § 62-94 prescribes the scope of appellate review of a decision by the Commission. Under this standard, the reviewing court

> (b) . . . shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.
>
> (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error.

N.C.G.S. § 62-94 (1982 Repl. Vol.). This Court's statutory function is to assess whether the Commission's order is affected by errors of law, and to determine whether there is substantial evidence, in view of the entire record, to support the position adopted. *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. 238, 243-44, 372 S.E. 2d 692, 695 (1988); *see, e.g., State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 355, 358 S.E. 2d 339, 347 (1987); *State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 316 N.C. 238, 242, 342 S.E. 2d 28, 31-32 (1986); *State ex rel. Utilities Commission v. Carolina Utilities Customers Assoc.*, 314 N.C. 171, 179-80, 333 S.E. 2d 259, 265 (1985).

With these principles in mind we hold that the Commission's conclusion that the two percent monies collected pursuant to Rate Schedule T-1 must be included in the IST true-up is not arbitrary and capricious and is supported by competent, material and sub-

stantial evidence in view of the entire record. The Commission's Final Order On Further Hearing shows the Commission carefully considered and reviewed several sources of evidence. These include the Commission's records, which contain testimony taken in earlier hearings and tariffs previously approved by the Commission, the Commission's Recommended Order On Further Hearing issued May 19, 1987, and statements of CUCA, Public Staff, and NCNG. Based upon the preceding evidence and findings made therefrom, the Commission reached the following conclusion:

> [I]n accordance with the IST mechanism it is proper to flow the revenues at issue into the IST. The Commission believes that the 2% monies collected pursuant to Rate Schedule T-1 constitute "transportation revenues" and therefore must be included in the IST true-up. The term "revenues" is very comprehensive; it generally includes all monies received from whatever source and in whatever manner. . . . NCNG's failure to include the 2% monies in the IST was at odds with the language of the IST, and a refund through the IST must be ordered.

NCNG's contrary position on this issue must fail. The substance of its argument is that the Commission, by including the value of gas retained under Rate Schedule T-1 in the IST mechanism as transportation revenues, has equated losses with revenues and therefore its finding is arbitrary and capricious and unsupported by the record as a whole. We disagree.

The term "loss" is defined as "synonymous with, or equivalent to, 'damage', 'damages', 'deprivation', 'detriment', 'injury', and 'privation.' " Black's Law Dictionary 851 (rev. 5th ed. 1979). The term "revenue" is defined as "[r]eturn or yield, as of land; profit, as that which returns or comes back from an investment; the annual or periodical rents, profits, interest or issues of any species of property, real or personal; income of individual, corporation, government, etc." *Id.* at 1185. The record in this proceeding does contain competent, material and substantial evidence to support the Commission's conclusion that the two percent gas volumes retained from T-1 customers does constitute a "revenue" rather than a "loss." This evidence includes the following: Public Staff witness Curtis testified that NCNG's two percent retained gas volumes were not losses, but were eventually

sold and converted into dollars received by the company. NCNG witness Gerald A. Teele denied that the two percent allowance represented additional transportation revenue. Teele, however, admitted that the allowance could be classified as "compensation to the Company." In addition, the evidence was uncontroverted that the approved T-1 rates, which were in effect during the time period at issue in this proceeding, already included a built-in allowance to NCNG for compressor fuel and lost and unaccounted for gas volumes. NCNG witness Teele admitted on cross-examination that though the company does keep records of lost and unaccounted for gas, he could not show the Commission that the company's actual losses exceeded this existing allowance.

Considering the above evidence and the record as a whole, we hold the Commission's conclusion is supported by substantial, competent evidence in view of the entire record.

B.

[2] NCNG also argues that the Commission's order requiring NCNG to include the two percent monies in the IST as transportation revenues constitutes retroactive ratemaking in excess of the Commission's statutory authority. Public Staff counters, claiming the Commission's order "bears no resemblance to . . . retroactive ratemaking as condemned by this Court . . . ." We agree with Public Staff.

"[R]etroactive rate making occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use." *Utilities Commission v. Edmisten, Atty. General*, 291 N.C. 451, 468, 232 S.E. 2d 184, 194 (1977). It is improper to require a utility to refund monies which it had been validly authorized to collect for recovery of anticipated expenses, though the expenses never actually materialized. *Id.* at 469, 232 S.E. 2d at 195. Generally, retroactive ratemaking is improper. *Id.* at 468, 232 S.E. 2d at 194; *see Utilities Commission v. City of Durham*, 282 N.C. 308, 318, 193 S.E. 2d 95, 102 (1972) (Utilities Commission may not fix rates retroactively so as to make them collectible for past service).[11]

11. This decision relies on this Court's interpretation of N.C.G.S. § 62-136, which states in part:

With these principles in mind, we hold the Commission's order does not constitute retroactive ratemaking. Here the Commission's order does not require NCNG to refund monies which it had been properly authorized to collect. Nor is this case analogous to our decision in *City of Durham*, when we refused to require a refund of interim rate increases since the rates charged were neither excessive nor unreasonable. *City of Durham*, 282 N.C. at 318-19, 193 S.E. 2d at 103. In contrast, here the Commission's order merely requires NCNG to abide by the rate structure in existence at the time the two percent monies were collected from T-1 customers. The Commission found: (1) the relevant rate structure included the IST mechanism; (2) the IST mechanism expressly provided T-1 transportation revenues to be refunded in the IST true-up; and (3) the two percent monies collected by NCNG from its T-1 transportation customers had not been flowed through the IST. All three of the above findings were uncontroverted. Finally, the Commission concluded the two percent monies were "revenues" under the IST and were therefore inappropriately excluded from the IST true-up. As noted above in section II. A. of this opinion, we agree with this conclusion for the reasons stated.

We hold, on this record, that the Commission's order does not constitute unlawful retroactive ratemaking.

C.

[3] NCNG argues the Commission's actions in this proceeding amount to an impairment of contract and an unlawful taking of property other than by the law of the land or without due process in violation of the North Carolina and United States Constitutions. More specifically, NCNG contends the Commission's action requiring NCNG to pay into the IST the value of gas retained constitutes impairment of the obligation of contracts in violation of the contracts clause under article I, section 10, of the United States Constitution. NCNG also contends the Commission's order

(a) Whenever the Commission, . . . finds that the existing rates in effect and collected by any public utility are unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law, the Commission shall determine the just, reasonable, and sufficient and nondiscriminatory rates to be thereafter observed and in force, and shall fix the same by order.

retroactively charges NCNG for the value of line loss allowances and requires it to bear the expense with no consideration of the additional line loss for customer owned volumes transported in addition to its system load. NCNG contends the Commission's action amounts to a taking of its property contrary to the law of the land and without due process in violation of article I, section 19 of the North Carolina Constitution. Public Staff counters, claiming the Commission's requirement that NCNG include the value of the two percent monies in the IST does not amount to an impairment of contract nor an unlawful taking of property other than by the law of the land or without due process. We agree with Public Staff.

Article I, section 10, clause 1, of the United States Constitution provides that "No state shall . . . pass any . . . law impairing the obligations of contracts . . . ." In interpreting this provision in the context of regulated utilities we have stated:

> [I]t is well settled in this State that rates for public utility service fixed by an order of the Commission, otherwise lawful, supersede contrary provisions in private contracts concerning rates for such service. *The enforcement of such an order of the Commission does not constitute an impairment of the obligation of such contract,* in violation of the Contract Clause of the United States Constitution, since contracts of public utilities, fixing rates for service, are subject to the police power of the State.

Utilities Comm. v. Power Co., 285 N.C. 398, 406, 206 S.E. 2d 283, 290 (1974) (citations omitted and emphasis added).

Article I, section 19 of the North Carolina Constitution provides in part: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." This Court has recognized "[u]nder the police power the state has authority to enact legislation to regulate the charges and business of a public utility . . ." *Paper Co. v. Sanitary District*, 232 N.C. 421, 430, 61 S.E. 2d 378, 385 (1950) (quoting with approval, *Schiller Piano Co. v. Illinois Northern Utilities Co.*, 288 Ill. 580, 585, 123 N.E. 631, 633 (1919)). Moreover, in *In re Hospital*, 282 N.C. 542, 550, 193 S.E. 2d 729, 735 (1973), we explained:

> Any exercise by the State of its police power is, of course, a deprivation of liberty. *Whether it is a violation of the Law of the Land Clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it.* To deny a . . . corporation the right to engage in a business . . . is a far greater restriction upon . . . its liberty than *to deny the right to charge in that business whatever prices the owner sees fit to charge for service.* Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon Article I, § 19 of the Constitution of North Carolina.

Id. (emphasis added). This Court has also recognized that an order of the Commission is legislative in character and is therefore subject to the same constitutional tests and commands as is a legislative enactment issued under the state's police power. *See Utilities Commission v. R.R.*, 267 N.C. 317, 325-26, 148 S.E. 2d 210, 216 (quoting with approval, 73 C.J.S. *Public Utilities* § 41 at 1081), *modified on other grounds*, 268 N.C. 204, 150 S.E. 2d 337 (1966).

With these principles in mind, we hold the Commission's actions are not unconstitutional under either article I, section 10 of the United States Constitution or article I, section 19 of the North Carolina Constitution. First, the Commission's actions do not amount to an unconstitutional impairment of contract. Here the Commission's order requires NCNG to comply with the approved rate structure in existence when the two percent monies were collected from T-1 customers. The order, therefore, constitutes a lawful "enforcement" of the Commission's prior order entered in Docket No. G-21, Sub 235. *See Utilities Comm. v. Power Co.*, 285 N.C. at 406, 206 S.E. 2d at 290. In that docket, the Commission established the rates and rate structure which were in effect during the time period at issue in this proceeding. Notably, the IST mechanism was a part of NCNG's rate structure approved at that time. In addition, there is arguably no conflict between the Commission's order and the service contracts entered into between NCNG and its T-1 customers. The Commission's order does not require NCNG to give up the value of the two percent retained gas volumes contracted for. Rather, the order only requires NCNG to include the value of retained vol-

umes in the IST mechanism as is required of all other T-1 revenues less gross receipts tax. Assuming arguendo there is a conflict, the Commission's previously approved rate structure lawfully supersedes the terms of the private customer contracts. *See id.*

The Commission's actions also do not amount to an unconstitutional taking of property other than by the law of the land or to a taking without due process. Here the Commission's order is reasonable and its benefit to the public outweighs any deprivation of NCNG's constitutional rights. In reaching this conclusion, we again emphasize that the Commission's order, requiring the inclusion of the two percent monies in the IST, comports with NCNG's lawful rate structure previously approved by the Commission. In addition, we also rely on our decision in *Power Co.*, when this Court recognized the significant public good involved in the Commission's regulation of utility companies' private contracts affecting rates. *See id.* at 407, 206 S.E. 2d at 290-91. The following words from that decision are equally applicable to the Commission's present actions:

> It is in the *public interest* that a public utility company charge for its services rates which will enable it to maintain its financial ability to render adequate service and to attract the capital necessary for expansion and improvement of its service as needed. It is also in the *public interest* that there be no unreasonable discrimination between the users of such service. *The police power of the state extends to the raising of rates fixed by private contract so as to accomplish either or both of these purposes.*

Id. (emphasis supplied).

We hold, on this record, the Commission's actions do not amount to an impairment of contract in violation of article I, section 10, of the United States Constitution nor an unlawful taking of property other than by the law of the land or without due process in violation of article I, section 19 of the North Carolina Constitution.

In conclusion and for the reasons stated, we hold that the Commission did not err in this proceeding. Its order is, therefore,

Affirmed.

STATE OF NORTH CAROLINA v. TAMILA LYNN SILVERS

No. 1A88

(Filed 4 January 1989)

1. **Criminal Law § 50— capacity to stand trial—opinion of jailers**

The trial court erred in a first degree murder prosecution in which the issue of defendant's capacity to stand trial had been raised by excluding the testimony of two employees of the Sheriff's Department who had observed defendant during her pretrial incarceration and who felt that defendant did not fully comprehend what was going on and could not assist in her own defense in a rational manner. Lay witnesses may testify, upon proper foundation, in terms of the tests set out in N.C.G.S. § 15A-1001(a). There was prejudice from the exclusion of the testimony here because this was the only evidence of defendant's condition shortly before trial.

2. **Criminal Law §§ 50, 6— capacity to stand trial—effect of voluntary intoxication—otherwise insane defendant—legal conclusion by psychiatrist**

The trial court erred in a prosecution for first degree murder, which was reversed on other grounds, by permitting a psychiatrist to offer an interpretation of the law that, if defendant was voluntarily intoxicated, she was responsible for her actions even if her underlying mental disorder might otherwise render her legally insane. Not only was the witness improperly permitted to state a legal conclusion, which was later used by the District Attorney in his closing argument, but the conclusion rests upon a misapprehension of the law.

APPEAL pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment for defendant's conviction by a jury of first degree murder at the 19 October 1987 Criminal Session of Superior Court, RUTHERFORD County, *Owens, J.*, presiding. Heard in the Supreme Court on 13 October 1988.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant appellant.

EXUM, Chief Justice.

The issue we find dispositive of this appeal is whether in ruling on the pretrial question of defendant's competency to proceed, the trial court erred to defendant's prejudice by excluding lay opinion testimony relevant to this question. We hold it did err,

vacate the verdict and judgment entered below and remand for further proceedings.

I.

Defendant was arrested on 22 May 1987 and charged with murdering Connie Mae Kennedy Davis. On 26 May 1987 defendant was referred to the North Carolina Division of Mental Health/Mental Retardation/Substance Abuse Services at Dorothea Dix Hospital in Raleigh for evaluation of her capacity to proceed to trial. Defendant was examined by Dr. Bob Rollins, a forensic psychiatrist, who filed a report of the examination on 4 June 1987. Dr. Rollins diagnosed chronic schizophrenia and concluded that although defendant was prevented by her mental illness from distinguishing right from wrong when she murdered her victim, defendant was competent to proceed to trial. Defendant was released from the hospital after ten days and incarcerated at the Rutherford County jail.

Defendant was indicted for murder on 7 July 1987, and on 16 July she returned to Dorothea Dix Hospital after having difficulty adjusting to her incarceration. Defendant's capacity to proceed to trial was re-evaluated by Dr. Rollins, and he determined defendant remained capable of so proceeding. The doctor also noted during this second examination that he had received information from the District Attorney's office regarding defendant's use of marijuana sometime before murdering her victim. Based on this information the doctor revised his opinion of 4 June 1987. He concluded in a report signed 22 July 1987 "that Ms. Silvers' mental disorder likely was made worse by voluntary intoxication" and that she "would be considered responsible for her actions" because of her marijuana use.

At the 19 October 1987 Criminal Session of the Superior Court for Rutherford County, before arraignment, defendant moved for determination of her capacity to proceed to trial pursuant to N.C.G.S. § 15A-1001. Defendant offered the lay opinions of two officers of the Rutherford County Sheriff's Department who had observed defendant during her pretrial incarceration. The state objected to these witnesses giving their opinions regarding defendant's ability to understand the nature of the proceedings against her, and the trial court sustained these objections. The state then submitted Dr. Rollins' two reports, written

in June and July, respectively, that concluded defendant was capable of proceeding to trial. The state put on no additional evidence. After listening to arguments and reviewing the two reports, the trial judge ruled defendant was competent to proceed to trial.

Defendant was then arraigned and pleaded not guilty to first degree murder. The state informed the court it found no evidence of aggravating circumstances pursuant to N.C.G.S. § 15A-2000(e) and would not seek the death penalty if defendant were convicted.

At trial state's evidence tended to show that, when not institutionalized at mental health facilities, defendant lived in a trailer directly behind her mother's home in Caroleen. Some time before murdering Connie Davis on 22 May 1987 defendant had a relationship with Carlos Rhodes. When this relationship ended defendant formed a relationship with Phillip Doster, who was later convicted of drug charges and imprisoned. Carlos Rhodes began dating the murder victim and enjoyed a friendship with her at the time of her death.

The victim's sister and a neighbor both testified that the victim expressed fear of defendant and that defendant had threatened her in the weeks before her murder. Another sister of the victim testified to hearing defendant say in 1985 or 1986 that defendant could kill somebody or do anything she wanted and "get by with it" because she had been "in Broughton [Hospital]" and people thought she was crazy.

Connie Davis spent the day of 22 May 1987 with her seven-year-old son at a friend's home. At midnight Carlos Rhodes persuaded Connie Davis to return to her trailer with him. After returning, they received a telephone call from defendant. She asked to borrow cigarettes and walked down to Connie Davis' trailer. After being let in, defendant sat on the sofa next to the victim, lit a cigarette and without provocation drew a knife and stabbed Connie Davis in the chest. The knife penetrated an artery, a lung and the victim's heart. Davis jumped up and defendant stabbed her again, in the upper portion of her left arm. The victim was rendered unconscious in a matter of minutes and died in five to ten minutes as a result of massive internal bleeding.

Defendant did not dispute the state's version of the murder but offered evidence supporting her defense of insanity. Evidence presented by defendant revealed she had a long history of chronic psychosis. There was testimony that at age fifteen defendant suffered a serious injury to the back of her head at a local swimming area. The accident required defendant's extended hospitalization. Defendant's mother said defendant's mental problems followed this accident. Defendant quit school in the ninth grade and was institutionalized on numerous occasions at several mental hospitals. She was diagnosed as suffering from paranoid schizophrenia. Dr. Rollins' evaluations include a report of past diagnoses including chronic schizophrenia or schizoaffective disorders, antisocial disorders, borderline personality disorders, borderline intellectual functioning, overanxious disorders and dysthymic disorders. Doctor Rollins found defendant's mental disorder characterized by pervasive delusional thinking and auditory hallucinations.

During defendant's first stay at Dorothea Dix Hospital following her arrest, she wrote a letter to Phillip Doster, who was at the Spindale Prison Camp in Spindale, North Carolina. This letter read in part:

> Phillip, Hey, hey they've got me. They got me for 1st degree murder. Guess who I killed? Connie Kennedy. Phillip, I don't know what in the hell got into me. I went crazy. I got high and I was real depressed. I went and got a knife. I put it in my bra. I called Connie and asked her if I could borrow a few cigarettes. Hell, I had a whole pack. I walked out there and sit [sic] on the couch and lit a cigarette and then I got the knife out and I stabbed her right in the heart. She jumped up and I stabbed her to death. It was awful. I'm at Dorothea Dix right now. There's some nice staff here and nice murders too. I have to stay here 10 days and then they put me back in jail.

II.

A.

[1] In support of her motion before arraignment to determine her capacity to proceed to trial, defendant called two witnesses who had opportunity to observe defendant during her incarceration. The testimony of both witnesses was excluded by the trial court.

In her first assignment of error defendant contends the trial court erred in excluding testimony of Joan Lavender, an employee of the Rutherford County Sheriff's Department and George Cash, Sergeant of the Rutherford County Jail and an employee of the Sheriff's Department.

Joan Lavender testified she had worked for the Sheriff's Department for two years and during cross-examination stated she had no formal training in mental health but had practical experience in dealing with many mental patients while working at the jail. Lavender stated she had become acquainted with defendant since defendant's pretrial incarceration through 20 or 30 occasions to observe and speak with defendant. She had seen defendant within the week before she testified. After acknowledging she had had the opportunity to talk with defendant and "be around her closely," Lavender was asked by defense counsel:

> Do you have an opinion satisfactory to yourself as to whether or not Tamila Silvers at the present time understands the nature and object of the proceedings against her, yes or no?

The District Attorney objected:

> Objection, there's medical experts that cannot [qualify] to answer that question. Mrs. Lavender is a nice lady and excellent officer but we don't think she's any more qualified than we would be to answer that particular question.

The court sustained the objection but permitted the witness to answer and be cross-examined for the record. She testified, "As many times as I've been around Tammy, I don't think she fully comprehends what's going on." Lavender also stated she did not believe defendant was able to assist in her own defense in a rational manner.

Defendant next called Sergeant Cash, who described his responsibilities as ensuring prisoners' safety and humane treatment and confirming the presence of a jailer and matron at the jail 24 hours a day. This witness testified he had observed defendant "most every day" after her incarceration. The following colloquy occurred:

> Q. I'll ask you also if you have an opinion satisfactory to yourself as to whether or not because of her mental illness or

defect, she's able to assist in her defense in a rational or reasonable manner, yes or no?

MR. LEONARD: Objection.

THE COURT: Objection sustained.

Q. I offer it.

A. No sir, I do not.

CROSS EXAMINATION BY MR. LEONARD:

Q. Are you saying you don't have an opinion as to those things?

A. I'm saying as long as it would take to try the case, I, personally, don't think she could stay in one mood long enough to handle it.

Q. Maybe I misunderstood, I thought when Mr. Harris asked you if you had an opinion you said no, you didn't have an opinion?

A. I said she's not capable in my opinion.

At the competency hearing the District Attorney put on no witnesses but offered the two reports by Dr. Rollins that we have described above.

After hearing counsel's arguments, the trial judge ruled:

Let the record show that the defendant offered the testimony of Joan Lavender, a Deputy Sheriff of Rutherford County and George Cash, a Deputy Sheriff of Rutherford County; that the witness, Joan Lavender has no special training in diagnosing medical condition[s], neither has the witness, George Cash; that both of these witnesses have had the opportunity to observe the defendant during the period she has been in the Rutherford County Jail since May 22nd, 1987; that upon objection by the State, the Court sustained the offered testimony of Joan Lavender and the witness George Cash as to any opinion as to whether the defendant understands the nature and object of the proceedings against her; as to whether she comprehends her own situation with reference to the proceedings or whether she's able to assist her Counsel in her defense in a rational and reasonable manner; *that for the record,* the Court permitted the witness,

Joan Lavender and George Cash to testify as to their opportunities to observe the defendant and their opinions; that the State offered into evidence the report signed by Dr. Bob Rollins, Forensic Psychiatrist of Dorothea Dix Hospital, as a result of examinations of defendant, who was admitted to Dorothea Dix Hospital on May 26, 1987 and July 17 [sic], 1987; that for the purpose of this hearing, these reports are admitted into evidence and the Court has read and examined each of these reports; that the Court notes that many of the symptoms described by Dr. Rollins in the report submitted by him were the same symptoms described by the witness, Joan Lavender and the witness, George Cash from their observations of the defendant; that the Court notes that in the report dated June 16 [sic] 1987, Dr. Rollins expressed the opinion that the defendant should be considered responsible for her actions on this charge and that another opinion dated July 22 1987 Dr. Rollins expressed the opinion that the defendant remains capable of proceeding to trial.

Based upon the foregoing findings of fact, the Court concludes that the defendant is capable of proceeding to trial; that she is able to understand the nature and object of the proceedings against her, to comprehend her own situation with reference to the proceedings and assist her counsel in a rational and reasonable manner. THE MOTION OF THE DEFENDANT IS DENIED. Exception for the defendant. (Emphasis supplied.)

It is apparent from his ruling that the trial judge relied entirely on Dr. Rollins' written reports and disregarded the testimony of the two lay witnesses. This was error.

The tests to determine a defendant's mental capacity to proceed to trial are found in N.C.G.S. § 15A-1001(a). N.C.G.S. § 15A-1001(a) states:

No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect [the person] is unable to understand the nature and object of the proceedings . . . , comprehend [the] situation in reference to the proceedings, or to assist in his [or her] defense in a rational or reasonable manner.

"[T]he new statute clearly sets forth in the disjunctive three tests of mental incapacity to proceed, and the failure to meet any one would suffice to bar criminal proceedings against a defendant." *State v. Jenkins*, 300 N.C. 578, 582-83, 268 S.E. 2d 458, 462 (1980).

N.C.G.S. § 15A-1002 permits the court, or the prosecutor, defense counsel or defendant by motion, to question defendant's competency at any time during the proceedings against defendant. The motion must detail the specific conduct upon which it rests. Upon the motion being made, the court must conduct a hearing to determine defendant's capacity to proceed. The court may in its discretion appoint impartial medical experts to examine defendant or commit defendant to a state mental health facility for up to 60 days for observation, treatment and diagnosis.

According to the Official Commentary to N.C.G.S. §§ 15A-1001-02, the statutes' objective is to ensure that a defendant will not be tried or punished while laboring under the incapacity the statutes describe. "Whether defendant is able to plead to the indictment and conduct a rational defense should be determined prior to the trial of defendant for the crime charged in the indictment." *State v. Propst*, 274 N.C. 62, 69, 161 S.E. 2d 560, 566 (1968). Over 100 years ago this Court noted, "[I]t is most obviously fitting and proper . . . that the defendant's capacity to enter upon a trial . . . should be determined before he is put to trial; for the trial would amount to nothing if the defendant has not the required capacity to defend himself against the charge." *State v. Hayward*, 94 N.C. 847, 854 (1886).

A lay witness may testify, upon a proper foundation, on the issue of a defendant's capacity to stand trial. "A lay witness who has observed, conversed, or dealt with another person and who has had a reasonable opportunity to form an opinion satisfactory to the witness as to that person's mental condition may testify as to the witness's opinion." *State v. Smith*, 310 N.C. 108, 114, 310 S.E. 2d 320, 324 (1984).

In *Smith* the trial court properly sustained an objection to a question posed to defendant's wife that asked whether she had an opinion as to her husband's *capacity to stand trial.* The question improperly asked for a legal conclusion, and witnesses may not testify to legal conclusions. *State v. Weeks*, 322 N.C. 152, 367 S.E. 2d 895 (1988); *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309

(1986); *State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). Instead, both lay and expert witnesses must testify in terms of the tests set out in N.C.G.S. § 15A-1001(a). For example, both expert and lay witnesses may, with proper foundation, give opinions as to whether defendant is able to understand the nature and object of the proceedings, or comprehend his or her own situation in reference to the proceedings, or assist in his or her defense in a rational and reasonable way. *State v. Smith*, 310 N.C. 108, 310 S.E. 2d 320.

Here defendant's witnesses were both asked proper questions after sufficient foundation had been established. Joan Lavender would have, if permitted, testified that after close and repeated observations of defendant she held the opinion that defendant was unable to comprehend what was "going on" and could not assist in her own defense in a rational manner. Sergeant Cash testified for the record that after observing defendant "most every day" after her incarceration, his opinion was that defendant was "not capable" of assisting in her defense.

This testimony should have been admitted and considered by the trial judge on the issue of defendant's capacity to proceed to trial. His failure to consider it constitutes error.

B.

The remaining question is whether the error in excluding this testimony requires that the verdict and judgment be vacated and further proceedings ordered. We hold that it does. The pertinent standards are found in N.C.G.S. § 15A-1443(a), and require us to ask whether, had the evidence not been excluded, there is a reasonable possibility the trial court might have reached a different conclusion in determining defendant's capacity to proceed.

The only evidence offered suggesting defendant was competent to proceed to trial was two reports written by Dr. Rollins some three and five months, respectively, before the hearing. In these reports Dr. Rollins deemed defendant then capable of proceeding to trial. Dr. Rollins did not testify at the October 1987 hearing, and there was no expert testimony regarding defendant's capacity to proceed at that time. There is no evidence Dr. Rollins evaluated defendant's capacity to proceed after his July report or that defendant's condition remained the same from July until the

time of trial. The only evidence introduced of defendant's condition during those months and shortly before trial was the improperly excluded testimony of witnesses Lavender and Cash, both of whom said, essentially, that defendant was unable to understand the proceedings against her and assist in her defense.

For these reasons, we conclude there is a reasonable possibility that had the trial judge properly allowed and considered the testimony of the two lay witnesses, he might have found defendant incompetent to proceed. Accordingly, the verdict and judgment below must be vacated and the case remanded for further proceedings consistent with this opinion.

III.

[2] Although for the reasons already stated the verdict and judgment below must be vacated and the case remanded for further proceedings, we find it appropriate to consider an assignment of error relating to the trial itself. Defendant argues, and we agree, that Dr. Rollins, called as a witness for defendant, was erroneously permitted to offer legal conclusions during cross-examination by the state. Arguably, had defendant properly objected at trial to this testimony, its admission alone might have required a new trial. Defendant, however, did not object to the testimony. We address the question in the hope that the error will not be repeated in subsequent proceedings.

The defense in this case is insanity. In North Carolina the legal definition of insanity continues to be the *M'Naghten* test, first laid down in *M'Naghten's Case*, 10 Clark & Fin. 200, 210 [8 Eng. Reps. 718, 722] (1843). Our cases state the test as follows: "[A]n accused is legally insane and exempt from criminal responsibility by reason thereof if [the accused] commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act [the accused] is doing, or, if he [or she] does know this, incapable of distinguishing between right and wrong in relation to such act." *State v. Johnson*, 298 N.C. 47, 65-66, 257 S.E. 2d 597, 612 (1979), *quoting State v. Swink*, 229 N.C. 123, 125, 47 S.E. 2d 852, 853 (1948); *accord, State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Pagano*, 294 N.C. 729, 242 S.E. 2d 825 (1978); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978).

In support of her insanity defense defendant first elicited testimony from Dr. Rollins concerning his initial finding in June 1987 that as a result of mental disorders, defendant was unable to distinguish between right and wrong when she killed Connie Davis. On cross-examination Dr. Rollins explained that after forming this opinion, he had learned of a letter defendant had mailed to her boyfriend in which she stated she had gotten "high" on marijuana before killing the victim. Dr. Rollins agreed with the District Attorney that his second report reflected a change of opinion, saying:

> I had been concerned all along about the possible effect of marijuana. One can have a serious mental disorder and still know what they are doing. In North Carolina we still hold people responsible for whatever they do, if they are intoxicated, so it was my thinking that if her condition were made worse by the voluntary use of marijuana then her mental disorder in my opinion wouldn't relieve her of responsibility for whatever she might of done.

The District Attorney capitalized on this testimony in his closing argument to the jury, saying

> there is every indication to assume that it is correct, that if she had been smoking marijuana on that occasion, everything that Dr. Rollins tells you about her not knowing right from wrong goes out the window. Because he said if it comes down to a question of drug intoxication of any type she is responsible under the laws of North Carolina.

We said in *State v. Weeks*, 322 N.C. 152, 164, 367 S.E. 2d 895, 903 (1988), that:

> Testimony by experts is admissible if it 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 (1986). Moreover, an expert may be permitted to give his opinion even though it embraces an ultimate issue to be decided by the trier of fact. *Id.*, Rule 704 (1986). However, it is not error for a trial court to refuse to admit expert testimony embracing a legal conclusion that the expert is not qualified to make.

We held in *Weeks* that an expert's testimony that embraces legal terms of art, the definitions of which are not readily apparent to

the expert, should be excluded because it tends to confuse rather than help the jury in understanding evidence and determining facts in issue. In *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986), the Court held that a doctor, by testifying that trauma injuries were a "proximate cause" of a blood clot that eventually caused death, stated a legal conclusion that should have been excluded. We noted in *Ledford* that "the principle excluding opinions on matters of law 'clearly bars opinion that a criminal defendant is "guilty" . . . .' " *Id.* at 617, 340 S.E. 2d at 321. We have also stated that the

> rule that an expert may not testify that such a particular legal conclusion or standard has or has not been met remains unchanged by the new Evidence Code, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.

State v. Smith, 315 N.C. 76, 100, 337 S.E. 2d 833, 849.

Dr. Rollins was improperly permitted to testify about the law of voluntary intoxication in North Carolina and its effect on defendant's insanity defense. He stated: "In North Carolina we still hold people responsible for whatever they do, if they are intoxicated." By this testimony Dr. Rollins offered an interpretation of the law that if defendant were voluntarily intoxicated, she was responsible for her actions even if her underlying mental disorder might otherwise render her legally insane.

Not only was Dr. Rollins improperly permitted to state a legal conclusion regarding the effect of voluntary intoxication on the defense of insanity, but the conclusion he gave, later used by the District Attorney in his closing argument, rests upon a misapprehension of the law. As we noted above, persons who are legally insane are exempt from criminal responsibility. Voluntary intoxication, on the other hand, does not relieve a defendant altogether from criminal responsibility. At most it may negate the element of specific intent in those crimes in which that element must be proved. "In certain instances voluntary drunkenness, while not an excuse for a criminal act, may be sufficient to negate the requisite intent element." *State v. Mash*, 323 N.C. 339, 347, 372 S.E. 2d 532, 537 (1988).

While one who is intoxicated may still be able to form whatever specific intent is required for conviction, *see State v. Hamby*, 276 N.C. 674, 174 S.E. 2d 385 (1970), one may also be intoxicated and due to a mental illness or defect meet the *M'Naghten* test for insanity. Indeed, this Court has held that a criminal defendant producing sufficient supporting evidence may be entitled to jury instructions regarding both the insanity defense and voluntary intoxication. *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560. The presence of voluntary intoxication does not invalidate an otherwise appropriate insanity defense. Insanity and voluntary intoxication are discrete doctrines that stand, respectively, on separate legal footings. They are not mutually exclusive. They may coexist in the same case and be considered, jointly and severally, by the jury. *Id.*

For the reasons given the verdict and judgment of the trial court are vacated and the matter remanded to the Superior Court, Rutherford County, for further proceedings consistent with this opinion.

Vacated and remanded.

STATE OF NORTH CAROLINA v. ROBERT LEE ROGERS, III

No. 571A87

(Filed 4 January 1989)

1. Criminal Law § 102.6— murder—prosecutor's comments to jury—no error

The trial court did not err in a prosecution for first degree murder by overruling defendant's objections to comments made by the prosecutor in his closing argument where the prosecutor's opinions that Transylvania County should be decent, safe and law-abiding, that drug abuse is bad, that young people should be warned about drug abuse, and that a person's home is his castle are opinions which are widely held; arguments that 95% of murderers would be free if intoxication was a defense and that politicians have talked about building a new stretch of road were related to the facts that voluntary intoxication is generally not a defense to a crime and that it is difficult to travel on snow-covered mountain roads; speculation that the defense of intoxication was an afterthought was a legitimate inference arising from the evidence that defendant was not as drunk as he claimed to be; and the prosecutor's statements exhorting the jury not to return a verdict of less than first degree murder were typical prosecutorial rhetoric.

2. Criminal Law § 50.1— murder—expert estimate of defendant's blood alcohol level—properly excluded

The trial court did not err in a first degree murder prosecution by sustaining the State's objection to the testimony of defendant's medical expert on his estimate of defendant's blood alcohol content at the time of the shootings. The data upon which the witness's opinion was based was inadequate for him to form an opinion; moreover, the exclusion could not have prejudiced defendant, even if it was error, because ample evidence was introduced showing defendant's very heavy consumption of alcohol that day and Dr. Moore was allowed to testify extensively about the effect of alcohol on the brain.

3. Criminal Law § 43.4— murder—photographs of bodies—admissible

The trial court did not err in a prosecution for first degree murder by admitting nine photographs of the victims' bodies. The number of photographs was not excessive and the photographs were not gory or gruesome.

4. Homicide § 18.1— murder—evidence of premeditation and deliberation sufficient

The trial court did not err by denying defendant's motion to dismiss both charges of first degree murder where a reasonable juror could have found premeditation and deliberation from the evidence that, after being teased by the victims about his drug use, defendant returned to his car, became depressed about his drug problem, retrieved his gun from under the back seat and his ammunition from between the front seats, loaded the gun, walked back to the house, shot the victims until his gun was empty, then reloaded and shot one of the victims again. The jury could infer malice although defendant's mental and physical faculties were impaired from the use of alcohol, and the court declined to reconsider the rule that malice may be inferred in a homicide case from the unlawful killing with a deadly weapon.

5. Homicide § 30.2— murder—refusal to submit voluntary manslaughter based on provocative words—no error

The trial court did not err in a first degree murder prosecution by refusing to submit voluntary manslaughter to the jury based on the victims' teasing of defendant about his drug problem. Mere words, however abusive, are not sufficient provocation to reduce second-degree murder to manslaughter.

6. Constitutional Law § 78— two murders—consecutive life sentences—no error

The trial court did not violate the constitutional mandate against cruel and unusual punishment by sentencing defendant to consecutive life sentences for two counts of first degree murder. N.C.G.S. § 14-17.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing life sentences entered by *Rousseau, J.*, at the 31 August 1987 Session of Superior Court, TRANSYLVANIA County. Heard in the Supreme Court 14 November 1988.

The defendant was tried on two counts of first degree murder. The evidence tended to show that he was a drug addict. As a

child, he had had a learning disability and a violent disposition. He began using illegal drugs at age 13. He later married a drug addict. He and his wife spent at least $15,000 a year on illegal drugs, mostly cocaine and dilaudid. He also drank excessive amounts of alcoholic beverages.

On Saturday, 4 April 1987, when he was 31 years old, the defendant spent his day drinking and driving various places. His wife took injections of dilaudid. When it began to wear off, the defendant decided to procure some cocaine. He called Charles Allen Hollingsworth, from whom he had purchased cocaine several times before. Hollingsworth agreed to sell him some on this occasion. The defendant left his home in Asheville to go to Hollingsworth's home in Brevard. By the time he left to drive to Brevard, he had drunk between 12 and 22 beers, four "mini-bottles" of whiskey and perhaps some tequila. He was "staggering drunk" with slurred speech. He drank more beer on the way to Brevard.

He had a .22 caliber handgun under the back seat. He often carried this gun when he went to buy drugs. It was not loaded; he kept the ammunition in the bin between the front seats.

The defendant arrived at Hollingsworth's house at 9:00 p.m. Maurice Olin Higginbothan, age 17, was present with Hollingsworth. The defendant had not met Higginbothan before this time. The defendant bought a gram of cocaine from Hollingsworth for $100. Hollingsworth and Higginbothan teased him about the lengths to which users go to get drugs. When the defendant returned to his car, he was "feeling really bad" about the way he and his wife were destroying their lives with drugs. He then "just caved in inside." He became numb and stiff. He retrieved his gun from under the seat, picked up a handful of shells, loaded the gun and walked back to Hollingsworth's house. He walked in the door, shot Hollingsworth in the head, then shot Higginbothan until the gun was empty. He then reloaded and shot Hollingsworth again.

The defendant then walked out of the house, got in the car and drove to Asheville. He did not take his $100 or take any other money, even though Hollingsworth had $3,457.81 in cash on his person and Higginbothan had $339.35. Nor did the defendant take any more drugs with him, even though there were varying amounts of several different drugs in various places in the room.

After the defendant returned to Asheville, he and his wife stayed up all night consuming the cocaine and drinking beer. He did not tell anyone what he had done. The next day, Sunday, he poured acid into the barrel of the pistol. He saw nothing about the murders on the news and began to think it might have been a bad dream. However, he read about them in the newspaper on Monday afternoon. When he came home from work, he told his wife that he had committed the murders. She was afraid he would shoot himself, so they both drove to his parents' house in Lenoir. He told them what he had done. They called a lawyer, then the defendant, his wife and his parents drove back to Asheville. The defendant surrendered to the sheriff's department and gave a full confession.

While in jail, the defendant told another inmate that "a deal went sour" and he had meant to kill Hollingsworth, but Higginbothan had been in the wrong place at the wrong time.

The jury found the defendant guilty on both counts of first degree murder. He received two consecutive life sentences.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

Leonard, Biggers & Knight, by T. Karlton Knight, for the defendant appellant.

WEBB, Justice.

[1] In his first assignment of error, the defendant contends that the trial court erred in overruling the defendant's objections to numerous comments the prosecutor made in his closing argument. The defendant argues that by the following comments, the prosecutor injected his personal beliefs into the trial:

> First of all, the very basic notion that Transylvania County should be a clean and a decent, and a safe and a law abiding—
>
> . . . .
>
> Let me tell you right off the bat, that I do not believe in, and I do not countenance this drug business, possession . . . of drugs, or use of drugs, by anyone—
>
> . . . .

> Especially when that murder has been directed against young citizens of this county. And, when I think about young citizens, . . . I found myself wishing that we had a courtroom big enough . . . to accommodate every young person in this county . . . especially our high school children. . . .
>
> . . . .
>
> Think how much more of [premeditation and deliberation] are required for me to take this pistol right here, and to go into a house where two people are, into the—one of those people being the owner of that house now, and the notion in law is that that house, regardless of how humble it is, is supposed to be that man's castle where he—

The defendant argues that by the following comments the prosecutor traveled outside the record:

> Generally, voluntary intoxication is not a legal excuse for a crime. If it was, that is, if voluntary intoxication either on drugs or liquor or beer, whatever, was an excuse for crime, ninety-five percent of the murderers in the State of North Carolina would be put back on the street—
>
> . . . .
>
> [A]nd, what's the one thing, ladies and gentlemen, that the politicians over here in Transylvania County talk about the most when election time comes? They talk about the need to build that connector road out there.

(Here the prosecutor's point was that the stretch of road the defendant was driving on that night was difficult to navigate in the snow, which is why people want the new road.)

> . . . .
>
> Was Mr. Rogers even intoxicated to the extent that he now contends that he was? Is this defense of intoxication an afterthought? Is this a situation where Mr. Rogers comes in and admits to certain acts to which there is no defense? And, then this intoxication is somehow encouraged and nourished along—

Thirdly, the defendant complains that by the following comments the prosecutor improperly asked the jury not to compromise its verdict:

> [A]nd we don't want you to compromise, or we don't want you folks to, in effect, go back there and strike a plea bargain—
>
> . . . .
>
> But, I say this, members of the jury, in a case like this where you've heard the kind of evidence that you've heard, and with the strength of this evidence that you've heard, I would must [sic] rather you, as jurors, rather than go back there and call this case second degree murder, . . . I'd just rather see you turn him loose and put him back—

After examining each of these comments, we conclude it was not error for the court to allow them. N.C.G.S. § 15A-1230(a) provides:

> During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. 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.

"Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their 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).

In the first four comments of which the defendant complains, the prosecutor did express his opinions. However, these opinions, namely that Transylvania County should be decent, safe and law-abiding, that drug abuse is bad, that young people should be warned about drug abuse, and that a person's home is his castle are opinions which are widely held. It was not error to allow the prosecuting attorney to use them as premises for his argument.

We hold it was not error for the district attorney to make the arguments the defendant argues were outside the record. His statement that 95% of the murderers would be free if intoxication was a defense was obvious hyperbole related to the fact that voluntary intoxication is generally not a defense to a crime. His statement that politicians have talked about building a new stretch of road was related to the well-known fact it is difficult to travel on mountain roads that are covered with snow. These were not improper arguments.

The prosecutor's comment speculating that the defense of intoxication was an afterthought was a legitimate inference arising out of the evidence that the defendant was not actually as drunk as he claimed to be. The prosecutor's statements exhorting the jury not to return a verdict of less than first degree murder are typical prosecutorial rhetoric. It was not error for the trial court to allow these comments. This assignment of error is overruled.

[2] The defendant next contends the trial court erred in sustaining the State's objection to the testimony of the defendant's medical expert on his estimate as to the defendant's blood alcohol content at the time of the shootings. Dr. Dennis Moore, the medical expert, testified extensively about the defendant's history of chemical dependency. He then testified as to the amount of alcohol the defendant had consumed on the day before and the day of the shootings. He was then asked to give his estimate of the defendant's blood alcohol content at the time of the shootings. The State objected. After a voir dire hearing, the trial court sustained the objection on the ground that the witness was "guessing at too many things." The defendant contends that this was error. We disagree.

Opinion testimony based on inadequate data should be excluded. *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E. 2d 797 (1986); *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963); *Rutherford v. Air Conditioning Co., Inc.*, 38 N.C. App. 630, 248 S.E. 2d 887 (1978), *cert. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979); 1 Brandis on North Carolina Evidence § 136 (1982).

In the present case, Dr. Moore admitted that he did not know when the defendant last drank alcohol on that day, and did not know the defendant's rate of metabolism. His opinion was based principally upon how sober one would have to be to be able to

drive. The data upon which the witness' opinion was based was inadequate for him to form an opinion. In the words of Judge Rousseau it was "just a guess." It was properly excluded.

Even if the exclusion were error, it could not have prejudiced the defendant; ample evidence was introduced showing the defendant's very heavy consumption of alcohol that day, and Dr. Moore was allowed to testify extensively about the effect of alcohol on the brain. Finally, Dr. Moore testified as to how a hypothetical 170-pound person would react to consumption of twelve to eighteen beers and four mini-bottles of whiskey, and what his blood alcohol content might be. Clearly, the defendant was allowed to present to the jury, at least in substance, the evidence he wanted to present. This assignment of error is overruled.

[3] The defendant next assigns error to the trial court's admission, over the defendant's objection, of nine photographs of the victims' bodies. The defendant argues that the photographs were repetitive, and that their relevancy was outweighed by their potential to inflame the passions of the jury. We disagree.

Under N.C.G.S. § 8-97, photographs may be introduced as substantive evidence or for the purpose of illustrating the testimony of a witness. Photographs of homicide victims may be introduced even if they are gory, gruesome, horrible, or revolting, so long as an excessive number of photographs are not used solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E. 2d 615 (1988).

Of the nine photographs at issue in the present case, one depicts Hollingsworth's body as found at the crime scene, and two are autopsy photographs showing Hollingsworth's different wounds. One photograph depicts Higginbothan's body as discovered at the crime scene and four are autopsy photographs showing Higginbothan's various wounds. One photograph of the crime scene includes Higginbothan's body and part of Hollingsworth's body. We do not find this number to be excessive, especially since each autopsy photograph shows a different wound, and since the photographs are not, in our opinion, gory or gruesome. This assignment of error is overruled.

[4] The defendant next contends the trial court erred in denying his motion to dismiss both charges of first degree murder. He argues first that the evidence was insufficient for a jury to find the elements of premeditation and deliberation.

> Premeditation means that defendant formed the specific intent to kill the victim for some period of time, however short, before the actual killing. Deliberation means that the intent to kill was formed while defendant was in a cool state of blood and not under the influence of a violent passion suddenly aroused by sufficient provocation.

State v. Misenheimer, 304 N.C. 108, 113, 282 S.E. 2d 791, 795 (1981).

> The term "cool state of blood" does not mean that the defendant must be calm or tranquil or display the absence of emotion; rather, the defendant's anger or emotion must not have been such as to disturb the defendant's faculties and reason.

State v. Tysor, 307 N.C. 679, 682-83, 300 S.E. 2d 366, 368 (1983).

We believe that a reasonable juror could have found premeditation and deliberation from the evidence that, after the defendant was teased by Hollingsworth and Higginbothan about his drug use, he returned to his car, became depressed about his drug problem, then retrieved his gun from under the back seat, and his ammunition from between the front seats, loaded the gun, walked back to the house, shot the victims until his gun was empty, then reloaded and shot Hollingsworth again. This evidence shows the defendant planned the murders and deliberately executed the plan. The jury could infer premeditation and deliberation from it.

The defendant also contends the evidence shows that his mental and physical faculties were impaired to such an extent from the use of alcohol that the jury could not infer malice. The jury could infer there was malice although the defendant's mental and physical faculties were impaired from the use of alcohol. *State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973). The defendant also asks that we reconsider the rule that malice may be inferred in a homicide case from the unlawful killing with a deadly weap-

on. *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983). This we decline to do. This assignment of error is overruled.

[5] The defendant next contends the trial court erred in refusing to submit to the jury the offense of voluntary manslaughter.

> The trial court is required to charge on a lesser offense only when there is evidence to support a verdict finding the defendant guilty of such lesser offense. . . . "However, when all the evidence tends to show that defendant committed the crime charged and did not commit a lesser included offense, the court is correct in refusing to charge on the lesser included offense."

State v. Hickey, 317 N.C. 457, 470, 346 S.E. 2d 646, 655 (1986) (citation omitted).

Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). The difference between second degree murder and manslaughter is that malice is present in the former and not in the latter. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Malice is that condition of the mind which prompts one person to take the life of another intentionally without just cause, excuse or justification. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430. The defendant argues that the victims' teasing of the defendant about his drug problem amounts to such "just cause, excuse or justification." We disagree. "Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault." *State v. Montague*, 298 N.C. 752, 757, 259 S.E. 2d 899, 903 (1979). Since the victims' teasing cannot amount to sufficient justification to negate malice, there was no evidence to support submission to the jury of the crime of voluntary manslaughter. Therefore, the trial court correctly refused to submit that offense to the jury. This assignment of error is overruled.

[6] The defendant lastly contends that the trial court violated the constitutional prohibition against cruel and unusual punishment when it sentenced him to consecutive life sentences. We disagree. The defendant was convicted of two counts of first degree murder. N.C.G.S. § 14-17 provides that the minimum punishment

for such a crime is life imprisonment. We have held that consecutive life sentences do not constitute cruel and unusual punishment and are not unconstitutional. *See State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983). We are bound by *Ysaguire* to overrule this assignment of error.

In the trial we find

No error.

STATE OF NORTH CAROLINA v. JAMES LEO TIDWELL

No. 276A88

(Filed 4 January 1989)

Homicide § 30.2— murder—failure to instruct on manslaughter—no error

The trial court did not err in a first degree murder prosecution by not submitting voluntary manslaughter to the jury where there was no evidence that the stabbing occurred immediately after the provocation, assuming that the provocation was adequate under the law. Moreover, since the jury did not find that defendant was in the grip of sufficient passion to reduce the murder from first to second degree, it would not have found defendant guilty of only voluntary manslaughter.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Reid, J.*, at the 19 January 1988 Criminal Session of Superior Court, NEW HANOVER County, upon defendant's conviction by a jury of murder in the first degree. Heard in the Supreme Court 15 November 1988.

Lacy H. Thornburg, Attorney General, by Reginald L. Watkins, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia DeVine, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

On Sunday morning, 27 September 1987, in front of at least three witnesses at a Wilmington gas station, defendant stabbed

and killed his estranged wife, Mavies. Defendant was convicted of first-degree murder and sentenced to life imprisonment.

The State's evidence tended to show the following: Ms. Katherine Williams testified that she had worked with defendant as a postal clerk at the United States Post Office for approximately three years. Defendant was living in the same apartment complex as Ms. Williams' husband. Ms. Williams saw defendant in the parking lot at about 8:00 a.m. on Sunday, 27 September 1987, and invited him in for coffee before he went to church. She testified that defendant was "real upset" and was shaking so badly that he spilled most of the coffee. When Ms. Williams asked defendant why he was upset, he told her that the night before he had caught his wife Mavies with another man. Defendant and his wife had been separated since June 1987. Defendant then said that he was going to kill his wife. Ms. Williams thought that defendant was having a nervous breakdown and offered to take him to the hospital, but he refused. He asked Ms. Williams whether she had a gun, saying that he wanted it to kill Mavies. When Ms. Williams refused to give defendant a gun, he left the apartment, stating that he would stab his wife and that "[w]herever he caught her, he was going to kill her." As defendant walked to his car, Ms. Williams noticed that he had a hunting knife with a black handle and a wide blade. This knife was not the murder weapon.

Travis Perry testified that he baby-sat the three Tidwell children on Saturday night, 26 September 1987. When Mavies Tidwell returned at approximately 12:30 a.m., a female friend who had a male date was with her, but Mavies herself was unaccompanied.

Ms. Dorothea Graham testified that she was working as the cashier at the Gas World on College Road in Wilmington on Sunday, 27 September 1987. At about 9:45 a.m., Mavies Tidwell, accompanied by her youngest child, drove up beside the cashier's booth. She yelled that she was being harassed by a man and that the police should be called. Within two minutes, defendant drove up behind Mrs. Tidwell's car. Shortly thereafter, Mrs. Tidwell drove around to the other side of the cashier's booth, still yelling for Ms. Graham to call the police. As defendant and his wife exchanged words, two customers approached the booth to pay for their purchases. One customer urged Ms. Graham to call the po-

lice. She did so. While making the call, she heard Mrs. Tidwell scream that defendant had a gun. Immediately, the two customers ran. Defendant got out of his car and told Ms. Graham to hang up the telephone. When she obeyed him, defendant went to his wife's car and "just started beating on her." Mrs. Tidwell fought back and screamed for help. Ms. Graham watched them for about five minutes. When she saw blood, she became hysterical, ran out of the cashier's booth, locked the door and jumped into the car of Ms. Evelyn Brown, a customer at the gas station. Ms. Graham last saw Mrs. Tidwell falling out of her car.

Ms. Graham and Ms. Brown drove away to seek help. Unsuccessful, they returned to a restaurant located across the street from Gas World. While there, Ms. Graham saw defendant leave the gas station in a blue car. When the police arrived, Ms. Graham and Ms. Brown returned to the gas station. Mrs. Tidwell was lying on the ground beside her car.

Ms. Brown testified that she bought gas at the Gas World on the morning of 27 September 1987. She was pumping the gas into her car when Mrs. Tidwell drove in yelling for the police to be called because a man was harassing her. Defendant pulled in at the same time as Mrs. Tidwell and parked right behind her. Ms. Brown repeated Mrs. Tidwell's request to Ms. Graham and told Mrs. Tidwell to continue driving until the police arrived. Mrs. Tidwell "drove around one time," but defendant followed her. Mrs. Tidwell stopped her car and asked Ms. Brown to ask defendant what she, Mrs. Tidwell, had done to him. Ms. Brown did so. Defendant stated that Mrs. Tidwell had hit his car. Ms. Brown relayed this statement. Mrs. Tidwell suggested that they wait for the police, but defendant replied that he would not wait and that he would take care of the matter himself. He then got out of his car, went to Mrs. Tidwell's car, pulled her car door open as she attempted to roll up the window and lock the doors, and began fighting with her inside the car. Ms. Brown stepped back and saw defendant pull a knife and begin striking at Mrs. Tidwell while she was still inside the car.

Frightened by what she had seen, Ms. Brown rushed to her car, where she was joined by Ms. Graham. They drove away in an unavailing attempt to get help. From the restaurant across the street from the Gas World, Ms. Brown saw defendant kneeling

over Mavies Tidwell, who was now lying on the ground beside her car. Defendant was stabbing her repeatedly. He eventually stopped and left the scene in his car. When the police and rescue personnel arrived, Ms. Brown returned to the gas station with Ms. Graham. An examination of Mrs. Tidwell's body revealed no vital signs. A knife was located about two feet from the victim's body.

Reverend David E. Duncan testified that he knew the Tidwell family and was aware that Mrs. Tidwell and defendant were separated. On the morning of 27 September 1987, between 9:00 a.m. and 9:15 a.m., defendant visited Reverend Duncan at the First Wesleyan Church. While they were talking privately, the Reverend heard the voices of Mrs. Tidwell and her children in the church parking lot. Defendant immediately left the church by a back door. He returned at approximately 10:15 a.m. Reverend Duncan heard defendant shout, "Pastor David . . . I killed Mavies." Reverend Duncan approached defendant, who again told him that he had killed his wife. Defendant's clothing from the knees down was covered with blood and so were his hands. Because the congregation was gathering for Sunday morning service, Reverend Duncan helped defendant into the parking lot, where he remained with him until the police and rescue unit arrived.

Patrick Falvey, a volunteer rescue worker, testified that his rescue unit responded to a reported accident at the First Wesleyan Church on the morning of 27 September 1987. Falvey observed defendant sitting in the church parking lot with blood on his hands and pants. Falvey asked defendant if he had been in an accident and if he was hurt. Defendant replied, "No, no, no." He stated that he had just killed his wife. Falvey asked defendant if he was sure that was what had happened. Defendant replied, "I killed my wife." In response to further questions, defendant stated that he had stabbed his wife at a gas station. Falvey remained with defendant until law enforcement officers arrived.

Officer J. T. Rogers testified that he placed defendant inside a patrol car and strapped the seat belt around him. Defendant then said, "Officer, I killed my wife." He asked about his wife's condition, but Officer Rogers had no information to give him. Defendant was taken to the police department.

Dr. Charles L. Garrett, pathologist and medical examiner for the State, performed an autopsy on Mrs. Tidwell's body. He observed multiple stab wounds, eighteen in the chest and three in the abdomen, as well as several superficial wounds on the hands, considered to be defensive wounds. In Dr. Garrett's opinion, Mrs. Tidwell's death resulted from "stab wounds to her chest that lacerated her heart from which she bled to death."

Officer Roger Henderson testified that during investigation of the case, he observed the two cars which defendant and Mrs. Tidwell had been driving. He could not determine when the damage to defendant's car occurred, but he considered that the damage to the right front fender of Mrs. Tidwell's car was "old damage."

Defendant presented no evidence at trial. The case was tried as a capital case, and the trial court instructed the jury on first- and second-degree murder. The jury found defendant guilty of first-degree murder and recommended that he be sentenced to life imprisonment.[1] The trial court so sentenced defendant.

1. During the sentencing phase of the trial, the jury found as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). The jury found three statutory mitigating circumstances: (1) that the capital felony was committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); (2) that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired, N.C.G.S. § 15A-2000(f)(6) (1988); and (3) that defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (1988). The jury also found nine nonstatutory mitigating circumstances: (1) that defendant expressed remorse for the commission of the crime; (2) that defendant sought forgiveness from God following the commission of the crime; (3) that defendant acknowledged his guilt to a law enforcement officer at an early stage in the criminal process; (4) that defendant served three years in the United States Army and was honorably discharged; (5) that defendant sought counseling for his problems prior to the commission of the crime; (6) that defendant has been, since his incarceration, a good prisoner; (7) that defendant, following the commission of the crime, sought the assistance of his pastor to effect his surrender to the police; (8) that the defendant worked for the United States Postal Service for many years up to the date of the commission of the crime; and (9) that defendant maintained a good relationship with his three minor children prior to and subsequent to the commission of the crime. N.C.G.S. § 15A-2000(f)(9) (1988). The jury considered but did not find as a mitigating circumstance that defendant did not intend to inflict unnecessary pain on the victim above that required to cause her death. As required by N.C.G.S. § 15A-2000(b), after failing to find beyond a reasonable doubt that the aggravating circumstance outweighed the mitigating circumstances, the jury recommended that the trial court impose on the defendant a sentence of life imprisonment. The trial court so sentenced defendant.

On appeal, defendant brings forward one assignment of error. He contends that the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter. Defendant argues that from the evidence presented at trial, the jury could have inferred the following version of the events. Defendant "went to pieces" when he caught his wife with another man. The next day, his co-worker, Ms. Williams, thought that he was having a nervous breakdown. Distraught and angry, defendant followed his wife to get an explanation from her after she deliberately hit his car with hers. Furious, he went over to her car at the gas station and produced a knife, at first only to intimidate her. After his wife continued to hit him, he became enraged and out of control. He began to stab her again and again, deciding *as he was doing it* to kill her. Defendant maintains that this scenario could have been found by a rational jury on the facts of this case. He contends that, notwithstanding his failure to request a jury instruction on voluntary manslaughter and the jury's verdict of first-degree murder, this possible verdict should have been submitted to the jury. We disagree.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E. 2d 430, 432 (1979). "One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter." *State v. Wynn*, 278 N.C. 513, 518, 180 S.E. 2d 135, 139 (1971). If any evidence of heat of passion on sudden provocation exists, either in the State's evidence or that offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury. *State v. Weeks*, 322 N.C. 152, 173, 367 S.E. 2d 895, 908 (1988). The determinative factor is the presence of such evidence. *State v. Fleming*, 296 N.C. at 562, 251 S.E. 2d at 432.

To have been properly entitled to a jury instruction on voluntary manslaughter, defendant was required either to offer his own evidence or to rely upon the State's evidence to show (1) that he stabbed his wife in the heat of passion, (2) that his passion was provoked by acts of his wife which the law regards as adequate provocation, and (3) that the stabbing occurred immediately after the provocation. *State v. Weeks*, 322 N.C. at 173, 367 S.E. 2d at

908; *see also State v. Robbins*, 309 N.C. 771, 778, 309 S.E. 2d 188, 192 (1983). This he clearly failed to do.

The State's evidence showed that shortly after 8:00 a.m. on Sunday, 27 September 1987, after telling his co-worker that he had caught his wife with another man the night before, defendant asked for a gun with which to kill his wife. When Ms. Williams declined to give him a gun, defendant stated that he would stab Mavies and that "[w]herever he caught her, he was going to kill her." Even assuming that defendant did discover that his wife was with another man the previous night and that, notwithstanding their four-month separation, his wife's conduct was adequate provocation under the law, the evidence does not show that the stabbing occurred *immediately* after defendant's discovery. According to the baby-sitter, Mavies Tidwell returned home unaccompanied at approximately 12:30 a.m. on 27 September 1987. Nearly seven and one-half hours elapsed before defendant made explicit statements to Ms. Williams about his intention to kill his wife. At approximately 9:00 a.m. that same morning, defendant met privately with Reverend Duncan at the church for about twenty-five minutes. When he heard the voices of his wife and children, defendant left by a back door. Shortly thereafter, defendant apparently pursued his wife by car until he caught her at the Gas World. The cashier there testified that defendant looked normal rather than angry or crazy when he went to his wife's car. Defendant then stabbed his wife repeatedly after she had been felled and rendered helpless. We note that the damage to Mrs. Tidwell's car was considered "old," thus raising the implication that no recent collision had occurred. The record fails to show that Mrs. Tidwell was the aggressor at any time. Rather, the evidence demonstrates that defendant had ample time to consider his actions. We conclude that there was no evidence tending to show that the stabbing occurred "so soon after the provocation that the passion of a person of average mind and disposition would not have cooled." *State v. Robbins*, 309 N.C. at 778, 309 S.E. 2d at 192. Absent any evidence to support it, a trial court is not required to charge the jury on the question of a defendant's guilt of a lesser degree of the crime charged. *State v. Wingard*, 317 N.C. 590, 346 S.E. 2d 638 (1986).

Even assuming arguendo that the evidence supported an instruction on voluntary manslaughter, the trial court's failure to give it would have been harmless error.

In *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969), the defendant alleged an error in the trial court's instructions on voluntary manslaughter and an error in the court's refusal to instruct on involuntary manslaughter. The court properly instructed on murder in the first degree and murder in the second degree and the jury returned a verdict of guilty of murder in the first degree. This Court, in finding no error in the defendant's trial, stated:

> A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant.

Id. at 668, 170 S.E. 2d at 465. *See also State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1212, 96 S.Ct. 3212 (1976).

State v. Judge, 308 N.C. 658, 664-65, 303 S.E. 2d 817, 821-22 (1983). Since the jury in the case sub judice did not find that defendant was in the grip of sufficient passion to reduce the murder from first-degree to second-degree, then ipso facto it would not have found sufficient passion to find the defendant guilty only of voluntary manslaughter. The trial court did not err in failing to give the jury an instruction on voluntary manslaughter.

Defendant received a fair trial, free from error.

No error.

STATE OF NORTH CAROLINA v. EZZARD CHARLES QUICK

No. 106A88

(Filed 4 January 1989)

1. Criminal Law § 73.2— statements in letter and by witness—no hearsay—admissibility to show motive

Statements in a "Dear John" letter written by a homicide victim to defendant, testimony elicited on cross-examination of defendant concerning the contents of the letter, and statements made by the victim's grandmother to de-

fendant during an argument between defendant and the victim the day of the shooting were not hearsay and were properly admitted to show defendant's motive for killing the victim. N.C.G.S. § 8C-1, Rule 802.

2. **Constitutional Law § 65— right of confrontation—statements to defendant—letter from victim—cross-examination of witnesses**

Defendant's constitutional right of confrontation was not violated by the admission of a "Dear John" letter written by the victim to defendant where the fact that the victim wrote the letter and not the truth of the matters stated therein was at issue, the letter was authenticated by two witnesses, and defendant had the opportunity to cross-examine both witnesses. Sixth Amendment to the U.S. Constitution; Art. I, §§ 19 and 23 of the N.C. Constitution.

3. **Criminal Law § 93— time of admission of exhibit for the State**

The trial court did not abuse its discretion in admitting an exhibit for the State, a letter from a homicide victim to defendant, at the end of the State's cross-examination of defendant for the limited purpose of showing his knowledge of the letter. Nor did the trial court err in permitting the State to reintroduce the letter over defendant's objection during the State's presentation of rebuttal evidence where defendant was given the opportunity to present further rebuttal evidence. N.C.G.S. § 15A-1221; N.C.G.S. § 15A-1226.

4. **Homicide § 21.5— malice, premeditation and deliberation—sufficiency of evidence**

The State presented sufficient evidence of malice, premeditation and deliberation to sustain defendant's conviction of first degree murder where the State's evidence tended to show that defendant threatened the victim immediately after arguing with her and after being restrained from getting into an automobile with her; defendant reentered the victim's house carrying a shotgun after having been ordered out of the house by the victim's grandmother; the grandmother fled out the front door when she saw defendant with the shotgun but heard a shot before she reached the back door of the house; the grandmother reentered the house and saw defendant dismantling the gun; defendant left the house without staying to render aid to the victim and was found six miles away nine hours later; the shotgun was never found; the victim died as a result of complications of a shotgun wound to the back; and the shot had been fired from a distance of only six to eight feet from the victim.

DEFENDANT appeals, pursuant to N.C.G.S. § 7A-27(a), from a judgment imposing life imprisonment entered by *Hobgood (Robert H.), J.*, at the 2 November 1987 Criminal Session of Superior Court, LEE County, upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court 13 October 1988.

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Assistant Attorney General, and Joan H. Byers, Special Deputy Attorney General, for the State.

G. Hugh Moore for defendant-appellant.

FRYE, Justice.

Defendant appeals from a sentence of life imprisonment upon his conviction of first degree murder. The case was tried as a non-capital case after the trial judge determined that there were no statutory aggravating circumstances. On appeal to this Court, defendant contends that the trial court erred by admitting allegedly hearsay statements of the deceased victim into evidence, by admitting evidence for the State during the presentation of defendant's case, and by denying defendant's motion to dismiss for insufficiency of the evidence. We find no error.

Defendant and the victim, Bridgette Richmond, had been lovers for about a year prior to the victim's death on 18 July 1987. On the previous day, the victim had placed in defendant's automobile a letter in which she stated that she no longer wished to continue a relationship with defendant. Defendant admitted at trial that he found the letter around 6:30 p.m. on the evening of 17 July 1987. Later that same evening, defendant and the victim got into an argument as the victim and her brother were leaving a party. Defendant attempted to get into the automobile with the victim and her brother but was restrained by the victim's brother. Defendant threatened to get a gun and told the victim and her brother that they were "both dead meat."

During this time, Bridgette Richmond lived with her grandmother, Lillian McCormick. She did not return to her grandmother's house on the night of 17 July 1987 but returned at approximately 10:15 on the morning of 18 July 1987. About fifteen minutes after the victim returned home, defendant arrived at the house, walked in and sat down to watch television. Shortly thereafter, defendant and the victim began arguing.

During the course of the argument, Mrs. McCormick entered the room and said to defendant, "Why don't you let her alone. She said she was breaking up with you. And get out." Defendant walked out of the house onto the front porch. After several minutes, defendant reached under a couch on the porch and pulled out a shotgun. Defendant reentered the house carrying the gun in both hands with the barrel pointed forward.

Upon seeing defendant with the shotgun, Mrs. McCormick fled through the front door and circled around the house to the

back door. Defendant and the victim started fighting and Mrs. McCormick heard a shot before she reached the back door. She entered the house and saw defendant "breaking his gun down." The victim was lying on the floor in the next room with "blood every which way." Defendant left through the back door carrying the shotgun. He was arrested nine hours later, approximately six miles from the crime scene.

Defendant testified that the victim's death was an accident, that while he had read the letter from the victim, he did not consider it to be a "Dear John" letter. Defendant testified that after the party he drove to the "lover's lane," parked his automobile and waited for the victim until the early hours of the morning on 18 July 1987. Defendant then walked to the victim's grandmother's house where he sat on the porch and waited for the victim but later went to sleep in a nearby abandoned automobile.

Upon awakening defendant returned to the house, walked in and approached the victim. Defendant left the house after what he characterized as a "disagreement" but denied that Mrs. McCormick had asked him to leave. Defendant testified that as he left the house, he remembered that he had left an old shotgun with the victim. He testified that he and the victim had previously placed the shotgun under the couch on the porch in order to provide the victim with some protection when she returned home from work late at night.

After retrieving the gun from beneath the couch, defendant testified that he entered the house with the shotgun in order to ask the victim to give him the shell which he had also given her when they placed the gun under the couch. He further testified that when he entered the house with the gun, the victim grabbed the gun and tried to wrestle it from him. Defendant stated that at this point, he realized the gun must be loaded and struggled with the victim to retain control of the gun for his own safety. Defendant testified that in the course of the struggle, both he and the victim fell in the kitchen. The victim regained a standing position before defendant and began to leave the kitchen toward the front door. Defendant testified that as he attempted to stand, the shotgun fell from his hand, struck the table and discharged.

Investigators arrived at the scene shortly after the shooting and found defendant's automobile parked on a side road two or three hundred yards from the victim's house. The shotgun was never found; defendant stated that he dropped it in a field. The detective investigating the scene found "a forearm to what appeared to be a single barrel shotgun" on the backseat of the automobile. A subsequent search of the automobile produced the victim's letter to defendant.

The victim was alive when detectives arrived at the scene. She died later at the hospital. The examining physician testified that the victim died as a result of complications of a shotgun wound to the back. He further testified that the shot had been fired from a distance of six to eight feet and the upward path of the bullets indicated either that the victim was bending forward when she was shot or that the gun had been fired from slightly beneath her at an upward angle.

[1] Defendant first contends that the trial court erred by admitting certain statements of the deceased victim into evidence. The statements were introduced in the form of: 1) a letter from the victim to defendant, 2) testimony of the victim's grandmother, and 3) defendant's testimony on cross-examination. The letter stated in part:

> This is just a letter to let you know that this is the end of our relationship. . . . I can't take you any longer. . . . You and I can be friends and not lovers. . . . Ezzard (I) stopped caring about you around the last of October of 1986 when I found out that you wasn't a real man. . . . I get sick just looking at you all the time. . . .

The victim's grandmother testified to statements made by her to defendant during an argument between the victim and defendant the day of the homicide. Defendant's testimony on cross-examination confirmed his knowledge of the letter and its contents.

Defendant contends that the admission of the statements violated N.C.G.S. § 8C-1, Rule 802. Rule 802 provides that "[h]earsay is not admissible except as provided by statute or by these rules."

Defendant's contention that these statements are inadmissible under Rule 802 as hearsay is without merit. N.C.G.S. § 8C-1, Rule 801(c), defines hearsay 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." Statements offered for the purpose of showing that the statement was made and that the defendant was aware of the statement are admissible for those purposes and are not considered hearsay. *State v. Walden*, 311 N.C. 667, 319 S.E. 2d 577 (1984); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). Statements offered, not to prove the correctness of the statement, but to show the motive of defendant in committing the homicide, are not hearsay and are admissible. *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977).

The letter and the testimony of the victim's grandmother were offered for the purpose of showing that defendant's motive for killing the victim was because she wished to discontinue their relationship. The cross-examination of defendant regarding the contents of the letter was designed to show that he knew its contents prior to the homicide. The statements were relevant for the purposes for which they were admitted and their admission into evidence did not violate Rule 802.

[2] Defendant also contends that the admission of these statements violated his constitutional right to confront and cross-examine the witnesses. Defendant's right to confront and cross-examine those witnesses who testify against him is guaranteed by the sixth amendment of the United States Constitution. *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489 (1970). The confrontation guarantee of the sixth amendment applies to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 406, 13 L.Ed. 2d 923, 928 (1965). A similar right of the accused to confront the accusers and witnesses against him is guaranteed by the North Carolina Constitution. N.C. Const. Art. I, §§ 19 and 23 (1984 & Cum. Supp. 1988). Nevertheless, the confrontation clause is not violated by the admission of a declarant's out-of-court statements as long as the declarant testifies as a witness and is subject to full and effective cross-examination. *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489 (1970).

The confrontation clause was not violated in this case. As to the grandmother's testimony concerning what she told the de-

fendant, defendant had the opportunity to cross-examine the grandmother. As to the letter written from the victim to the defendant, it was authenticated by two witnesses. Defendant had the opportunity to cross-examine both witnesses. It is not necessary that he be allowed to confront the writer of the letter because the truth of the matter stated in the letter was not at issue. The fact that the victim wrote the "Dear John" letter is what the State wanted to prove. This depended on the credibility of the two witnesses who authenticated her signature. Since defendant was able to confront the two witnesses, the confrontation clause was not violated.

[3] Defendant next contends that the trial court erred by admitting evidence for the State during the presentation of defendant's case contrary to the order of proceedings established by N.C.G.S. § 15A-1221. Defendant assigns error to the timing of the court's admission of State's Exhibit 16, the letter from the deceased victim to defendant.

The order of proceedings is regulated by N.C.G.S. § 15A-1221, as defendant notes; however, the issue of admission of evidence during the presentation of an opponent's case is regulated by N.C.G.S. § 15A-1226. This statute provides in pertinent part:

> (a) Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.
>
> (b) The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.

N.C.G.S. § 15A-1226 (1988).

The statute is clear authorization for a trial judge, within his discretion, to permit a party to introduce additional evidence at any time prior to the verdict. *State v. Riggins*, 321 N.C. 107, 361 S.E. 2d 558 (1987). The judge may also permit a party to offer new evidence which could have been offered in the party's case in chief or during a previous rebuttal as long as the opposing party

is permitted further rebuttal. *State v. Lowery*, 318 N.C. 54, 347 S.E. 2d 729 (1986).

A review of the record reveals that State's Exhibit 16 was admitted *sua sponte* by the trial court at the end of the state's cross-examination of defendant for the limited purpose of showing his knowledge of the letter. The letter was reintroduced over defendant's objection during the State's presentation of rebuttal evidence after the close of defendant's case. There is nothing in the record which suggests that defendant was prevented from presenting further rebuttal evidence. In fact, the trial judge asked if there was anything else to be presented by either side and both parties responded in the negative. It thus appears that the trial court followed the statute in admitting the exhibit during rebuttal and we find no abuse of discretion in admitting the exhibit for a limited purpose following cross-examination of defendant.

[4] Finally, defendant contends that the trial court erroneously denied his motion to dismiss made at the close of all the evidence. Defendant contends that the evidence was insufficient to sustain a conviction of first degree murder because the State failed to present substantial evidence of each element of the offense charged.

A motion to dismiss is properly denied if substantial evidence of each essential element of the offense charged is presented at trial. *State v. Stone*, 323 N.C. 447, 373 S.E. 2d 430 (1988). The evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Murder in the first degree is defined as the "unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Calloway*, 305 N.C. 747, 751, 291 S.E. 2d 622, 625 (1982). The essential elements of murder may be established by circumstantial evidence. *State v. Childress*, 321 N.C. 226, 362 S.E. 2d 263 (1987).

Defendant essentially asserts that the evidence was insufficient to establish that he committed the homicide with malice and with premeditation and deliberation because the State's evidence was circumstantial while his testimony showed that the shooting was accidental. He relies on *State v. Foust*, 258 N.C. 453, 128 S.E.

2d 889 (1963), where this Court held the evidence insufficient to show malice in order to support a charge of second degree murder. The Court examined the ostensibly threatening remarks made by the sixteen-year-old defendant and concluded that, under the circumstances, they were "just sort of sweetheart talk" and did not permit a legitimate inference that defendant killed the victim with malice. The facts in *Foust* should be contrasted with *State v. Childress*, 321 N.C. 226, 362 S.E. 2d 263, where this Court distinguished *Foust* and upheld the submission of first degree murder to the jury notwithstanding defendant's evidence of accident and the reliance by the State on inferences to be drawn from circumstantial evidence. Without belaboring the point, we find that the evidence in the instant case more closely resembles the evidence in *Childress* than that in *Foust*.

In the instant case, the State's evidence shows that defendant threatened the victim immediately after arguing with her and after being restrained from getting into the automobile with her; that defendant reentered the house carrying a shotgun after having been ordered out of the house by the victim's grandmother; that the grandmother fled when she saw defendant with the shotgun but heard a shot before she reached the back door of the house; that when she reentered the house, she saw defendant dismantling the gun; that defendant left the house without staying to render aid to the victim and was found six miles away nine hours later. This evidence, when considered together with the expert opinion that the victim was shot in the back from a distance of six to eight feet and with the disappearance of the shotgun, is inconsistent with an accident theory and supports an inference that the shooting was intentional and with premeditation and deliberation. *See State v. Childress*, 321 N.C. 226, 362 S.E. 2d 263. Malice may be presumed from the intentional use of the shotgun, clearly a deadly weapon. *Id.* at 230, 362 S.E. 2d at 266.

When all the evidence in the record is considered in the light most favorable to the State, it is clear that there was sufficient evidence of defendant's guilt to survive his motion to dismiss and to sustain the jury verdict finding defendant guilty of murder in the first degree.

No error.

STATE OF NORTH CAROLINA v. WANDA GRAYBEAL SHYTLE

No. 542A87

(Filed 4 January 1989)

1. **Criminal Law § 29— competency to stand trial—ability to assist in defense**

A defendant does not have to be at the highest stage of mental alertness to be competent to stand trial. If a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner.

2. **Criminal Law § 29— competency to stand trial—brain injury—ability to assist in defense—sufficient evidence**

There was evidence from which the trial court could find that defendant was able to assist in her defense in a rational manner to two charges of murder and one of felonious assault, although she suffered brain damage from a self-inflicted gunshot wound which impaired her emotional response to situations in which she found herself, where two psychiatrists testified that defendant's disorder does not prevent her from understanding her legal situation and assisting her lawyer in her defense. N.C.G.S. § 15A-1001(a).

3. **Criminal Law § 29— competency to stand trial—brain injury—understanding of nature of proceedings—comprehension of own situation—sufficient evidence**

Evidence that defendant did not appreciate the gravity of the situation she was in at the time of the trial because of brain damage from a self-inflicted gunshot wound did not require the trial court to find that she did not understand the nature and object of the proceedings against her or that she could not comprehend her own situation in reference to the proceedings against her where there was evidence that defendant had an I.Q. within the normal range and that she knew what the charges were and what could happen to her if she was convicted. The fact that defendant's situation did not bother her does not mean that she did not comprehend it.

4. **Criminal Law § 75.14— mental capacity to testify—capacity to confess**

A defendant who has the mental capacity to testify has the requisite mental capacity to make a confession.

5. **Criminal Law § 75.14— brain injury—mental capacity to confess**

Defendant had the requisite mental capacity to confess, although she suffered brain damage from a self-inflicted gunshot wound which impaired her emotional responses, where there was no dispute that defendant was capable of expressing herself concerning the matter so that she could be understood, and there was no evidence that defendant was incapable of understanding the duty of a witness to tell the truth. N.C.G.S. § 8C-1, Rule 601.

6. **Criminal Law § 75.14— brain injury—inability to appreciate import of confession—admissibility of confession**

Defendant's inability to fully appreciate the import of her confession because of a brain injury from a self-inflicted gunshot wound would not render

her confession inadmissible if it otherwise has the indicia of reliability, since defendant did not have to know all the legal consequences of making a confession and did not have to be made aware of all facts which might influence her decision in order for the confession to be admitted into evidence.

7. **Criminal Law § 5.1— insanity issue—sufficient evidence to support jury's verdict**

Although two expert witnesses stated opinions that defendant did not know right from wrong at the time of two murders and a felonious assault, the jury was not required to believe the expert witnesses and could find that defendant was legally sane upon the basis of an investigating officer's testimony that defendant had "very normal" demeanor, appeared to be oriented to time, and was responsive to questions. Therefore, the trial court did not err in refusing to set aside the verdict as being against the greater weight of the evidence on the insanity issue.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment of the Superior Court, RUTHERFORD County, imposing consecutive life sentences. The defendant's motion to bypass the Court of Appeals as to a sentence of less than life was allowed. Heard in the Supreme Court 16 November 1988.

The defendant was tried for her life on two charges of first degree murder. She was also tried in the same trial for assault with a deadly weapon with intent to kill inflicting serious injury. The defendant lived with her husband and her fifteen-year-old daughter and her eleven-year-old son. In the early morning hours of 11 December 1986 the defendant shot and killed her husband and her son. She also shot and seriously injured her daughter. Immediately after shooting her daughter the defendant walked to some woods behind her home and shot herself in the head.

Prior to the trial, Judge Lamar Gudger held a hearing to determine the defendant's competency to stand trial. The court, without objection, considered written reports by Dr. Bob Rollins and Dr. Patricio Lara, psychiatrists at Dorothea Dix Hospital who had examined the defendant, and Dr. Thomas M. LaBreche, Ph.D., a clinical neuropsychologist, who had examined the defendant. The court also heard testimony from Dr. Rollins.

The reports and testimony revealed that as a result of the self-inflicted gunshot wound to the head and the resulting surgery, the defendant had suffered damage to her brain which impaired her emotional response to situations in which she found herself. Her I.Q. was within the normal range and she had a good

recall of the events which occurred on 11 December 1986. However, she did not, in her altered mental state, appreciate the seriousness of those events. Dr. Rollins said in his report that the defendant's "approach to her situation was superficial, somewhat silly, and not in keeping with the seriousness of her situation." Dr. Lara noted that the defendant's "[m]ental status examination has continued to present her with somewhat shallow affects demonstrating very little emotional reaction to the discussion of matters of intense meaning. . . . She continued to address her situation in a matter-of-fact manner with no display of emotional response and with evidence of a tendency to rationalize all issues."

Dr. Rollins concluded that "Mrs. Shytle is capable of proceeding to trial in that her disorder does not prevent her from understanding her legal situation and cooperating with her attorney." Dr. Lara concluded, "[t]hese problems do not appear to prevent her from being able to assist her lawyers in the preparation of her defense, especially when she can be adequately advised and instructed with the assistance of her lawyers. It is my opinion that this patient is at present capable to proceed to trial." On the other hand, Dr. LaBreche concluded that "her affective or emotional response to her current situation and past behavior (i.e. alleged charges) cannot be linked to factual understanding of her circumstance. Her ability to comprehend the meaning or significance of actions (e.g. alleged murders and attempted murder and attempted suicide) is impaired. In contrast to the first two forensic evaluations, it is my opinion that Mrs. Shytle is not competent to proceed to trial because her affective appreciation of events has been lost."

Judge Gudger found that the defendant was competent to be tried. A second competency hearing was held before Judge James U. Downs at which the same evidence which had been used at the first hearing was again introduced. Judge Downs found the defendant competent to stand trial.

The defendant made a motion to suppress a statement she had made to a deputy sheriff and a pre-trial hearing was held on this motion. The evidence at this hearing showed that the defendant was carried to the Rutherford County Hospital a short time after she had been shot. At that time she was interviewed by

Clarence Simmons, a deputy sheriff with the Rutherford County Sheriff's Department. He testified that the defendant had a "very normal" demeanor, that she seemed to be oriented to time and was responsive to questions, speaking in complete sentences. The emergency room physician testified that none of the medications given the defendant would have affected her mental capacity. During her interrogation by Mr. Simmons, the defendant waived her right to remain silent and her right to consult an attorney. She then made a statement to Mr. Simmons that she had shot her husband, her daughter, her son, and herself. The court made findings of fact in accordance with this evidence and overruled the defendant's motion to suppress her statement.

The defendant relied on insanity as a defense. Dr. Rollins and Dr. LaBreche testified at the trial that the defendant did not know the difference between right and wrong in relation to the shooting of her family members. The jury found the defendant guilty of the two first degree murders with which she was charged and of assault with a deadly weapon with intent to kill resulting in serious injury.

After a sentencing hearing the jury recommended that the defendant be sentenced to life in prison on each murder charge. The court imposed a life sentence for each murder conviction and a sentence of six years in prison for the assault conviction. All sentences are to be served consecutively. The defendant appealed.

Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia DeVine, Assistant Appellate Defender, for defendant appellant.

WEBB, Justice.

The appellant, by her first assignment of error, challenges the holding of the court that she was competent to stand trial. N.C.G.S. § 15A-1001(a) provides:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in ref-

erence to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

The statute provides three separate tests in the disjunctive. If a defendant is deficient under any of these tests he or she does not have the capacity to proceed. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981); *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981); *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980).

The defendant concedes that Dr. Rollins and Dr. Lara stated enough in their reports to support a finding that she was competent to stand trial. She says, however, that Dr. LaBreche made a deeper diagnosis and based on his testimony we should hold as a matter of law that she was not competent to stand trial. She contends, quoting Dr. LaBreche, that the question is, "if an individual's cognitive, reasoning ability is separated from basic emotional responses or affect, is this individual actually competent not only to aid in his own defense but also to proceed to trial as the same individual who committed the violation of the law?" The defendant argues that because a part of her brain which governs her emotion and the appreciation of the seriousness of her situation has been destroyed, her ability to exercise her will was so impaired that she failed all of the three tests which determine competency to stand trial. The defendant says she was not able (1) to understand the nature and object of the proceedings against her, (2) comprehend her own situation in reference to the proceedings, or (3) to assist in her defense in a rational or reasonable manner. The defendant contends the test is whether she could participate in her defense in a meaningful way.

In determining this question we are helped by *State v. Avery*, 315 N.C. 1, 337 S.E. 2d 786 (1985) and *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975). In *Avery* the defendant suffered from a post traumatic stress syndrome as a result of service in the Vietnamese War. He also suffered from a self-inflicted gunshot wound to his head which had damaged a part of his brain which "controls affect and mood." The trial court found that although Avery's memory was impaired and his intellectual functions, judgment, and insight were limited that he was competent to stand trial. This Court found no error. In *Cooper* the defendant suffered from paranoid schizophrenia. He was required to take

medication three times a day in order to keep this condition in remission. We held that it was not error to find he was competent to stand trial.

[1, 2] We believe *Avery* and *Cooper* establish the proposition that a defendant does not have to be at the highest stage of mental alertness to be competent to be tried. So long as a defendant can confer with his or her attorney so that the attorney may interpose any available defenses for him or her, the defendant is able to assist his or her defense in a rational manner. It is the attorney who must make the subtle distinctions as to the trial. There was evidence from which the court could find the defendant was able to assist in her defense in a rational manner.

[3] The defendant argues that because she did not appreciate the gravity of the situation she was in at the time of the trial, that she did not understand the nature and object of the proceedings against her. There was evidence that the defendant had an I.Q. within the normal range and that she knew what the charges were and what could happen to her if she was convicted. If this did not worry or upset her because of her altered mental condition, it does not mean she did not understand these facts. The court could find from this and other evidence that the defendant understood the nature and object of the proceedings against her. For the same reasons the defendant contends that at the time of the trial she could not comprehend her own situation in reference to the proceedings. Again there was evidence from which the superior court could find to the contrary. If the defendant's situation did not bother her it does not mean she did not comprehend it. This assignment of error is overruled.

The defendant next assigns error to the admission into evidence of her confession. She contends it was error to admit this confession for two reasons. She says first that she did not have the requisite mental capacity to confess and second that the confession was not voluntarily, understandingly or knowingly made.

[4, 5] We deal first with the defendant's argument that she did not have the capacity to confess. If a defendant has the mental capacity to testify he or she has the requisite mental capacity to make a confession. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 and *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). N.C.G.S. § 8C-1, Rule 601 provides in part:

(a) General rule—Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witness in general—A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

There is no dispute that the defendant was capable of expressing herself concerning the matter so that she could be understood. There was no evidence that she was incapable of understanding the duty of a witness to tell the truth. The defendant would have been competent to testify and she was competent to confess.

[6] The defendant argues that, considering the totality of the circumstances, she could not fully appreciate the import of her confession and for this reason it was not knowingly, understandably, and voluntarily made. She does not argue that she was not fully advised of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), or that she did not waive her rights. She says that because of her mental condition due to her brain damage, she could not fully appreciate the implications of her confession. A person does not have to know all the legal consequences of making a confession in order for the confession to be admitted into evidence. *State v. McRae*, 276 N.C. 308, 172 S.E. 2d 37 (1970). Nor must he or she be made aware of all facts which might influence his or her decision. *Moran v. Burbine*, 475 U.S. 412, 89 L.Ed. 2d 410 (1986); *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987). The defendant was properly found competent to confess. If she was not fully capable of appreciating the seriousness of the confession, this does not make it inadmissible if it otherwise has the indicia of reliability.

[7] In her last assignment of error the defendant contends it was error to deny her motion to set the verdict aside as against the greater weight of the evidence. A motion to set aside the verdict as against the weight of the evidence is addressed to the discretion of the trial judge and is reviewable on appeal only to determine if there has been an abuse of discretion. *State v. Hamm*, 299 N.C. 519, 263 S.E. 2d 556 (1980); *State v. Boykin*, 298 N.C. 687, 259

S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264 (1980); *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975).

The defendant contends that all the evidence shows that she was insane and under this evidence there was no showing of motive or malice. For this reason, she argues that it was error not to set the verdict aside. There was ample evidence to support the verdicts of guilty. Dr. Rollins and Dr. LaBreche each testified that in his opinion the defendant did not know right from wrong in regard to the acts of 11 December 1986. Mr. Simmons testified the defendant had "very normal" demeanor and that she appeared to be oriented to time and was responsive to questions. The burden was on the defendant to prove insanity. *State v. Evangelista*, 319 N.C. 152, 353 S.E. 2d 375 (1987). The jury did not have to believe the expert witnesses. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). The evidence supported the verdicts and it was not error to refuse to set them aside.

No error.

LEA COMPANY v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 427PA88

(Filed 4 January 1989)

1. **Attorneys at Law § 7.3— condemnation action—attorney fees—discretion of court**

An award of attorney fees under N.C.G.S. § 136-119 in an inverse condemnation action and the amount of such fees are within the discretion of the trial judge, and his decision will not be reversed absent a clear showing of abuse of discretion.

2. **Attorneys at Law § 7.3— failed motion—attorney fees not reasonably incurred**

The trial court did not abuse its discretion in finding that attorney fees incurred in the pursuit of a failed Rule 60(b) motion to reopen an inverse condemnation judgment for an award of compound interest were not "reasonably incurred" and in denying plaintiff's application for such attorney fees.

3. **Attorneys at Law § 7.3— condemnation action—attorney fees—services of paralegals and legal secretaries**

A trial judge, acting within his discretion, may consider and include in the sum he awards as attorney fees the services expended by paralegals and secretaries acting as paralegals if, in his opinion, it is reasonable to do so.

4. **Attorneys at Law § 7.3— condemnation—services by paralegals and legal secretaries—recovery separate from attorney fees not mandated**

N.C.G.S. § 136-119 does not mandate that services performed by paralegals and secretaries acting as paralegals be paid as "costs, disbursements and expenses" separate and apart from attorney fees. In this case, the trial judge could reasonably have concluded that services of paralegals and secretaries acting as paralegals were largely clerical in nature or, even if not, were part of the ordinary office overhead and ought to be subsumed in the hourly rate of the attorneys, and that such services were not reasonably incurred separate and apart from the attorney fees.

5. **Attorneys at Law § 7.3— expenses for paralegals and legal secretaries—allowance as attorney fees in part of action—subsequent allowance not mandated**

The trial judge's allowance of expenses for paralegals and legal secretaries to be recovered as a part of the attorney fees in previous orders relating to other stages of the action does not mandate that they be allowed as a part of the attorney fees in subsequent stages.

ON appeal by plaintiff from an order entered by *Ross, J.*, in Superior Court, GUILFORD County, on 21 July 1988, allowing in part and denying in part plaintiff's application for fees. On 18 October 1988, we allowed the parties' joint petition for discretionary review prior to determination of the Court of Appeals. The case was consolidated for purpose of oral argument with case No. 111PA88, bearing the same caption, by order of this Court entered on 25 October 1988. Heard in the Supreme Court 14 December 1988.

Patton, Boggs & Blow, by C. Allen Foster, Eric C. Rowe, and Julie A. Davis, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, for defendant-appellee.

MEYER, Justice.

This is a companion case to No. 111PA88, which was jointly argued with this case. Our decision in the companion case is rendered this date and is reported as *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 374 S.E. 2d 866 (1989). For the factual background of this case, see our opinion in the companion case.

Upon the denial by Judge Ross of plaintiff's motion filed pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure to reopen the judgment disposing of the case on the merits for

the purpose of offering evidence of and recovering compound interest on the amount of damages, plaintiff filed an amended affidavit and application for attorneys' fees. The plaintiff, in its amended affidavit and application, sought to recover attorneys' fees for the Rule 60(b) motion in addition to attorneys' fees for the main case. By order dated 21 July 1988 Judge Ross allowed plaintiff's application for attorneys' fees and expenses in full for all the time claimed and at the rate claimed except for services for the Rule 60(b) proceeding. The order denied all fees relating to services of paralegals and secretaries acting as paralegals both as to the main case and the Rule 60(b) motion.

Two questions are presented by this appeal: (1) did the trial court err in denying that portion of plaintiff's application for fees relating to its Rule 60(b) motion, and (2) did the trial court err in denying that portion of plaintiff's application for fees attributable to the services of paralegals and secretaries acting as paralegals in the case in general. We hold that the trial court did not err in either respect. We address the issues seriatim.

I.

As we noted in the companion case:

> [S]ubsequent to certification of our mandate in the second appeal, plaintiff moved pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) "that the [trial] court reopen its prior judgment . . . for the purpose of making additional findings and conclusions as to whether [plaintiff] should be awarded compound interest as an element of just compensation." The trial court noted that "with respect to this case, the Supreme Court in its mandate did not remand . . . for consideration of the award of compound interest, but simply affirmed the judgment of the trial court." . . . It then denied the motion "on the ground that this [c]ourt is bound by the mandate of the Supreme Court which affirmed the earlier judgment of the trial court and did not remand for further proceedings . . . ."

323 N.C. at 699, 374 S.E. 2d at 867-68.

We held in the companion case that our mandate did not include a remand for consideration of an award of compound interest; rather, it affirmed a judgment awarding simple interest,

which was all the plaintiff had sought. We further held that the trial court had no authority to modify or change in any material respect the decree affirmed.

The statutory authorization for the award of the property owner's expenses, including attorneys' fees, in inverse condemnation actions is contained in N.C.G.S. § 136-119, which in relevant part provides as follows:

> The judge rendering a judgment for the plaintiff in a proceeding brought under G.S. 136-111 awarding compensation for the taking of property, *shall determine and award or allow* to such plaintiff, as a part of such judgment, *such sum as will in the opinion of the judge* reimburse such plaintiff for his *reasonable* cost, disbursements and expenses, including *reasonable* attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

N.C.G.S. § 136-119 (1986) (emphasis added).

Lea Company contends that the statute is mandatory and that an examination of the facts of the case discloses that each condition of the statute has been satisfied, that is, that a judgment awarding compensation has been rendered in its favor for the taking of property, that it acted reasonably in expending attorneys' fees in seeking compound interest under Rule 60(b), and that those fees were incurred in the course of the inverse condemnation action. We disagree.

[1] While this Court has not previously addressed the award of attorneys' fees under N.C.G.S. § 136-119, we conclude that the language of the statute is itself determinative of the issues before us. Though the statute provides that the judge "shall determine and award or allow" particular types of fees, it also provides that the amount awarded is to be "such sum as will in the opinion of the judge reimburse such plaintiff for his . . . *reasonable* attorney[s'] . . . fees." Our Court of Appeals has held and we now hold that the award of attorneys' fees under N.C.G.S. § 136-119 is within the sound discretion of the trial judge and that his exercise of that discretion is not reviewable except for abuse of discretion. *See Cody v. Dept. of Transportation*, 60 N.C. App. 724, 728, 300 S.E. 2d 25, 28-29 (1983). Both the question of whether to award fees for a particular activity and, if so, the question of the

amount of such fees are within the discretion of the trial judge, and his decision will not be reversed absent a clear showing of abuse of discretion.

[2] The amount of attorneys' fees a trial judge awards is not controlled by the contractual arrangement between the property owner and his attorney or by the attorney's assessment of the value of his services but, as the General Assembly has provided, is an amount to be determined by the trial judge in his discretion based upon the "*reasonable*" value of the services rendered. *See Bandy v. City of Charlotte*, 72 N.C. App. 604, 325 S.E. 2d 17, *disc. rev. denied*, 313 N.C. 596, 330 S.E. 2d 605 (1985). Two of the numerous factors for consideration in fixing reasonable attorneys' fees are the kind of case or motion for which the fees are sought and the result obtained. Here, Lea Company sought attorneys' fees for the motion to reopen a judgment which the trial court recognized, and which we held in the companion case, it could not reopen as to interest on the award of damages because it was bound by the mandate of this Court. The result was that the motion was denied. The trial judge ordered that "[t]he application for fees and expenses in the Rule 60(b) proceeding is denied because the Rule 60(b) motion was denied and the fees were not reasonably incurred." Whether the fees incurred in the pursuit of the failed Rule 60(b) motion were "reasonably incurred" was within the discretion of the trial judge, and we are unable to say that he abused that discretion.

II.

[3] While this Court is sensitive to the fact that work performed by paralegals and legal secretaries is both valuable and can result in a reduction from the fees charged by attorneys for performing the same services, we are here faced with the question of whether the trial judge abused his discretion in denying fees for such services. The decision of whether to incur the expense of such services on a particular activity and the extent of those services is ordinarily made by the attorney or attorneys in charge of the litigation after consultation with the client. A trial judge, acting within his discretion, may consider and include in the sum he awards as attorneys' fees the services expended by paralegals and secretaries acting as paralegals if, in his opinion, it is reasonable to do so. While, here, some of the paralegal and secre-

tarial time was spent in research, obtaining copies of cases, organizing exhibits, preparing for hearings, and keeping files in order, the plaintiff concedes in its brief that "much of the secretarial and paralegal time was charged for preparing the fee affidavits" and that "[m]ost of the amounts sought for secretarial time were incurred in preparing the fee statement."

[4] We reject plaintiff's contention that the statute mandates that the services performed by the paralegals and secretaries acting as paralegals be paid as "cost, disbursements and expenses" separate and apart from "attorney[s'] fees." Based upon the record before us, it is quite clear that Judge Ross could reasonably have concluded that these services of the paralegals and secretaries acting as paralegals were largely clerical in nature or, even if not, were part of the ordinary office overhead and ought to be subsumed in the hourly rate of the attorneys. Here, as we previously noted, the attorneys' hourly rate was allowed in full, as was the total hours of attorneys' time claimed. We hold that Judge Ross did not abuse his discretion in concluding that such services on the appeal of the interest issue and other work (other than the Rule 60(b) motion to reopen the judgment for the award of compound interest) were not reasonably incurred separate and apart from the attorneys' fees.

[5] We find no merit in plaintiff's contention that the doctrine of the law of the case entitles it to recover the fees for paralegals and secretaries acting as paralegals. Simply because the trial judge seemingly allowed expenses for paralegals and legal secretaries to be recovered as a part of the attorneys' fee in previous orders relating to other stages of the action does not mandate that they be allowed as a part of the attorneys' fees in subsequent stages.

Judge Ross did not make written findings of fact or conclusions of law relating to the services of paralegals and secretaries acting as paralegals, and no party requested that he do so. N.C.R. Civ. P. 52(a)(2). Therefore, it is presumed that the court on proper evidence found facts to support its order. *Watkins v. Hellings*, 321 N.C. 78, 361 S.E. 2d 568 (1987).

In summary, we find no abuse of discretion by the trial judge in denying Lea Company's application for attorneys' fees for services rendered in regard to the Rule 60(b) motion or in denying the

application for fees for time expended by paralegals and secretaries acting as paralegals. The order of Judge Ross allowing in part and denying in part plaintiff's application for fees is affirmed.

Affirmed.

LEA COMPANY v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 111PA88

(Filed 4 January 1989)

Appeal and Error § 68— affirmation of judgment—consideration of collateral issue—motion to reopen judgment denied

The trial court properly denied plaintiff's motion to reopen a prior judgment for the purpose of making additional findings and conclusions as to whether plaintiff should be awarded compound interest as an element of just compensation for defendant's taking of an interest in plaintiff's property by inverse condemnation where the trial court had determined that the statutory rate of interest was unconstitutional as applied to the facts of this case and awarded interest at 11% per annum; the Supreme Court affirmed, adopting the prudent investor standard for determining the appropriate interest rate; the Supreme Court also addressed the collateral issue, not raised by the parties, of whether compound interest should have been used; and plaintiff moved to reopen the prior judgment subsequent to certification of the mandate in the appeal. The mandate did not include a remand for consideration of an award of compound interest; rather, it affirmed a judgment awarding simple interest, which was all the plaintiff had sought, and the trial court had no authority to modify or change in any material respect the decree affirmed.

ON appeal by plaintiff from an order entered by *Ross, J.*, in Superior Court, GUILFORD County, on 22 October 1987. On 19 April 1988 we allowed defendant's petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court 14 December 1988.

Patton, Boggs and Blow, by Eric C. Rowe and C. Allen Foster, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by James B. Richmond, Special Deputy Attorney General, for defendant-appellee.

WHICHARD, Justice.

The issue is whether the trial court properly denied plaintiff's motion, pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6), to reopen a prior judgment for the purpose of making additional findings and conclusions as to whether plaintiff should be awarded compound interest as an element of just compensation for defendant's taking of an interest in plaintiff's property by inverse condemnation. We hold that it did.

This case is before us for the third time. On the first appeal, we affirmed a judgment that defendant was liable to plaintiff for the taking of a compensable interest in plaintiff's property as a result of intermittent and recurring flooding caused by inadequately sized culverts installed by defendant in its highway structures downstream from plaintiff's property. *Lea Company v. N.C. Board of Transportation*, 308 N.C. 603, 304 S.E. 2d 164 (1983). Upon remand for a trial on the issue of damages, the trial court determined, *inter alia*, that the statutory rate of interest, as applied to the facts of this case, was unconstitutional. It thereupon awarded interest on plaintiff's award of damages at the rate of 11% per annum for the period between the time of the taking and the entry of the judgment awarding compensation. On defendant's appeal from that award, we adopted the "prudent investor" standard for determining the appropriate interest rate for calculation of additional compensation for delay, concluded that the trial court had applied this standard correctly, and affirmed. *Lea Company v. N.C. Bd. of Transportation*, 317 N.C. 254, 345 S.E. 2d 355 (1986).

In the second appeal, we also exercised our "rarely used general supervisory powers" to address a collateral issue not raised by the parties, *viz*, "whether compound interest rather than simple interest should be used in measuring the amount by which the award should be adjusted due to delayed payment." *Id.* at 263, 345 S.E. 2d at 360. We concluded:

> Since this Court has now adopted the "prudent investor" standard, compound interest should be allowed for delayed payment in condemnation cases if the evidence shows that during the pertinent period the "prudent investor" could have obtained compound interest in the market place. The use of compound interest as a measure in calculating addi-

> tional compensation for delay is a matter which will turn upon the evidence in each case and must be decided on a case-by-case basis.

Id. at 264, 345 S.E. 2d at 361.

On 4 September 1986, subsequent to certification of our mandate in the second appeal, plaintiff moved pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6) "that the [trial] court reopen its prior judgment . . . for the purpose of making additional findings and conclusions as to whether [plaintiff] should be awarded compound interest as an element of just compensation." The trial court noted that "with respect to this case, the Supreme Court in its mandate did not remand . . . for consideration of the award of compound interest, but simply affirmed the judgment of the trial court." It also noted that "[a]t the trial, the plaintiff made no offer of evidence of compound interest rates obtainable in the marketplace during the pertinent period; nor did it assign as error on appeal, the trial court's failure to award compound interest." It then denied the motion "on the ground that this [c]ourt is bound by the mandate of the Supreme Court which affirmed the earlier judgment of the trial court and did not remand for further proceedings [and on the further] ground that no evidence was presented at trial to support the award of compound interest."

Plaintiff gave notice of appeal to the Court of Appeals. On 19 April 1988 we allowed defendant's petition for discretionary review prior to determination by the Court of Appeals. N.C.G.S. § 7A-31(b) (1986). We now affirm.

A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E. 2d 181, 183 (1974). "[O]ur mandate is binding upon [the trial court] and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered." *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E. 2d 199, 202 (1966). "We have held judgments of Superior [C]ourt which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the Supreme Court . . . to be unauthorized and *void.*" *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E. 2d 298, 303 (1962).

The mandate of this Court in the second appeal of this case affirmed a judgment of the trial court granting plaintiff simple interest on its award at the rate of 11% per annum for the time between defendant's taking of plaintiff's property and entry of the judgment awarding compensation. *Lea Company*, 317 N.C. 254, 345 S.E. 2d 355. As the trial court noted, our mandate did not include a remand for consideration of an award of compound interest; rather, it affirmed a judgment awarding simple interest, which was all the plaintiff had sought. The trial court "had no authority to modify or change in any material respect the decree affirmed." *Murrill v. Murrill*, 90 N.C. 120, 122 (1884).

Accordingly, the order denying plaintiff's motion to "reopen [the] judgment" for consideration of an award of compound interest is

Affirmed.

PELICAN WATCH, A NORTH CAROLINA PARTNERSHIP, AND DERWOOD H. GODWIN, SR., OSCAR L. NORRIS, MURRAY O. DUGGINS, KENNETH M. NORRIS, AND DEBORAH N. HOOKER, THE GENERAL PARTNERS OF PELICAN WATCH v. UNITED STATES FIRE INSURANCE COMPANY AND AMERICAN INTERNATIONAL CONSULTANTS, INC.

No. 263PA88

(Filed 4 January 1989)

1. **Appeal and Error § 6.2— compensatory damages—summary judgment—right of appeal**

   Plaintiffs were entitled to appellate review of the trial court's grant of summary judgment against them on the issue of compensatory damages since that portion of the trial court's order was a final judgment.

2. **Appeal and Error § 6.2— partial summary judgment for plaintiff—denial of summary judgment for defendant—no right of appeal**

   An order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was interlocutory and not appealable by defendant.

ON plaintiffs' and defendant United States Fire Insurance Company's petitions for discretionary review of a decision of the

Court of Appeals, 90 N.C. App. 140, 373 S.E. 2d 113 (1988), dismissing both appeals from an order entered by *Smith, J.*, at the 10 August 1987 Civil Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 14 December 1988.

Tuggle, Duggins, Meschan & Elrod, P.A., by J. Reed Johnston, Jr., for plaintiff-appellants.

Henson, Henson, Bayliss & Teague, by Perry C. Henson and Jack B. Bayliss, Jr., for defendant-appellant.

PER CURIAM.

In this civil action plaintiffs sought to recover from defendants, jointly and severally, actual damages, damages for unfair or deceptive trade acts or practices, and punitive damages arising out of a contract of insurance issued by defendant United States Fire Insurance Company (USFIC) through American International Consultants, Inc., to plaintiffs. Plaintiffs subsequently took a voluntary dismissal of their claims against American International Consultants, Inc., leaving USFIC as the only party defendant.

On 14 August 1987, Judge Smith entered summary judgment in favor of defendant USFIC and against the plaintiffs with respect to the plaintiffs' claim for actual damages, and entered summary judgment for plaintiffs "against the defendant USFIC on the liability issues on plaintiffs' claim made pursuant to N.C.G.S. Chapter 75 and N.C.G.S. § 58-54.4 and plaintiffs' claim under the common law for punitive damages . . . ." Judge Smith also found that the order affected substantial rights of both parties and that there was no reason for delay in obtaining appellate review.

Plaintiffs and defendant USFIC appealed to the Court of Appeals. The Court of Appeals dismissed both appeals, holding that defendant's appeal was from a judgment that was not final and that plaintiffs' appeal was from a judgment that disposed of fewer than all the claims and did not involve a substantial right. Plaintiffs' and defendant's petitions for discretionary review were allowed by this Court on 7 September 1988, with review limited to the propriety of the dismissal of the respective appeals.

[1] The Court of Appeals erred in dismissing the plaintiffs' appeal. Plaintiffs were appealing from a summary judgment which dismissed their claim for compensatory damages. That portion of

the trial judge's order was a final judgment and plaintiffs were entitled to appellate review of the grant of summary judgment against them on the issue of compensatory damages. *Oestreicher v. American National Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). In *Oestreicher*, the trial judge granted summary judgment in favor of the defendant on punitive damage and anticipatory breach of contract claims but denied summary judgment on the plaintiff's breach of contract claim. The plaintiff appealed, the Court of Appeals dismissed the appeal and this Court held that the dismissal was error. This Court held that final dismissal of the claims under summary judgment involved substantial rights and the plaintiff was entitled to an immediate appeal therefrom. *Id.* Plaintiffs' appeal here is controlled by *Oestreicher*.

[2] The Court of Appeals held that defendant's appeal from a partial summary judgment for plaintiffs on the issue of liability only was not a final judgment within the meaning of N.C.G.S. § 1-277. We agree. The order of a trial court allowing the plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying the defendant's motion for summary judgment, is interlocutory and not appealable. *Industries, Inc. v. Insurance Company*, 296 N.C. 486, 251 S.E. 2d 443 (1979).

While we agree with the panel of the Court of Appeals below that defendant's appeal was interlocutory and therefore subject to dismissal, we believe that dismissal of defendant's appeal in this case would encourage rather than prevent fragmentary and partial appeals. Accordingly, in the exercise of our supervisory authority and in the interest of judicial economy, we treat defendant's appeal as a petition for certiorari. The petition for certiorari is allowed and the decision of the Court of Appeals dismissing defendant's appeal is reversed solely for the reasons stated herein.

Since this case was not heard on the merits in this Court, we remand to the Court of Appeals for consideration on the merits of the issues raised in the plaintiffs' and defendant's briefs previously filed in that court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ROBIN STACY SMITH

No. 282A88

(Filed 4 January 1989)

APPEAL by defendant from the decision of the Court of Appeals, 90 N.C. App. 161, 368 S.E. 2d 33 (1988), finding no error in defendant's trial and conviction but vacating in part and remanding judgment of *Brannon, J.*, at the 11 May 1987 session of Superior Court, DURHAM County. Heard in the Supreme Court 13 December 1988.

Lacy H. Thornburg, Attorney General, by Linda Anne Morris, Assistant Attorney General, for the state.

Dean A. Shangler for defendant.

PER CURIAM.

Affirmed.

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

IN RE KOZY

No. 482P88.

Case below: 91 N.C. App. 342.

Petition by Kozy for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

KIRBY BLDG. SYSTEMS v. McNEIL

No. 481P88.

Case below: 91 N.C. App. 444.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

LAMB v. McKESSON CORP.

No. 467P88.

Case below: 91 N.C. App. 288.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 January 1989. Petition by Appellant (Lamb) for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

MACK v. MOORE

No. 490P88.

Case below: 91 N.C. App. 478.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

MOORE v. HENLINE

No. 483P88.

Case below: 91 N.C. App. 585.

Petition by defendant (R. C. Henline) for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 4 January 1989.

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

NORTHHAMPTON COUNTY DRAINAGE DISTRICT NUMBER ONE v. BAILEY

No. 576A88.

Case below: 92 N.C. App. 68.

Petition by defendants pursuant to G.S. 7A-31 and Appellate Rule 16(b) for discretionary review as to additional issues allowed as to attorneys' fee issue only 4 January 1989. Notice of appeal as to constitutional question dismissed 4 January 1989.

STATE v. BONNER

No. 486P88.

Case below: 91 N.C. App. 424.

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

STATE v. DILLINGHAM

No. 25P89.

Case below: 92 N.C. App. 596.

Petition by defendant for temporary stay allowed 19 January 1989 on condition appearance bond remains in full force and effect.

STATE v. PARKS

No. 580A88.

Case below: 92 N.C. App. 181.

Petition by Attorney General for temporary stay allowed 21 December 1988.

STATE v. STETSON

No. 24P89.

Case below: 92 N.C. App. 597.

Petition by defendant for writ of supersedeas and temporary stay denied 20 January 1989.

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

TABORN v. HAMMONDS

No. 487A88.

Case below: 91 N.C. App. 302.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 January 1989.

TRUESDALE v. UNIVERSITY OF NORTH CAROLINA

No. 438P88.

Case below: 91 N.C. App. 186.

Appeals by plaintiff and by defendants dismissed 4 January 1989. Petitions by plaintiff and by defendants for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989. Supplemental petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

WACHOVIA BANK AND TRUST CO.
v. SOUTHEAST AIRMOTIVE

No. 489P88.

Case below: 91 N.C. App. 417.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 4 January 1989.

APPENDIXES

AMENDMENTS TO RULES FOR DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO RULES RELATING TO LEGAL SPECIALIZATION

CLIENT SECURITY FUND

MEMBERS OF THE SUPREME COURT OF NORTH CAROLINA – 1819-1989

AMENDMENTS TO RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

ARTICLE IX

Discipline and Disbarment of Attorneys

The Rules and Regulations of the North Carolina State Bar relating to the Disciplinary Procedures were originally approved by the Supreme Court of North Carolina on the 4th day of November 1975, as appears in 288 N.C. 743, and reprinted in full with the several amendments in 310 N.C. 794, and were further amended on June 2, 1987, and October 7, 1987.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX—Discipline and Disbarment of Attorneys—Disability Procedures be amended as follows:

ARTICLE IX

Discipline and Disbarment of Attorneys

Section 5. Chairman of the Grievance Committee—Powers & Duties.

By amending subsection (A)(5) by inserting after the words, private reprimand, "a public reprimand," so that the sentence shall read:

(5) to issue, at the direction and in the name of the Grievance Committee, a Letter of Caution, a Private Reprimand, a Public Reprimand, or a Public Censure to an accused attorney.

By further amending (A) by adding a new subsection (12) to read as follows:

(12) to enter orders of reciprocal discipline in the name of the Grievance Committee.

Section 6. Grievance Committee—Powers and Duties.

By deleting subsection (4) in its entirety and in lieu thereof insert the following:

(4) to issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated. The Letter of Caution shall admonish the attorney to be more cautious in his or her practice in one or more ways which are to be specifically identified.

By striking the period at the end of subsection (6) and inserting in lieu thereof a comma and inserting the words, "or public reprimand." so that the sentence will read:

(6) to issue a public censure of an accused attorney in cases wherein a complaint and hearing are not warranted but the conduct warrants more than a private reprimand, or public reprimand.

By renumbering subsection (6) as amended, and (7) to be numbers (7) and (8) and adding a new subsection (6) to read as follows:

(6) to issue a public reprimand wherein a violation of the Rules of Professional Conduct has occurred but a public censure is not warranted.

Section 13. Preliminary Hearing.

By rewriting subsection (9) of Section 13 to read as follows:

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney admonishing the attorney to be more cautious in his or her practice in one or more ways which are to be specifically identified. A record of the Letter of Caution shall be maintained in the Office of the Secretary.

By renumbering existing subsections (11) and (12) to be (12) and (13) respectively.

By adding a new subsection (11) to read as follows:

(11) If probable cause is found and it is determined by the Grievance Committee that a complaint and hearing are not warranted, and the conduct warrants more than a private reprimand but less than a public censure, the committee may issue a notice of public reprimand to the accused attorney. A copy of the proposed public reprimand shall be served upon the accused attorney as provided in G.S. Section 1A-1, Rule 4. The accused attorney must be advised that he may accept the public reprimand within fifteen days after service upon him or a formal complaint will be filed before the Disciplinary Hearing Commission. The accused attorney's acceptance must be in writing, addressed to the Grievance Committee and filed with the Secretary. Once the public reprimand is accepted by the accused, the discipline must be filed as provided by Section 23(A)(2).

Section 16. Reciprocal Discipline.

By adding a new subsection (A) before the existing subsection (1) as follows:

(A) Except as provided in subsection (B) below, reciprocal discipline shall be administered as follows:

By adding subsections (B) and (C) after subsection (A)(4) to read as follows:

(B) Reciprocal discipline with certain federal courts shall be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member of the North Carolina State Bar has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals or in the United States Supreme Court, the Chairman of the Grievance Committee shall forthwith issue a notice directed to such attorney containing a copy of the order from such court and an order directing that the attorney inform the Committee within ten days from service of the notice whether such attorney will accept reciprocal discipline which is substantially similar to that imposed by such federal court or within thirty days from service of the notice of any claim by the accused attorney that the imposition of discipline by the North Carolina State Bar would be unwarranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. This notice is to be served on the accused attorney in accordance with the provisions of G.S. 1A-1, Rule 4. If the accused attorney notifies the State Bar within ten days after service of the notice that he accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline shall be ordered as provided in paragraph (2) and shall run concurrently with the discipline ordered by the federal court.

(2) In the event the accused attorney notifies the State Bar of his acceptance of reciprocal discipline as provided in paragraph (1), the Chairman of the Grievance Committee shall execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and shall cause said order to be served upon the attorney.

(3) In the event the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the State Bar shall be deferred until such stay expires.

(4) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Chairman of the Grievance Committee shall enter an Order of Reciprocal Discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the accused attorney requests a hearing before the Grievance Committee and at such hearing:

(a) The accused attorney demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case shall be dismissed; or

(b) The Grievance Committee determines that the discipline imposed by the federal court is not of a type described in Section 23(A) of these rules and, therefore, cannot be imposed by the North Carolina State Bar, in which event the Grievance Committee may dismiss the case or direct that a complaint be filed in the Disciplinary Hearing Commission.

(5) All findings of fact in the federal disciplinary proceeding shall be binding upon the North Carolina State Bar and the accused attorney.

(C) If the accused attorney fails to accept reciprocal discipline as provided in subsection (B) above or if a hearing is held before the Grievance Committee under either subsection (A) or (B) above and the Committee orders the imposition of reciprocal discipline, such discipline shall run from the date of service of the final order of the Chairman of the Grievance Committee unless the Committee expressly provides otherwise.

Section 21. Notice to Complainant.

By amending subsection (1) by adding after the word, cause, the following language: "and refers the matter to the Disciplinary Hearing Commission" so that the sentence shall read:

(1) If the Grievance Committee finds probable cause and refers the matter to the Disciplinary Hearing Commission, the Chairman of the Grievance Committee shall advise the complainant that the

grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.

By deleting the words in subsection (2), "or a private reprimand," in the first sentence so that the same shall read:

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified.

By renumbering subsections (1) as amended, and (2) as amended, to be numbers (2) and (3) respectively, and adding a new subsection (1) to read as follows:

(1) If the Grievance Committee finds probable cause and imposes discipline, the Chairman of the Grievance Committee shall notify the complainant of the action of the Committee.

Section 23. Imposition of Discipline, Findings of Incapacity or Disability; Notice to Courts

By amending subsection (A)(1) by adding "private" before the word, "reprimand," and by deleting the second sentence of subsection (A)(1) and inserting in lieu thereof the following:

The letter of private reprimand shall be served upon the accused attorney or defendant and upon the complainant. The letter of private reprimand shall not be recorded on the judgment docket of the North Carolina State Bar.

Subsection (A)(1) as amended will read:

(A)(1) Private reprimand. A letter of private reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission depending upon the agency ordering the private reprimand. The letter of private reprimand shall be served upon the accused attorney or defendant and upon the complainant. The letter of private reprimand shall not be recorded on the judgment docket of the North Carolina State Bar.

Renumbering present subsection (A)(2) to (A)(3); and by adding a new subsection (A)(2) to read as follows:

(A)(2) Public reprimand. The Chairman of the Grievance Committee or Chairman of the Hearing Committee of the Disciplinary Hearing Commission shall file an order of public reprimand with the Secretary, who shall cause the order to be recorded on the judgment docket of the North Carolina State Bar and shall forward a copy to the complainant.

Section 29. Confidentiality.

By amending the beginning of the sentence by striking Capital A and inserting in lieu thereof a small a and adding the following phrase to the beginning of the first sentence of said section: "Except as otherwise provided in this Article and North Carolina General Statute 84-28(f), so that the amended section will read:

Except as otherwise provided in this Article and North Carolina General Statute 84-28(f), all proceedings involving allegations of misconduct by an attorney shall remain confidential until the complaint against an accused attorney has been filed with the Secretary of the North Carolina State Bar. . . .

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on October 28, 1988, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of November, 1988.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of December, 1988.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 8th day of December, 1988.

WHICHARD, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar, relating to Rule 10.3 INTEREST ON LAWYERS' TRUST ACCOUNTS as appear in 312 N.C. 845 at 915 and recently amended by the Supreme Court of North Carolina on May 5, 1988, was further reconsidered by the Council at its meeting on October 28, 1988, after consultation with the Supreme Court and the following changes were adopted:

BE IT RESOLVED by the Council of the North Carolina State Bar that Rule 10.3 INTEREST ON LAWYERS' TRUST ACCOUNTS as appears in 312 N.C. 845 at 915 be amended as follows:

By deleting the second sentence of subparagraph (A) which now reads "a lawyer may be compelled to invest on behalf of a client in accordance with Rule 10.1, only those funds not nominal in amount or not expected to be held for a short period of time."

BE IT FURTHER RESOLVED by the Council of the North Carolina State Bar that Rule 10.3 of the Rules of Professional Conduct as amended by the Court on May 5, 1988, is amended as follows:

By deleting all of paragraph (C) and rewriting the same and adding a new paragraph (D) and paragraph (E) so that the same shall read as follows:

"(C) The North Carolina State Bar shall periodically deliver to its members and to its new members appropriate forms whereby each may signify his or her intention not to participate in IOLTA. A lawyer who does not so signify shall participate in the program only upon delivering the direction specified in subparagraph (B) above.

(D) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

(E) Upon being directed to do so by the client, a lawyer may be compelled to invest on behalf of a client in accordance with Rule 10.1 those funds not nominal in amount or not expected to be held for a short period of time. Certificates of Deposit may be obtained by a lawyer or

law firm on some or all of the deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately."

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on October 28, 1988, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of November, 1988.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of December, 1988.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 8th day of December, 1988.

WHICHARD, J.
For the Court

AMENDMENT TO STATE BAR RULES CONCERNING RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 14, 1989.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar as appears in 312 N.C. 845 are amended by striking Rule 2.4 Solicitation (A) and (B) and the comment, and rewriting the same to read as follows:

Rule 2.4—Direct Contact with Prospective Clients

A) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

B) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (A), if:

1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

2) the solicitation involves coercion, duress, harassment, compulsion, intimidation or threats.

C) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "This is an advertisement for legal services" on the outside envelope and at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name and at the beginning and ending of any recorded communication.

D) Notwithstanding the prohibitions in paragraph (A), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit

memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, so long as such contact does not involve coercion, duress or harassment and is not false, deceptive or misleading.

Comment

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 2.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 2.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 2.1. The contents of direct in-person or live telephone conversations between a lawyer and a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occa-

sionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family or prior professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 2.4(A) and the requirements of Rule 2.4(C) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 2.1, which involves coercion, duress, harassment, compulsion, intimidation or threats with the meaning of Rule 2.4(B)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 2.4(B)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 2.2 the lawyer received no response, any further effort to communicate with the prospective client may violate the provisions of Rule 2.4(B).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 2.2.

The requirement in Rule 2.4(C) that certain communications be marked "This is an advertisement for legal services" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Paragraph (D) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (D) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (D) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 2.1, 2.2 and 2.4. See Rule 1.2(A).

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on April 14, 1989, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of April, 1989.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of May, 1989.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 1989.

WHICHARD, J.
For the Court

AMENDMENT TO STATE BAR RULES RELATING TO LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 13, 1989.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, J. (3.2) of the Committee on Legal Specialization, as appears is hereby amended by adding the following:

There is hereby created, pursuant to Section 5, Standing Committees of the Council, J. (3.2) of the Committee on Legal Specialization the following additional designated area of practice in which certificates of specialty may be granted:

4. Family Law. The specialty of Family Law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on January 13, 1989, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of January, 1989.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of February, 1989.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 9th day of February, 1989.

WHICHARD, J.
For the Court

AMENDMENT TO STATE BAR RULES RELATING TO LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 14, 1989.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council of the Committee on Legal Specialization, as appears in 313 N.C. 760 is hereby amended by adding the following:

There is hereby established the following standards for Certification as a Specialist in Family Law:

4. Family Law. The specialty of Family Law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

IV. STANDARDS FOR CERTIFICATION AS A SPECIALIST IN FAMILY LAW

1. *Establishment of Specialty Field*

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Family Law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. *Definition of Specialty*

The specialty of Family Law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy and adoption.

3. *Recognition as a Specialist in Family Law*

If a lawyer qualifies as a specialist in Family Law by meeting the standards set for the specialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Family Law."

4. *Applicability of Provisions of the North Carolina Plan of Legal Specialization*

Certification and continued certification of specialists in Family Law shall be governed by the provisions of the North

Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. *Standards for Certification as a Specialist in Family Law*

Each applicant for certification as a specialist in Family Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification as a specialist in Family Law:

A) *Licensure and Practice*

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B) *Substantial Involvement*

An applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Family Law.

1. Substantial involvement shall mean during the five (5) years preceding the application, the applicant has devoted an average of at least six hundred (600) hours a year to the practice of Family Law, and not less than four hundred (400) hours during any one year.

2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

3. Practice equivalent shall mean:

a. Service as a law professor concentrating in the teaching of family law. Such service may be substituted for one (1) year of experience to meet the five (5) year requirement.

b. Service as a District Court Judge in North Carolina, hearing a substantial number of family law cases. Such service may be substituted for one (1) year of experience to meet the five (5) year requirement.

C) *Continuing Legal Education*

An applicant must have earned no less than forty-five (45) hours of accredited continuing legal education (CLE) credits in Family Law, nine (9) of which may be in re-

lated fields, during the three (3) years preceding application, with not less than nine (9) credits in any one (1) year. Related fields shall include taxation, trial advocacy, evidence, and negotiation.

D) *Peer Review*

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E) *Examination*

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Family Law.

1. *Terms*—The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the Specialty Committee.

2. *Subject Matter*—The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

   a. Contempt (Chapter 5A of the North Carolina General Statutes)

b. Adoptions (Chapter 48)

c. Bastardy (Chapter 49)

d. Divorce and Alimony (Chapter 50)

e. Uniform Child Custody Jurisdiction Act (Chapter 50A)

f. Domestic Violence (Chapter 50B)

g. Marriage (Chapter 51)

h. Powers and Liabilities of Married Persons (Chapter 52)

i. Uniform Reciprocal Enforcement of Support Act (Chapter 52A)

j. Uniform Premarital Agreement Act (Chapter 52B)

k. Termination of Parental Rights, as relating to adoption and termination for failure to provide support (Article 24B of Chapter 7A)

l. Garnishment for Enforcement of Child Support Obligations (Chapter 110-136 *et seq.*)

6. *Standards for Continued Certification as a Specialist*

The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A) *Substantial Involvement*

The specialist must demonstrate that, for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty as defined in Section 5.B.

B) *Continuing Legal Education*

Since last certified, a specialist must have earned no less than sixty (60) hours of accredited continuing legal education credits in Family Law or related fields. Not

less than nine (9) credits may be earned in any one (1) year, and no more than twelve (12) credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, and negotiation.

C) *Peer Review*

The specialist must comply with the requirements of Section 5.D.

D) *Time for Application*

Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E) *Lapse of Certification*

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F) *Suspension or Revocation of Certification*

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 5.

7. *Applicability of Other Requirements*

The specific standards set forth herein for certification of specialists in Family Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on April 14, 1989, and the amendment as certified was duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of April, 1989.

B. E. JAMES
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of May, 1989.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 1989.

WHICHARD, J.
For the Court

CLIENT SECURITY FUND

On 10 October 1984, this Court, upon recommendation of the North Carolina State Bar, established the Client Security Fund. It now appears, based on projected receipts and expenditures for the foreseeable future made by the Client Security Fund Board, that it will be necessary for contributions to be made to the Fund for the calendar years 1990 and 1991 in the sum of $15 per year to be assessed from each member of the North Carolina State Bar; therefore, the Court orders that each member of the North Carolina State Bar shall be assessed the sum of $15 per annum in each of the years 1990 and 1991 for the Client Security Fund.

Done by order of the Court in Conference, this 27th day of June 1989.

WHICHARD, J.
For the Court

MEMBERS OF THE SUPREME COURT OF NORTH CAROLINA — 1819-1989

Compiled by Harry C. Martin, Associate Justice

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1819	Taylor, J.L.[1]	Hall, J.[2]	Henderson, L.[3]				
1820			June Term[4]				
1821							
1822							
1823							
1824							
1825							
1826							
1827							
1828							
1829	Henderson, L.[5]		Toomer, J.D.[6]				
			Ruffin, T.[7]				
1830							
1831							
1832							
1833	Ruffin, T.	Daniel, J.J.[8]	Gaston, W.[9]				
1834							
1835							
1836							
1837							
1838							
1839							
1840							

1. Died 29 January 1829.
2. Resigned 15 December 1832.
3. Elected to Superior Court 1808; died 13 August 1883. Taylor, Hall, and Henderson were Superior Court Judges who, as members of the "Court of Conference," performed appellate functions. The Supreme Court was not actually created until 1818, and Taylor, Hall, and Henderson sat for the Court's first session on 5 January 1819.
4. Murphey, A.D., presided in several cases in place of Henderson.
5. Elected Chief Justice June 1829; died August 1833.
6. Appointed by Governor Owen, May 1829; term expired December 1829.
7. Elected December 1829.
8. Died 10 February 1848.
9. Died 23 January 1844.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1841							
1842							
1843							
1844			Nash, F.[10]				
1845							
1846							
1847							
1848		Battle, W.H.[11]					
		Pearson, R.M.[12]					
1849							
1850							
1851							
1852	Nash, F.		Battle, W.H.[13]				
1853							
1854							
1855							
1856							
1857							
1858	Pearson, R.M.	Ruffin, T.[14]					
1859		Manly, M.[15]					
1860							
1861							
1862							
1863							
1864							
1865		Reade, E.G.[16]					
1866							
1867							

10. Elected June 1844.

11. Appointed by Governor Graham, May 1848; term expired December 1848.

12. Elected by General Assembly December 1848.

13. Elected 1852.

14. Resigned in 1852 as Chief Justice; elected Associate Justice by the General Assembly in 1858; resigned December 1859. Ruffin was the only Justice to resign as Chief Justice and to rejoin the Court as Associate Justice.

15. Elected 1860.

16. In 1865, the last Supreme Court Justice to be elected by the General Assembly; chosen by the people of North Carolina in 1868 to succeed himself.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1868			Dick, R.P.[17]	Rodman, W.B.	Settle, T.[18]		
1869							
1870							
1871					Boyden, N.[19]		
1872			Settle, T.[20]				
1873					Bynum, W.P.[21]		
1874							
1875							
1876			Faircloth, W.T.[22]				
1877							
1878	Smith, W.N.H.[23]						
1879		Ashe, T.S.	Dillard, J.H.[24]	---	---[25]		
1880							
1881			Ruffin, T., Jr.[26]				
1882							
1883			Merrimon, A.S.[27]				
1884							
1885							
1886							
1887		Davis, J.J.[28]					
1888							
1889	Merrimon, A.[29]		Clark, W.[30]	Avery, A.C.[31]	Shepherd, J.E.[32]		

17. Appointed U.S. District Court Judge June 1872; resigned from Supreme Court 1 December 1872.
18. Resigned April 1871.
19. Appointed by Governor Caldwell, May 1871; died 20 November 1873.
20. Appointed by Governor Caldwell, 5 December 1872; resigned 1876.
21. Appointed by Governor 21 November 1873; term expired 1 January 1879.
22. Appointed by Governor Brogden, 18 November 1876, upon resignation of Settle.
23. Appointed by Governor Vance, 14 January 1878, upon death of Pearson.
24. Resigned in 1881.
25. Two seats vacant following termination of ten-year terms of Rodman and Bynum.
26. Appointed by Governor Jarvis 11 February 1881; elected 1882; resigned September 1883.
27. Appointed by Governor Jarvis 29 September 1883.
28. Appointed by Governor upon death of Ashe (February Term 1887).
29. Appointed Chief Justice by Governor Fowle upon death of Smith, November 1889.
30. Appointed by Governor Fowle upon appointment of Merrimon to Chief Justice 16 November 1889.
31. Elected by virtue of amendment to constitution at General Election, November 1888; took seat January 1889.
32. Elected by virtue of amendment to constitution at General Election, November 1888.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1890							
1891							
1892	Shepherd, J.E.[33]	MacRae, J.C.[34]			Burwell, A.[35]		
1893							
1894					Montgomery, W.A.[36]		
1895	Faircloth, W.T.[37]	Furches, D.M.[38]					
1896							
1897				Douglas, R.M.			
1898							
1899							
1900							
1901	Furches, D.M.[39]	Cook, C.A.[40]					
1902							
1903	Clark, W.	Connor, H.G.	Walker, P.D.[41]				
1904							
1905				Hoke, W.A.[42]	Brown, G.H., Jr.[43]		
1906							
1907							
1908							
1909		Manning, J.S.					
1910							
1911		Allen, W.R.[44]					
1912							
1913							
1914							
1915							

33. *Appointed Chief Justice by Governor Holt upon death of Merrimon 14 November 1892.*
34. Appointed by Governor Holt upon death of Davis 7 August 1892.
35. Appointed by Governor Holt November 1892.
36. Elected to unexpired term 1894; elected to full term 1896.
37. *Elected Chief Justice 1894.*
38. Elected; took seat 1 January 1894.
39. Faircloth died 30 December 1900; Furches appointed 5 January 1901.
40. Appointed by Governor Russell 7 January 1901; term expired January 1903.
41. *Clark, Connor, and Walker elected November 1902.*
42. Took seat 1 January 1905, succeeding Douglas.
43. Took seat 1 January 1905, succeeding Montgomery.
44. Took seat 1 January 1911, succeeding Manning.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1916							
1917							
1918							
1919							
1920							
1921		Adams, W.R.[45]			Stacy, W.P.		
1922							
1923			Clarkson, H.[46]				
1924	Hoke, W.[47]			Connor, G.W.[48]			
1925	Stacy, W.P.[49]				Varser, L.R.[50]		
1926					Brogden, W.J.[51]		
1927							
1928							
1929							
1930							
1931							
1932							
1933							
1934		Schenck, M.[52]					
1935					Devin, W.A.[53]		
1936							
1937						Barnhill, M.V.	Winborne, J.W.[54]
1938				Seawell, A.R.F.[55]			
1939							
1940							
1941							

45. Appointed by Governor Morrison 8 September 1921 upon death of Allen.
46. Appointed by Governor Morrison upon death of Walker at close of 1922 Term.
47. Appointed Chief Justice by Governor Morrison upon death of Clark; resigned 16 March 1925.
48. Appointed by Governor Morrison to succeed Hoke.
49. Appointed Chief Justice by Governor McLean upon retirement of Hoke 16 March 1925.
50. Appointed by Governor McLean to succeed Stacy; resigned 31 December 1925.
51. Appointed by Governor McLean 1 January 1926 to succeed Varser.
52. Appointed by Governor Ehringhaus 23 May 1934 to succeed Adams, who died 20 May 1934.
53. Appointed by Governor Ehringhaus 1 November 1935 upon death of Brogden.
54. Court increased to seven members; Barnhill and Winborne appointed by Governor Hoey 1 July 1937.
55. Appointed by Governor Hoey 30 April 1938 upon death of Connor.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1942			Denny, E.B.[56]				
1943							
1944							
1945							
1946							
1947							
1948		Ervin, S.J., Jr.[57]					
1949							
1950				James, M.G.[58]			
				Johnson, J.D., Jr.[59]			
1951	Devin, W.A.[60]				Valentine, I.T.[61]		
1952					Parker, R.H.[62]		
1953							
1954	Barnhill, M.[63]	Higgins, C.W.[64]				Bobbitt, W.H.[65]	
1955							
1956	Winborne, J.W.[66]						Rodman, W.B., Jr.[67]
1957							
1958							
1959				Moore, C.L.[68]			
1960							
1961							
1962	Denny, E.[69]		Sharp, S.[70]				
1963							

56. Appointed by Governor Broughton 29 January 1942 upon death of Clarkson 27 January 1942.
57. Appointed by Governor Cherry 3 February 1948 upon retirement of Schenck.
58. Appointed by Governor Scott 19 October 1950 upon death of Seawell 14 October 1950.
59. Nominated by State Democratic Executive Committee and elected at regular election of 1950 for unexpired term of Seawell.
60. Appointed Chief Justice by Governor Scott 17 September 1951, following death of Stacy 13 September 1951.
61. Appointed by Governor Scott 17 September 1951 as successor to Devin.
62. Defeated Valentine in primary and elected to unexpired term of Devin 15 November 1952.
63. Appointed Chief Justice by Governor Umstead 1 February 1954, upon resignation of Devin 30 January 1954.
64. Appointed by Governor Umstead upon resignation of Ervin 11 June 1954.
65. Appointed by Governor Umstead; took oath of office 1 February 1954 as successor to Barnhill.
66. Appointed Chief Justice by Governor Hodges upon retirement of Barnhill, 21 August 1956.
67. Appointed by Governor Hodges August 1956 to succeed Winborne.
68. Appointed by Governor Hodges 2 February 1959 following retirement of Johnson 31 January 1959.
69. Appointed Chief Justice by Governor Sanford following retirement of Winborne.
70. Appointed by Governor Sanford to succeed Denny.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1964							
1965							Lake, I.B.[71]
1966	Parker, R.H.[72]			Branch, J.[73]	Pless, J.W., Jr.[74]		
1967							
1968					Huskins, J.F.[75]		
1969	Bobbitt, W.H.[76]					Moore, D.K.[77]	
1970							
1971							
1972							
1973							
1974							
1975	Sharp, S.[78]	Exum, J.G., Jr.	Copeland, J.W.[79]				
1976							
1977							
1978							Britt, D.M.[80]
1979	Branch, J.[81]			Carlton, J.P.[82]		Brock, W.E.[83]	
1980							
1981						Meyer, L.B.[84]	
1982					Mitchell, B.B., Jr.[85]		Martin, H.C.[86]
1983				Frye, H.E.[87]			
1984							

71. Appointed by Governor Moore 30 August 1965 following resignation of Rodman.
72. Appointed Chief Justice by Governor Moore 5 February 1966 upon retirement of Denny.
73. Appointed by Governor Moore 21 July 1966 upon death of Justice C. L. Moore.
74. Appointed by Governor Moore 7 February 1966 to succeed Parker.
75. Appointed by Governor Moore 5 February 1968 upon retirement of Pless.
76. Appointed Chief Justice by Governor Scott on 13 November 1969 following death of Parker 10 November 1969; took office 17 November 1969.
77. Appointed by Governor Scott 20 November 1969; took office 1 December 1969.
78. Elected Chief Justice 5 November 1974 in anticipation of Bobbitt's retirement 31 December 1974; took office 2 January 1975.
79. Exum and Copeland elected 5 November 1974; took office 3 January 1975.
80. Appointed 31 August 1978 to fill unexpired term of Lake, who retired 31 August 1978; elected to full term 7 November 1978.
81. Appointed Chief Justice by Governor Hunt upon retirement of Sharp 31 July 1979; took office 1 August 1979.
82. Appointed by Governor Hunt; took office 2 August 1979.
83. Elected 7 November 1978 in anticipation of Moore's retirement 31 December 1978.
84. Appointed by Governor Hunt upon retirement of Brock 1 December 1980; took office 9 January 1981.
85. Appointed by Governor Hunt upon retirement of Huskins 1 February 1982; took office 3 February 1982.
86. Appointed by Governor Hunt upon retirement of Britt 31 July 1982; took office 3 August 1982.
87. Appointed by Governor Hunt upon resignation of Carlton 31 January 1983; took office 3 February 1983.

Year	Chief Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice	Associate Justice
1985			Vaughn, E.[88] Billings, R.G.[89]				
1986	Billings, R.G.[90] Exum, J.G., Jr.[93]	Browning, R.[91] Whichard, W.P.	Parker, F.[92] Webb, J.[94]				

88. Appointed by Governor Hunt upon retirement of Copeland 31 December 1984; took office 2 January 1985.

89. Appointed by Governor Martin upon retirement of Vaughn 31 July 1985; took office 4 September 1985.

90. Appointed Chief Justice by Governor Martin upon retirement of Branch 1 September 1986.

91. Appointed by Governor Martin following retirement of Exum 1 September 1986.

92. Appointed by Governor Martin to succeed Billings 1 September 1986.

93. Elected Chief Justice in General Election of 1986; sworn into office 26 November 1986.

94. Webb and Whichard elected in General Election of 1986; sworn into office 26 November 1986.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADVERSE POSSESSION

§ 16.1. Railroad Property

The statute protecting a railroad from loss of land by adverse possession does not require that a railroad actually use the land but only that the railroad obtain the land for its use for a railroad purpose. *McLaurin v. Winston-Salem Southbound Railway Co.*, 609.

An individual may take advantage of G.S. 1-44 to show that a railroad had not lost land by adverse possession at the time it conveyed the land to him. *Ibid.*

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

The trial court's grant of summary judgment against plaintiffs on the issue of compensatory damages was immediately appealable since that portion of the trial court's order was a final judgment. *Pelican Watch v. U.S. Fire Ins. Co.*, 700.

An order allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was interlocutory and not appealable by defendant. *Ibid.*

§ 62.2. Granting of Partial New Trial

A new trial will be awarded on the damage issue only in an action by a trust beneficiary against an executor-trustee for breach of fiduciary duty. *Fortune v. First Union Nat. Bank*, 146.

§ 68. Law of the Case and Subsequent Proceedings

The trial court properly denied plaintiff's motion to reopen a prior judgment for the purpose of making additional findings and conclusions as to whether plaintiff should be awarded compound interest as an element of just compensation for defendant's taking of an interest in plaintiff's property by inverse condemnation. *Lea Co. v. N.C. Board of Transportation*, 697.

ATTORNEYS AT LAW

§ 3.1. Nature and Extent of Attorney's Authority

An attorney who follows the disbursement provisions of G.S. 44-50 when disbursing a client's funds from a personal injury settlement cannot be held liable for the client's unpaid debt to a medical service provider who the attorney knew had obtained the client's assignment of all such funds up to the full amount of the client's debt for medical services. *N.C. Baptist Hospitals, Inc. v. Mitchell*, 528.

§ 7.3. Compensation in Condemnation Proceedings

The award of attorney fees under G.S. 136-119 in an inverse condemnation action and the amount of such fees are within the discretion of the trial judge. *Lea Co. v. N.C. Board of Transportation*, 691.

The trial court did not abuse its discretion in finding that attorney fees incurred in the pursuit of a failed Rule 60(b) motion to reopen an inverse condemnation judgment for an award of compound interest were not reasonably incurred. *Ibid.*

A trial judge has the discretion to consider and include the services of paralegals and legal secretaries in the sum he awards as attorney fees, but G.S. 136-119 does not mandate that services performed by paralegals and legal secretaries be paid separate and apart from attorney fees. *Ibid.*

ATTORNEYS AT LAW — Continued

The trial judge's allowance of expenses for paralegals and legal secretaries to be recovered as a part of the attorney fees in previous orders relating to other stages of the action does not mandate that they be allowed as part of the attorney fees in subsequent stages. *Ibid.*

§ 7.4. Fees Based on Provisions of Notes or other Instruments

Agreements by the debtors in a purchase money note concerning attorneys' fees could not amount to a waiver of the requirement that purchase money creditors be strictly limited to the property conveyed. *Merritt v. Edwards Ridge*, 330.

G.S. 6-21.2 does not permit a purchase money creditor to recover from the purchase money debtor attorneys' fees incurred in connection with foreclosure of the purchase money deed of trust since the anti-deficiency statute controls over that statute. *Ibid.*

BILLS OF DISCOVERY

§ 6. Compelling Discovery

Where the State provided defendant with the substance of his own remarks to a witness without identifying the witness or providing a written copy of the statement, and the State then made the written statement available to defendant at trial, the trial court did not err in refusing to require the State to reveal the name of the witness and to provide a copy of the witness's written statement to defendant prior to trial. *S. v. Harris*, 112.

CONSPIRACY

§ 6. Sufficiency of Evidence

The trial court did not err by denying defendant's motions to dismiss two charges of conspiracy to murder. *S. v. Hunt*, 407.

CONSTITUTIONAL LAW

§ 28. Due Process

Due process did not require that the same judge hear all pretrial motions and procedural matters and hear the case itself in a prosecution for three first degree murders. *S. v. McLaughlin*, 68.

Defendant was not denied due process by the trial court's denial of his motion to continue an evidence suppression hearing on the ground his two counsel needed more time to prepare. *Ibid.*

§ 30. Discovery

Defendant was not entitled to discovery of the names, addresses and statements of all persons interviewed by the State, a list of criminal records of all State witnesses, or all written reports, documents or physical evidence in the possession of the State relative to defendant's case or its investigation. *S. v. McLaughlin*, 68.

Where the State provided defendant with the substance of his own remarks to a witness without identifying the witness or providing a written copy of the statement, and the State then made the written statement available to defendant at trial, the trial court did not err in refusing to require the State to reveal the name of the witness and to provide a copy of the witness's written statement to defendant prior to trial. *S. v. Harris*, 112.

CONSTITUTIONAL LAW — Continued

§ 31. Affording the Accused the Basic Essentials for Defense

The report of a psychiatrist was properly introduced into evidence at a pretrial hearing to determine defendant's competency to stand trial for three murders even though defendant's motion for an independent psychiatric examination was denied. *S. v. McLaughlin*, 68.

The trial court did not err in denying defendant's motion for funds to hire a private investigator in a first degree murder case. *Ibid.*

The trial court did not err in denying defendant's motion for funds for a jury selection expert. *Ibid.*

§ 34. Double Jeopardy

Defendant was not twice put in jeopardy for the same offense where his first trial for armed robbery ended in a mistrial when the jury could not agree on a verdict, defendant was tried and acquitted for possession of a weapon by a previously convicted felon based on a pistol found in defendant's automobile three hours after the robbery, and defendant was then tried again and convicted on the charge of armed robbery. *S. v. Alston*, 614.

§ 40. Right to Counsel Generally

The trial court erred in a prosecution for first degree murder by accepting a guilty plea and conducting the sentencing hearing without appointing additional counsel in a timely manner pursuant to G.S. 7A-450(b1) after defendant was charged with murder. *S. v. Hucks*, 574.

§ 60. Racial Discrimination in Jury Selection Process

Defendant failed to make a prima facie showing of racial discrimination in the selection of grand jury foremen. *S. v. McLaughlin*, 68.

The defendant in a first degree murder prosecution did not make a prima facie showing of racially motivated peremptory challenges to black jurors. *S. v. Allen*, 208.

§ 61. Discrimination in Jury Selection Process on Basis other than Race

The fair cross-section of the community principle does not extend to petit juries, and jurors equivocal as to the death penalty do not qualify as a distinctive group for fair cross-section purposes. *S. v. Fullwood*, 371.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

The trial court did not err in a murder prosecution by death qualifying the jury. *S. v. McLaughlin*, 68; *S. v. Fullwood*, 371.

§ 65. Right of Confrontation Generally

Defendant's constitutional right of confrontation was not violated by the admission of a "Dear John" letter written by the victim to defendant. *S. v. Quick*, 675.

§ 66. Presence of Defendant at Proceedings

There was no prejudice in a prosecution for the murder of a highway patrolman from the trial court's examination of each juror in chambers with only a court reporter present following a weekend television broadcast concerning the trial. *S. v. Allen*, 208.

CONSTITUTIONAL LAW — Continued

§ 70. Cross-Examination of Witnesses

There was no merit to defendant's argument that his right to confrontation was violated in a prosecution for the first degree rape of a five-year-old child where the child did not testify but her statements to others were admitted. *S. v. Deanes*, 508.

§ 72. Use of Confession or Inculpatory Statement of Codefendant

The trial court did not err in a murder prosecution by admitting into evidence an extrajudicial statement by a codefendant recanting an earlier statement taking full blame. *S. v. Hunt*, 407.

§ 78. Cruel and Unusual Punishment Generally

The trial court did not violate the constitutional mandate against cruel and unusual punishment by sentencing defendant to consecutive life sentences for two counts of murder. *S. v. Rogers*, 658.

§ 80. Death Sentences

North Carolina's death penalty statute is constitutional. *S. v. McLaughlin*, 68.

CORPORATIONS

§ 13. Liability of Officers to Third Persons

The trial court was not required to instruct the jury on whether corporate directors are guarantors or insurers of their agents where defendant directors were being sued for their own alleged personal misrepresentations. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 559.

§ 15. Liability of Officers for Torts

The evidence was sufficient for the jury on the issue of defendant corporate officer's gross negligence in submitting to plaintiff contractor sworn applications for payment to the corporate subcontractor for specialty items purportedly purchased and stored in a warehouse for installation in a construction project but which later could not be found. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 559.

CRIMINAL LAW

§ 5. Mental Capacity in General

The report of a psychiatrist was properly introduced into evidence at a pretrial hearing to determine defendant's competency to stand trial for three murders even though defendant's motion for an independent psychiatric examination was denied. *S. v. McLaughlin*, 68.

§ 5.1. Determination of Issue of Insanity

Although two expert witnesses stated opinions that defendant did not know right from wrong at the time of two murders and a felonious assault, the jury could find that defendant was legally sane upon the basis of an investigating officer's testimony. *S. v. Shytle*, 684.

§ 15.1. Pretrial Publicity as Ground for Change of Venue

The trial court in a murder and armed robbery case did not err in denying defendant's motion for a change of venue based on pretrial publicity. *S. v. Harris*, 112.

CRIMINAL LAW — Continued

The trial court did not err in a prosecution for first degree murder by denying a motion for a change of venue or a special venire based on inflammatory media coverage. *S. v. Hunt*, 407.

§ 29. Mental Capacity to Stand Trial

There was evidence from which the trial court could find that defendant was able to assist in her defense in a rational manner to two charges of murder and one of felonious assault although she suffered brain damage from a self-inflicted gunshot wound which impaired her emotional responses. *S. v. Shytle*, 684.

Evidence that defendant did not appreciate the gravity of the situation she was in at the time of the trial because of brain damage from a self-inflicted gunshot wound did not require the trial court to find that she did not understand the nature and object of the proceedings against her or that she could not comprehend her own situation in reference to the proceedings against her. *Ibid.*

§ 33. Facts Relevant to Issues

The trial court in a first degree murder case did not err in refusing to admit the entire packet of defendant's medical records on the ground that it would be a waste of time. *S. v. Fullwood*, 371.

§ 42.4. Articles Connected with Crime; Identification of Object and Connection with Crime; Weapons

The trial court properly admitted an iron pipe with which two of three murder victims were attacked. *S. v. McLaughlin*, 68.

§ 43.4. Gruesome, Inflammatory or Otherwise Prejudicial Photographs

The trial court did not err in admitting photographs and slides of three murder victims. *S. v. McLaughlin*, 68.

The trial court did not err in admitting a color photograph of a robbery and murder victim's remains where the victim was found two and one-half weeks after the murder and the upper body had apparently been ravaged by animals. *S. v. Harris*, 112.

The trial court did not err in a murder prosecution by admitting nine photographs of the victims' bodies. *S. v. Rogers*, 658.

§ 45.1. Particular Experimental Evidence

There was no error in a first degree murder prosecution in allowing the pistol identified as the murder weapon to be passed among the jury and tested by the jury as to its pull. *S. v. Allen*, 208.

§ 50. Expert and Opinion Testimony in General

The trial court erred in a first degree murder prosecution in which the issue of defendant's capacity to stand trial had been raised by excluding the testimony of two employees of the Sheriff's Department who had observed defendant during her incarceration. *S. v. Silvers*, 646.

The trial court erred in a prosecution for first degree murder by permitting a psychiatrist to offer an interpretation of the law involving voluntary intoxication. *Ibid.*

§ 50.1. Admissibility of Opinion Testimony; Opinion of Expert

The trial court did not err in a first degree murder prosecution by sustaining the State's objection to the testimony of defendant's medical expert on his estimate of defendant's blood alcohol content at the time of the shootings. *S. v. Rogers*, 658.

CRIMINAL LAW — Continued

§ 53. Medical Expert Testimony in General

A pathologist's use of the word "guess" did not render inadmissible his opinion as to the length of time between the victim's injuries and her death. *S. v. Fullwood*, 371.

The trial court was not required to recognize defendant's objection to a pathologist's opinion testimony as a request under Rule 705 for disclosure of the facts and data underlying the opinion. *Ibid.*

The trial court did not err in a murder prosecution by not instructing the jury that they could consider the opinion of an expert regarding whether premeditation and deliberation existed. *S. v. Rose*, 455.

§ 60.1. Photographs of Fingerprints

The trial court properly admitted defendant's fingerprints which were lifted from one murder victim's car. *S. v. McLaughlin*, 68.

§ 62. Lie Detector Tests

The trial court did not err in failing to declare a mistrial after a State's witness testified that he had asked both defendant and an accomplice who testified for the State to take a polygraph test. *S. v. Harris*, 112.

§ 73.1. Admission of Hearsay Statements as Harmless Error

There was no prejudice in a prosecution for the rape of a five-year-old child from the testimony of a doctor that the lab had called her office the day after she sent the child's specimen and informed her that the culture was positive for gonorrhea. *S. v. Deanes*, 508.

§ 73.2. Statements not within Hearsay Rule

Testimony in a murder prosecution that the witness's wife had said she was going to insure the victim and have him killed was not hearsay and was properly admitted. *S. v. Hunt*, 407.

A trial court considering the admission of evidence under the residual exception to the hearsay rule must consider certain factors in order, must make findings of fact and conclusions of law on the issues of trustworthiness and probativeness, and must make conclusions of law and give its analysis on the other issues. *S. v. Deanes*, 508.

In a prosecution for the first degree rape of a five-year-old child in which the child did not testify, there were sufficient circumstantial guarantees of trustworthiness to admit the testimony of a social worker as to statements the child had made to her where the court's findings and conclusions demonstrate that the court properly considered factors bearing upon the child at the time the statement was made and other evidence which tended to support the truthfulness of the child's statement. *Ibid.*

The trial court did not err in a prosecution for the rape of a five-year-old child by admitting into evidence a laboratory worksheet prepared by Roche Labs confirming the presence of gonorrhea in the child. *Ibid.*

Statements in a letter written by a homicide victim to defendant, cross-examination of defendant concerning the contents of the letter, and statements made by the victim's grandmother to defendant on the day of the shooting were not hearsay and were properly admitted to show defendant's motive for killing the victim. *S. v. Quick*, 675.

CRIMINAL LAW — Continued

§ 77.3. Admissions of Codefendants

The trial court did not err in allowing a detective to read statements a witness made to law officers allegedly in violation of G.S. 15A-927 because that statute applies only where a joint trial occurs, and because defendant himself brought the statements to the jury's attention. *S. v. McLaughlin*, 68.

§ 82.2. Physician-Patient Privilege

The trial court did not abuse its discretion in ruling that the physician-patient privilege should be waived and that a surgeon's testimony concerning defendant's wounds should be allowed into evidence even though investigators obtained information from the surgeon before the trial court compelled his testimony. *S. v. Fullwood*, 371.

§ 86.4. Impeachment of Defendant; Prior Accusations of Crime

Defendant was not prejudiced when the court allowed the prosecutor to cross-examine defendant about an altercation in which he was involved at Dorothea Dix Hospital during his competency evaluation. *S. v. Harris*, 112.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

When defendant testified that he had not robbed or injured the victim "or anyone else," he opened the door to cross-examination about specific instances of prior violent conduct designed to rebut this assertion. *S. v. Darden*, 356.

§ 87.1. Leading Questions

The trial court did not err in permitting a detective to testify that defendant had told him that a pipe which he used to strike the murder victims was in the closet of his house. *S. v. McLaughlin*, 68.

§ 90. Rule that Party Is Bound by and May Not Discredit His Own Witness

The trial court did not err in allowing the State to impeach its own witness because Rule of Evidence 607 permits impeachment of a party's own witness, and the questions about the witness's prior criminal activity were asked to clarify the witness's testimony. *S. v. McLaughlin*, 68.

§ 91.1. Continuance

Defendant was not denied due process by the trial court's denial of his motion to continue an evidence suppression hearing on the ground his two counsel needed more time to prepare. *S. v. McLaughlin*, 68.

§ 91.4. Continuance on Ground of Absence of Counsel

The trial court in a murder case did not err in denying defendant's motion for a continuance because one of the two attorneys who had represented him for four months was absent for one week to attend a sick relative. *S. v. McLaughlin*, 68.

§ 92. Severance

The trial court abused its discretion in a prosecution for first degree murder by denying a motion to sever. *S. v. Hucks*, 574.

§ 92.1. Consolidation Held Proper; Same Offense

The trial court did not err by consolidating first degree murder cases for trial. *S. v. Hunt*, 407.

There was a transactional connection supporting the consolidation for trial of two conspiracy and two murder charges. *Ibid.*

CRIMINAL LAW — Continued

§ 93. Order of Proof

The trial court did not err in admitting a letter from a homicide victim to defendant as a State's exhibit at the end of the State's cross-examination of defendant for the limited purpose of showing his knowledge of the letter; nor did the trial court err in permitting the State to reintroduce the letter over defendant's objection during the State's presentation of rebuttal evidence. *S. v. Quick*, 675.

§ 98.2. Sequestration of Witnesses

The trial court did not abuse its discretion in the denial of defendant's Rule 615 motion to sequester witnesses. *S. v. Fullwood*, 371.

§ 101. Conduct Affecting Jurors

Defendant in a first degree murder case was not prejudiced by the trial court's individual conversation with the jury foreman when handing him the verdict sheets out of the presence of the other jurors or by the court's statement to the jury that the trial would have to await the recovery of any sick juror before proceeding. *S. v. McLaughlin*, 68.

§ 101.3. Permitting Jury to View Evidence Outside Courtroom

Where the jury in a first degree murder case asked to see an exhibit, defendant was not prejudiced by the court's misstatement of the law that the jury could only view exhibits during the trial while sitting together in the jury box. *S. v. McLaughlin*, 68.

§ 101.4. Conduct Affecting or During Deliberation

Defendant was not prejudiced when the jury foreman was explaining the jury's difficulty in completing the sentencing forms in two of three first degree murder cases and another juror asked permission to speak and clarified the foreman's explanation. *S. v. McLaughlin*, 68.

The trial court did not abuse its discretion by denying the jury's request for portions of the transcript. *S. v. Benson*, 318.

§ 102.6. Particular Conduct and Comments in Jury Argument

The trial court did not err in overruling defendant's objection to the prosecutor's jury argument suggesting that the fact that defendant was competent to stand trial indicated that his sanity defense lacked merit. *S. v. McKoy*, 1.

The trial court properly sustained the State's objection to defense counsel's jury argument that, in order to convict defendant of first degree murder, the jury would have to find that a psychiatrist who testified that defendant lacked the mental capacity to premeditate and deliberate at the time of the crime "was wrong about it beyond a reasonable doubt." *Ibid.*

The trial court did not err in a first degree murder prosecution by not intervening ex mero motu when the prosecution argued that defendant was hiding behind the constitution with regard to his confession. *S. v. Allen*, 208.

The trial court did not err by not intervening ex mero motu in a prosecution for first degree murder where the assistant district attorney argued that defendant had indicated that he wanted a lawyer as a feeler to see how officers would react. *Ibid.*

There was sufficient conflict in the testimony in a first degree murder prosecution for the assistant district attorney to argue that the jury would have to believe that police officers were lying in order to believe defendant. *Ibid.*

The trial court did not err by not intervening ex mero motu in the closing arguments of a murder prosecution where the prosecutor argued to the jury that others involved in the incident with defendant had not testified because they would not survive in prison if they had testified. *Ibid.*

The trial court did not err in a first degree murder prosecution by not intervening ex mero motu in the prosecutor's opening argument. *S. v. Benson*, 318.

The prosecutor's closing argument in a prosecution for first degree murder was not so grossly egregious that the trial judge was required to intervene ex mero motu. *Ibid.*

The prosecutor's references in his jury argument in a first degree murder case to the impact of the crime upon members of the victim's family who testified for the State did not require the trial court to intervene ex mero motu. *S. v. Cummings*, 181.

Assuming arguendo that the prosecutor's jury argument during the sentencing phase of a first degree murder case concerning the effect of the crime on certain members of the victim's family was improper under *Booth v. Maryland*, the trial judge's failure to take corrective action was harmless error. *Ibid.*

The prosecutor in a murder case could properly rebut defendant's accident defense by calling the jury's attention to defendant's failure to produce evidence of satellite wounds from the shotgun pellets. *S. v. Ford*, 466.

The prosecutor's jury argument in a first degree murder case that whether defendant was in passion when he killed the victim is immaterial was a correct statement of the law and properly permitted. *S. v. Fullwood*, 371.

The trial court did not err in a prosecution for murder and conspiracy by not intervening ex mero motu following various prosecutor's arguments. *S. v. Hunt*, 407.

The trial court did not err in a prosecution for first degree murder by overruling defendant's objections to comments made by the prosecutor in his closing argument. *S. v. Rogers*, 658.

§ 102.7. Jury Argument; Comment on Credibility of Witnesses

The prosecutor's potentially misleading jury argument in a first degree murder case that "if the law recognized them [psychiatrists] as the experts on what the condition of somebody's mind was, you wouldn't be hearing the case" was not prejudicial. *S. v. McKoy*, 1.

§ 102.12. Jury Argument; Comment on Sentence

The prosecutor's argument that the sentence for a first degree murder was not purely a matter for the jury's discretion but must be determined "under the instructions of the Court" was not improper. *S. v. Fullwood*, 371.

The trial court did not abuse its discretion by not intervening ex mero motu when the prosecution read verses from the Bible which say that a murderer shall be put to death. *Ibid.*

§ 102.13. Jury Argument; Comment on Judicial Review

Comments by the trial court and the prosecutor concerning appellate review did not fatally undermine the jury's verdict of guilty of first degree murder and its conclusion that death is the appropriate punishment. *S. v. McKoy*, 1.

CRIMINAL LAW — Continued

§ 103. Function of Court in General

The trial judge did not express an opinion in a murder prosecution in which defendant relied on an accident defense by refusing to allow defendant to use the murder weapon to demonstrate his testimony. *S. v. Ford*, 466.

§ 106. Sufficiency of Evidence

The trial court was not required to dismiss a charge of first degree murder on the basis of defendant's contention that the State's chief witness lied about the murder to protect her boyfriend and to cover up her own involvement in the crime. *S. v. Cummings*, 181.

The evidence was sufficient for the jury to find a defendant guilty of conspiracy and murder. *S. v. Hunt*, 407.

§ 111.1. Particular Miscellaneous Instructions

The trial court in a murder prosecution did not err by refusing to give an instruction on the placement of an iron pipe which was the murder weapon on the clerk's desk immediately in front of the jury, to allow defendant to photograph the desk, or to grant defendant a mistrial. *S. v. McLaughlin*, 68.

The trial court did not err in its jury instructions in the sentencing phase of a capital case by commenting that the news media would be allowed to look at a copy of the issues and punishment recommendation sheet. *Ibid.*

§ 113.1. Recapitulation of Evidence

The trial court did not err in refusing defendant's request for clarification of testimony in certain areas. *S. v. McLaughlin*, 68.

§ 113.7. Charge as to Acting in Concert or Aiding and Abetting

There was no prejudice in a prosecution for three first degree murders where the jury foreman asked the court during the sentencing phase for an explanation of acting in concert and the judge replied that he would be happy to explain the concept after the jury completed deliberations on defendant's punishment. *S. v. McLaughlin*, 68.

The trial court in a prosecution for armed robbery and murder did not err in refusing defendant's request for an instruction on aiding and abetting. *S. v. Harris*, 112.

§ 114.1. Disparity in Time Consumed in Stating Evidence for Parties

The trial court did not err in its narration of the evidence in a first degree murder case although the summary of defendant's evidence was shorter than that of the State. *S. v. McLaughlin*, 68.

§ 117.4. Charge on Credibility of Accomplices

The trial court in an armed robbery and murder case did not err in denying defendant's request for a special instruction on the motive of an accomplice who testified for the State. *S. v. Harris*, 112.

§ 126. Polling Jury

In a prosecution for three first degree murders wherein the jury originally returned a death sentence in all three cases but one juror recanted her decision in two of the cases, the trial court did not err in refusing to allow defendant to poll that juror again as to a decision in the third case, refusing to allow de-

fendant to repoll the entire jury, denying defendant's motion for further deliberation, and refusing to allow the recanting juror's request to speak. *S. v. McLaughlin*, 68.

§ 134.4. Youthful Offenders

A defendant serving sentences of less than life imprisonment concurrently with a mandatory life sentence is not entitled to the benefit of the youthful offender statute. *S. v. Smith*, 359.

A seventeen-year-old defendant was not prejudiced by failure of the trial court to determine whether he would benefit from serving a three-year sentence for intimidation of a witness as a committed youthful offender where this sentence is to be served consecutively to a life sentence. *Ibid.*

§ 135.3. Judgment and Sentence in Capital Cases; Exclusion of Veniremen Opposed to Death Penalty

Both the prosecutor and defense counsel may exercise peremptory challenges to exclude jurors based upon their capital punishment views. *S. v. Fullwood*, 371.

The fair cross-section of the community principle does not extend to petit juries, and jurors equivocal as to the death penalty do not qualify as a distinctive group for fair cross-section purposes. *Ibid.*

§ 135.4. Separate Sentencing Proceeding

The trial court in a prosecution for three first degree murders did not err in denying defendant's motions for a mistrial and a life sentence after the jury had deliberated for seven hours without returning a verdict. *S. v. McLaughlin*, 68.

Defendant was not prejudiced by the court's failure to grant a motion for mistrial directed only to the sentencing phase of a first degree murder case where defendant received a life sentence. *S. v. Darden*, 356.

Enmund v. Florida did not apply where the evidence showed that defendant was an aider and abettor in two murders committed with premeditation and deliberation and defendant intended that the victims be killed. *S. v. Hunt*, 407.

§ 135.6. Separate Sentencing Proceeding in Capital Case; Competency of Evidence

The trial court properly admitted defendant's conviction for involuntary manslaughter during the sentencing phase of a capital case. *S. v. McLaughlin*, 68.

In the sentencing phase of a first degree murder case in which the State introduced a certified copy of the court records of defendant's conviction of first degree murder in 1966, defendant was not prejudiced by the admission of eyewitness testimony detailing the factual circumstances of the 1966 murder. *S. v. Cummings*, 181.

§ 135.7. Separate Sentencing Proceeding in Capital Case; Instructions

The prior violent felony aggravating circumstance is not unconstitutionally vague and overbroad. *S. v. McKoy*, 1.

The trial court did not err in instructing the jury in a capital case that it must recommend a death sentence if it answered issue four affirmatively. *Ibid.*

The trial court in a capital case did not err by including an instruction on the recommendation sheet that the jury should indicate death as the appropriate punishment if it should find that the aggravating factors outweighed the mitigating factors and were sufficiently substantial to call for the death penalty. *S. v. McLaughlin*, 68.

CRIMINAL LAW — Continued

There was no error in a first degree murder case in the issues submitted to the jury. *Ibid.*

There was no error in a prosecution for three first degree murders because the jury was not allowed to add comments to the punishment blanks in the verdict sheets, and the trial court properly instructed the jury that it had to fill in and answer all the aggravating factor blanks but could leave the mitigating factor blanks empty if it did not find the facts by a preponderance of the evidence. *Ibid.*

The trial court in a capital case did not err in giving the jury an instruction designed to limit the jury during the first phase of the trial to a consideration of issues bearing upon the guilt or innocence of the accused without concern as to sentencing issues. *S. v. Harris*, 112.

The death penalty is not unconstitutional as applied in North Carolina because the jury is instructed that one issue is whether the jury finds beyond a reasonable doubt that the mitigating circumstance or circumstances found are insufficient to outweigh the aggravating circumstance found. *S. v. Hunt*, 407.

The trial court did not err in a first degree murder prosecution by instructing the jury that "this [sentencing] proceeding may be conducted before you and most likely will or another jury." *S. v. Drayton*, 585.

§ 135.8. Sentencing Proceeding in Capital Case; Aggravating Circumstances

The trial court in a capital case did not err in submitting to the jury the aggravating factor of prior conviction of a felony involving the use or threat of violence to the person. *S. v. McLaughlin*, 68.

The trial court in a prosecution for three first degree murders properly submitted the aggravating factor in two of the cases that the murders were committed to prevent a lawful arrest. *Ibid.*

The trial court did not err in submitting the aggravating factor of pecuniary gain in a murder case. *Ibid.*

The trial court did not err in submitting an aggravating factor that a first degree murder was especially heinous, atrocious or cruel. *Ibid.*

The trial court did not err in submitting the course of conduct aggravating factor in a first degree murder case. *Ibid.*

It was not improper for the district attorney in a prosecution for murder of a highway patrolman to argue that the jury should consider the bravery of law enforcement officers, that the widow of the deceased highway patrolman had done her duty by coming to court and that law enforcement officers across the state expected the jury to do its duty, and that the jurors would be telling law enforcement officers that their lives and services were without value if the jury did not recommend death. *S. v. Allen*, 208.

There was no error in a first degree murder prosecution from the district attorney's argument that the General Assembly had adopted aggravating factors and that the Supreme Court had held that they were proper. *Ibid.*

The "especially heinous, atrocious, or cruel" aggravating circumstance is not unconstitutionally subjective and arbitrary. *S. v. Fullwood*, 371.

There was no prejudice in a prosecution for murder by allowing the admission of evidence in the sentencing phase to support the aggravating factor of conviction of a felony involving the use or threat of violence to the person based on conspiracy to dynamite a dwelling house where the State was not able to offer any evidence that the house was occupied at the time of the dynamiting. *S. v. Hunt*, 407.

CRIMINAL LAW — Continued

The trial court did not err in a prosecution for murder by submitting to the jury the aggravating factor that the crime was committed to avoid or prevent a lawful arrest. *Ibid.*

The aggravating factor of preventing a lawful arrest need not refer to defendant's own arrest. *Ibid.*

The trial court did not err when sentencing defendant for murder by submitting the aggravating factor that the murder was committed for pecuniary gain. *Ibid.*

§ 135.9. Sentencing Proceeding in Capital Case; Mitigating Circumstances

The testimony of defendant's two psychiatric experts that defendant was suffering from significant psychological disorders at the time of a shooting was neither uncontradicted nor inherently credible so as to require the jury to find the statutory mitigating circumstance that "defendant was under the influence of mental or emotional disturbance." *S. v. McKoy*, 1.

The trial court in a capital case did not err in placing the burden of proving the existence of mitigating circumstances on defendant. *Ibid.*

The trial court's sentencing instructions in a first degree murder case were not erroneous and unconstitutional under the decision of *Mills v. Maryland* because they required jury unanimity on the existence of a mitigating circumstance before that circumstance could be considered for the purpose of sentencing. *Ibid.; S. v. McLaughlin*, 68.

The evidence in a murder case was insufficient to require submission of the statutory mitigating factor of duress or domination of another person based on defendant's drug use or the non-statutory factor of parental obligations. *S. v. McLaughlin*, 68.

The trial court did not err in a prosecution for first degree murder by not submitting the statutory mitigating factor of impaired capacity to appreciate the criminality of conduct. *S. v. Allen*, 208.

The trial court did not err in a first degree murder prosecution by charging the jury that they must be unanimous before they could find a mitigating circumstance to exist. *Ibid.*

In order for defendant to succeed upon an assignment of error as to the failure to submit nonstatutory mitigating factors, the defendant must establish that the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value and that there was sufficient evidence of the circumstance to require it to be submitted to the jury. *S. v. Benson*, 318.

Defendant's argument as to the requirement of unanimity of the jury in finding mitigating circumstances in a murder prosecution was rejected. *Ibid.*

The trial judge in a capital case did not commit plain error under *Mills v. Maryland* by instructing the jury that its decisions as to mitigating circumstances must be unanimous. *S. v. Cummings*, 181.

The trial court in a first degree murder case did not err in refusing to submit defendant's proposed non-statutory mitigating circumstance of an extenuating relationship between defendant and the victim where this relationship was the basis for an instruction on the emotional disturbance mitigating circumstance. *S. v. Fullwood*, 371.

The trial court did not err in refusing to submit as a mitigating circumstance for first degree murder that defendant did not have a significant history of prior criminal activity. *Ibid.*

CRIMINAL LAW -- Continued

The fact that the jury did not answer all mitigating circumstances submitted for a first degree murder with either a "yes" or a "no" did not render the verdict form constitutionally defective. *Ibid.*

The trial court properly refused to instruct the jury that if it found any non-statutory mitigating circumstances, it must give them some mitigating value. *Ibid.*

The trial court did not err in instructing the jury that they must be unanimous before they could find the existence of a mitigating circumstance. *Ibid.*

§ 135.10. Sentencing Proceeding in Capital Case; Review

A sentence of death imposed upon defendant for first degree murder in killing a law officer while he was engaged in his official duties was not disproportionate or excessive. *S. v. McKoy*, 1; *S. v. Allen*, 208.

A sentence of death was not disproportionate and was supported by defendant's violent history as well as his brutality and calculation in killing and disfiguring his victim and his lack of remorse as shown by his further murders of the victim's wife and child. *S. v. McLaughlin*, 68.

Although the recommendation of a death sentence in a first degree murder prosecution was not arbitrary or capricious, it was disproportionate. *S. v. Benson*, 318.

A sentence of death imposed on defendant for first degree murder was not disproportionate where the jury found the single aggravating circumstance that defendant had previously been convicted of another capital felony, and where the evidence showed that defendant volunteered his services as an assassin after defendant's cousin and the victim had a dispute about a missing dog. *S. v. Cummings*, 181.

A sentence of death imposed on defendant for first degree murder was not excessive or disproportionate. *S. v. Fullwood*, 371.

Death sentences for two defendants who committed a contract killing and then eliminated a witness were not disproportionate. *S. v. Hunt*, 407.

§ 138.14. Fair Sentencing Act; Consideration of Aggravating and Mitigating Factors in General

The trial court did not err when sentencing defendant for armed robbery by determining that the single aggravating factor of prior convictions outweighed the two mitigating factors of physical condition and aiding in the apprehension of another felon. *S. v. Harris*, 112.

§ 138.21. Fair Sentencing Act; Aggravating Circumstance of Especially Heinous, Atrocious, or Cruel Offense

There was sufficient competent evidence to support the trial court's finding in aggravation that a first degree burglary was especially heinous, atrocious, or cruel. *S. v. Hayes*, 306.

§ 138.29. Fair Sentencing Act; Other Aggravating Factors

There was sufficient evidence, apart from acts forming the gravamen of convictions for other joined offenses, to support the trial court's finding as a nonstatutory aggravating circumstance for breaking or entering and larceny convictions that defendant engaged in a pattern of conduct causing a serious danger to society. *S. v. Hayes*, 306.

The trial court erred by aggravating a sentence for second degree murder by the joined offense of the murder of another victim. *S. v. Rose*, 455.

CRIMINAL LAW — Continued

§ 138.42. Fair Sentencing Act; Other Mitigating Factors

The trial court did not abuse its discretion in refusing to find defendant's good prison conduct between his commitment and resentencing as a mitigating factor in determining the sentences for all his convictions. *S. v. Hayes*, 306.

§ 159.1. Appeal and Error; Transcript of Evidence

Defendant was not prejudiced because the court reporter took eighteen months to prepare the transcript of a trial for three murders and the transcript was not a model of reporting service. *S. v. McLaughlin*, 68.

DIVORCE AND ALIMONY

§ 21.8. Foreign Alimony Awards

The URESA does not allow foreign support orders to become effective automatically at the time of registration without a hearing in violation of the due process rights of support obligors. *Allsup v. Allsup*, 603.

The URESA as applied did not violate respondent's due process right to be heard on the question of whether alimony arrearages due under South Carolina orders should be modified retroactively under South Carolina law to reflect his changed financial circumstances. *Ibid.*

§ 30. Equitable Distribution

A defendant in an equitable distribution action is presumed to have intended a gift to the marital estate of separate funds used in the purchase of a house and lot. *McLean v. McLean*, 543.

The trial court did not abuse its discretion in an equitable distribution action by determining that a C.P.A.'s testimony would be helpful in valuing a law practice even though the C.P.A. was admittedly unfamiliar with the sale of law practices in the Asheville area. *Ibid.*

FRAUD

§ 3. Material Misrepresentation of Past or Subsisting Fact

Language in a subcontractor's notarized application for payment certifying "that to the best of his knowledge, information and belief" work had been completed according to the contract and the payments applied for were then due constituted a representation which is actionable for fraud if scienter is present. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 559.

§ 4. Knowledge and Intent to Deceive

The concepts of a statement made with reckless indifference as to its truth and concealment of a material fact may satisfy the false representation element of fraud but do not satisfy the element of a statement made with intent to deceive. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 559.

To the extent that statements of the elements of fraud in prior decisions omit the essential element of the intent to deceive in a definition of fraud, they are disavowed. *Ibid.*

§ 12. Sufficiency of Evidence

The evidence was insufficient to support a jury finding that the individual defendant intentionally committed a fraud in the submission of applications to plain-

FRAUD — Continued

tiff for payment for specialty items purportedly purchased and stored in a bonded warehouse for installation by defendant's company in a construction project but which later could not be found. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 559.

GAS

§ 1. Regulation

The Utilities Commission's conclusion approving a 14.0% rate of return on common equity for a natural gas company was supported by competent, material and substantial evidence in view of the entire record. *State ex rel. Utilities Comm. v. Public Staff*, 481.

The Utilities Commission did not err in considering the fact that a natural gas company is "a small but efficient and well-managed natural gas utility" in determining the company's rate of return on common equity. *Ibid.*

The Utilities Commission's findings in support of its return on common equity conclusion in a natural gas rate case were sufficiently detailed and specific to comply with G.S. 62-79(a). *Ibid.*

The Utilities Commission's determination that the value of gas-in-kind retained by a natural gas company from T-1 transportation customers as a line loss and compressor fuel charge should be included in the IST mechanism as transportation revenues was supported by the evidence. *State ex rel. Utilities Comm. v. N.C. Natural Gas Corp.*, 630.

The Utilities Commission's order requiring a natural gas company to refund to certain customers the monies collected pursuant to a two percent line loss and compressor fuel charge previously assessed against its transportation customers did not constitute unlawful retroactive ratemaking. *Ibid.*

The Utilities Commission's order requiring that monies collected by a natural gas company pursuant to a line loss and compressor fuel charge be included in the IST does not amount to an unconstitutional impairment of contract or an unlawful taking in violation of due process. *Ibid.*

§ 1.1. Regulation; Reasonableness of Classification of Customers

Findings by the Utilities Commission supported its conclusion that different rates of return adopted for the various classes of customers of a natural gas company are just and reasonable and do not unreasonably discriminate among the customer classes. *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 238.

Rates which allow a natural gas company to earn the same margin of profit for transporting customer owned gas as it earns for transporting gas under a sales contract are not unjust and unreasonably discriminatory. *Ibid.*

A modified Industrial Sales Tracker Formula adopted by the Utilities Commission for a natural gas company does not unreasonably discriminate between customer classes or result in unreasonable rates. *Ibid.*

The Utilities Commission's order contained findings sufficient to justify its conclusion that approved rates of return for various classes of customers of a natural gas utility are just and reasonable and do not unreasonably discriminate against cities which are wholesale customers of the utility. *State ex rel. Utilities Comm. v. Public Staff*, 481.

GRAND JURY

§ 3.3. Sufficiency of Evidence of Racial Discrimination

Defendant failed to make a prima facie showing of racial discrimination in the selection of grand jury foremen. *S. v. McLaughlin*, 68.

HIGHWAYS AND CARTWAYS

§ 12.1. Nature and Grounds of Remedy to Established Cartways

The term "standing timber" in the cartway statute encompasses all growing trees, and the statute thus provides for cartways for the purpose of cutting and removing firewood from property to which there is no other access from public roads. *Turlington v. McLeod*, 591.

HOMICIDE

§ 4.3. Murder in the First Degree; Premeditation and Deliberation

The prosecutor's jury argument in a first degree murder case that whether defendant was in passion when he killed the victim is immaterial was a correct statement of the law and properly permitted. *S. v. Fullwood*, 371.

§ 8.1. Defense of Intoxication; Evidence and Instructions

The trial court erred in a first degree murder prosecution in its instructions on voluntary intoxication. *S. v. Mash*, 339.

The evidence in a first degree murder prosecution was sufficient to support an instruction on voluntary intoxication. *Ibid.*

§ 12.1. Indictment; Premeditation and Deliberation; Perpetration of Felony

An indictment for first degree murder which complied with the short form authorized by G.S. 15-144 was sufficient. *S. v. Harris*, 112.

The trial court did not err in failing to require the State to elect either the theory of premeditation and deliberation or the theory of felony murder. *Ibid.*

§ 15. Relevancy and Competency of Evidence in General

The defendant in a prosecution for the murder of a highway patrolman could not have been prejudiced by the admission of testimony by the patrolman's widow that she was hurt, mad and disgusted when she heard that her husband had been killed. *S. v. Allen*, 208.

§ 15.5. Opinion as to Cause of Death

The trial court did not err in a first degree murder prosecution by allowing a pathologist to testify regarding the victim's death by asphyxiation, even though the jury found defendant guilty on the theory of felony murder. *S. v. Drayton*, 585.

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

Although some evidence of defendant's intoxication was presented in a first degree murder case, the evidence was sufficient to support a finding that defendant was not so intoxicated as to be incapable of premeditation and deliberation. *S. v. Cummings*, 181.

Defendant in a murder prosecution was entitled to an instruction allowing the jury to consider psychiatric testimony that he could not form the specific intent to kill because he was suffering from a psychotic episode. *S. v. Rose*, 455.

HOMICIDE — Continued

The trial court did not err by denying defendant's motion to dismiss charges of first degree murder where a reasonable juror could have found premeditation and deliberation from the evidence. *S. v. Rogers*, 658.

§ 20.1. Photographs

The trial court abused its discretion in the admission for illustrative purposes of nine photographs of three murder victims' bodies taken at the crime scene and twenty-six photographs of the bodies taken at the autopsy where many photographs were repetitious and the majority of the autopsy photographs added nothing to the State's case, and the prejudicial effect of the repetitious photographs was compounded by the manner in which the photographs were presented. *S. v. Hennis*, 279.

§ 21.4. Sufficiency of Evidence of Identity of Defendant

There was sufficient evidence that each of the essential elements of murder in the first degree was met and that defendant was the perpetrator of the murder. *S. v. Stone*, 447.

§ 21.5. Sufficiency of Evidence of First Degree Murder

Evidence of premeditation and deliberation was sufficient for the jury in a prosecution for first degree murder. *S. v. Harris*, 112.

The trial court in a prosecution for three murders did not err in denying defendant's motion for a directed verdict as to two of the murders for failure to prove premeditation and deliberation. *S. v. McLaughlin*, 68.

The evidence raised inferences of malice, premeditation and deliberation sufficient to survive defendant's motion to dismiss a charge of first degree murder where it tended to show that defendant volunteered his services as an assassin after his cousin had a dispute with the victim about a missing dog. *S. v. Cummings*, 181.

The trial court did not err in a prosecution for conspiracy and murder by denying a motion to dismiss where there was sufficient evidence of defendant's constructive presence. *S. v. Hunt*, 407.

There was sufficient evidence for the jury to find that a defendant aided and abetted in a murder. *Ibid.*

The State presented sufficient evidence of malice, premeditation and deliberation to sustain defendant's conviction of first degree murder of his former girlfriend. *S. v. Quick*, 675.

§ 25. Instructions on First Degree Murder Generally

The trial court in a prosecution for three first degree murders did not err by instructing the jury on all three murders simultaneously where the final mandate clearly separated the three cases. *S. v. McLaughlin*, 68.

The trial court did not err in refusing to instruct the jury on the time span between two attacks on a murder victim by defendant and a State's witness where the two men acted together to rid themselves of a potential witness against them for another murder. *Ibid.*

There was no plain error in the court's instructions for murder and conspiracy. *S. v. Hunt*, 407.

§ 25.2. Instructions on Premeditation and Deliberation

The trial court's instructions in a first degree murder case that the intent to kill must have been formed "in a cool state of mind" and not "during some

HOMICIDE — Continued

suddenly aroused violent passion" were the same in substance as defendant's requested instructions and were a correct statement of the law. *S. v. Fullwood*, 371.

The court's instruction that premeditation and deliberation may be proved by the infliction of lethal blows after the victim was felled did not permit the jury to infer premeditation and deliberation from factors not supported by the evidence. *Ibid.*

§ 30.2. Submission of Lesser Offense of Manslaughter

The trial court did not err in a first degree murder prosecution by refusing to submit voluntary manslaughter to the jury based on the victims' teasing of defendant about his drug problem. *S. v. Rogers*, 658.

The trial court did not err in a first degree murder prosecution by not submitting voluntary manslaughter to the jury where there was no evidence that the stabbing occurred immediately after the provocation. *S. v. Tidwell*, 668.

HOSPITALS

§ 1. Definitions

An attorney who follows the disbursement provisions of G.S. 44-50 when disbursing a client's funds from a personal injury settlement cannot be held liable for the client's unpaid debt to a medical service provider who the attorney knew had obtained the client's assignment of all such funds up to the full amount of the client's debt for medical services. *N.C. Baptist Hospitals, Inc. v. Mitchell*, 528.

INDICTMENT AND WARRANT

§ 13. Bill of Particulars

The trial court did not err in failing to require the State to elect either the theory of premeditation and deliberation or the theory of felony murder. *S. v. Harris*, 112.

A defendant charged with first degree murder was not denied due process by the denial of his motion for a bill of particulars on the aggravating factors to be offered during the sentencing phase or because he was not provided with a list of the State's witnesses. *S. v. McLaughlin*, 68.

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

A defendant charged with first degree murder was not denied due process by the denial of his motion for a bill of particulars on the aggravating factors to be offered during the sentencing phase or because he was not provided with a list of the State's witnesses. *S. v. McLaughlin*, 68.

INSANE PERSONS

§ 13. Rights of Minor Patients

The Court of Appeals erred by affirming a trial court order declaring unconstitutional the statute which governs voluntary admission and discharge of minors from facilities for the mentally ill where the trial court had already concluded the case or controversy by finding respondent not mentally ill. *In re Lynette H.*, 598.

JURY

§ 6. Voir Dire Generally; Procedure

There was no error in a murder prosecution from the trial court's refusal to require that jurors be sequestered at night or from the denial of defendant's motion for individual voir dire of prospective jurors. *S. v. McLaughlin*, 68.

The trial judge did not abuse his discretion in a prosecution for first degree murder by denying a motion for individual voir dire and sequestration of prospective jurors. *S. v. Hunt*, 407.

§ 6.3. Propriety and Scope of Voir Dire Examination

The trial court did not abuse its discretion by failing to prohibit the prosecutor in a first degree murder case from asking several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *S. v. McKoy*, 1.

§ 7.4. Challenges to Array; Sufficiency of Evidence of Racial Discrimination

Evidence that the county population is 34.02% black and that prospective jurors were only 24% black was insufficient to show racial discrimination in the jury array. *S. v. McLaughlin*, 68.

§ 7.10. Challenges for Cause; Social Relationships

The trial court did not err in a prosecution for first degree murder by denying defendant's challenge for cause of a juror who knew four of the police officers who were prospective witnesses for the State. *S. v. Benson*, 318.

§ 7.11. Challenges for Cause; Scruples against or Belief in Capital Punishment

The trial court did not err in a murder prosecution by death qualifying the jury. *S. v. McLaughlin*, 68.

The trial judge did not err in allowing the State to challenge a juror for cause in a first degree murder prosecution where the juror's responses may have demonstrated an ambivalence toward the death penalty. *S. v. Benson*, 318.

The fair cross-section of the community principle does not extend to petit juries, and jurors equivocal as to the death penalty do not qualify as a distinctive group for fair cross-section purposes. *S. v. Fullwood*, 371.

§ 7.12. Challenges for Cause; Scruples against Death Penalty; What Constitutes Disqualifying Scruples

The trial court did not err in a first degree murder prosecution by excusing a juror for cause based on her opposition to the death penalty. *S. v. Allen*, 208.

§ 7.14. Manner of Exercising Peremptory Challenges

The prosecutor's use of peremptory challenges in a first degree murder prosecution to excuse veniremen who had qualms about the death penalty but who were not excludable for cause was not unconstitutional. *S. v. Allen*, 208.

Both the prosecutor and defense counsel may exercise peremptory challenges to exclude jurors based upon their capital punishment views. *S. v. Fullwood*, 371.

§ 9. Alternate Jurors

The trial court did not err in denying defendant's motion to withdraw a juror who was acquainted with a State's witness. *S. v. Harris*, 112.

JURY — Continued

The trial court did not abuse its discretion by removing a distraught black juror between the guilt and sentencing phases of a first degree murder case and by replacing her with a white alternate. *S. v. McLaughlin*, 68.

The trial court did not abuse its discretion in a first degree murder prosecution where it was discovered that one juror had heard the case discussed by her follow coworkers and the court excused that juror. *S. v. Allen*, 208.

MORTGAGES AND DEEDS OF TRUST

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase Money Deeds of Trust

The anti-deficiency statute bars the holder of a purchase money promissory note given by a buyer of real property to the seller and secured by a purchase money deed of trust embracing the property from recovering the expenses of foreclosure and related attorneys' fees even though the buyer expressly agrees in the purchase money notes and the deed of trust to pay these expenses. *Merritt v. Edwards Ridge*, 330.

MUNICIPAL CORPORATIONS

§ 30.9. Comprehensive Zoning Plan; Spot Zoning

The rezoning of defendant's property was invalid where the Durham City Council did not determine that the property was suitable for all uses permitted in the new general use district. *Hall v. City of Durham*, 293.

NEGLIGENCE

§ 7. Wilful or Wanton Negligence

The evidence was sufficient for the jury on the issue of defendant corporate officer's gross negligence in submitting to plaintiff contractor sworn applications for payment to the corporate subcontractor for specialty items purportedly purchased and stored in a warehouse for installation in a construction project but which later could not be found. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 559.

OBSCENITY

§ 1. Statutes Proscribing Dissemination of Obscenity

The N.C. Constitution does not require that a statewide standard be judicially incorporated into the N.C. obscenity statute in order to render the statute facially valid. *S. v. Mayes*, 159.

The trial court did not err by failing specifically to define the term community or to instruct the jury to reach a consensus as to the geographic bounds of the community standards they were to apply. *Ibid.*

A defendant may not be convicted of a separate offense for each obscene item disseminated in a single transaction but may be convicted of only one offense for each sales transaction involving obscene materials. *S. v. Smith*, 439.

§ 3. Prosecutions for Disseminating Obscenity

The trial court in an obscenity case did not err in refusing to admit survey responses and testimony relating thereto. *S. v. Mayes*, 159.

RAILROADS — Continued

A railroad has the power to sell for nonrailroad purposes real property which it acquired for railroad purposes. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4.2. Evidence of Physical Condition of Prosecutrix

There was no prejudice in a prosecution for the first degree rape of a five-year-old child from testimony concerning the potential long term effect of untreated gonorrhea in a small child. *S. v. Deanes*, 508.

§ 5. Sufficiency of Evidence

The trial judge in a prosecution for second degree rape correctly denied defendant's motions to dismiss. *S. v. Scott*, 350.

SEARCHES AND SEIZURES

§ 29. Form and Contents of Warrant Generally

A search warrant application for defendant's home and automobile and the warrant itself satisfied statutory requirements. *S. v. McLaughlin*, 68.

TAXATION

§ 28.3. Individual Income Tax; Deductions

The Secretary of Revenue's interpretation of a statute to require a nonresident taxpayer to reduce his North Carolina carryover losses by his non-North Carolina income does not exceed legislative authority and does not have the effect of imposing a tax on the non-North Carolina income in violation of the due process clause of the U.S. Constitution or the law of the land clause of the N.C. Constitution. *Aronov v. Sec. of Rev.*, 132.

TRUSTS

§ 11. Actions by Beneficiaries against Trustee

A trust beneficiary may sue an executor or trustee for damages if the executor or trustee has mismanaged the property he holds in a fiduciary capacity. *Fortune v. First Union Nat. Bank*, 146.

Damages to the beneficiary of a family trust from mismanagement of the trust assets by defendant executor-trustee could be proved with sufficient certainty to permit the jury to reach a reasonable conclusion. *Ibid.*

§ 19. Action to Establish Constructive Trust; Sufficiency of Evidence

Plaintiff is entitled to a constructive trust requiring defendants to convey a one acre tract to plaintiff to prevent unjust enrichment of defendants. *Roper v. Edwards*, 461.

UTILITIES COMMISSION

§ 21. Power to Fix or Regulate Rates

The Utilities Commission's order requiring a natural gas company to refund to certain customers the monies collected pursuant to a two percent line loss and compressor fuel charge previously assessed against its transportation custom-

UTILITIES COMMISSION — Continued

ers did not constitute unlawful retroactive ratemaking. *State ex rel. Utilities Comm. v. N.C. Natural Gas Corp.*, 630.

§ 24. Rate Making in General

The Utilities Commission's order requiring that monies collected by a natural gas company pursuant to a line loss and compressor fuel charge be included in the IST does not amount to an unconstitutional impairment of contract or an unlawful taking in violation of due process. *State ex rel. Utilities Comm. v. N.C. Natural Gas Corp.*, 630.

§ 41. Fair Return Generally

The Utilities Commission's conclusion approving a 14.0% rate of return on common equity for a natural gas company was supported by competent, material and substantial evidence in view of the entire record. *State ex rel. Utilities Comm. v. Public Staff*, 481.

The Utilities Commission did not err in considering the fact that a natural gas company is "a small but efficient and well-managed natural gas utility" in determining the company's rate of return on common equity. *Ibid.*

§ 43. Classifications and Discrimination in Rates

The Utilities Commission's order contained findings sufficient to justify its conclusion that approved rates of return for various classes of customers of a natural gas utility are just and reasonable and do not unreasonably discriminate against cities which are wholesale customers of the utility. *State ex rel. Utilities Comm. v. Public Staff*, 481.

§ 57. Rate Orders; Specific Instances Where Findings are Conclusive or Sufficient

The Utilities Commission's findings in support of its return on common equity conclusion in a natural gas rate case were sufficiently detailed and specific to comply with G.S. 62-79(a). *State ex rel. Utilities Comm. v. Public Staff*, 481.

WITNESSES

§ 1.2. Children as Witnesses

The trial court did not abuse its discretion in a prosecution for the rape of a five-year-old child by finding the child incompetent and thus unavailable to testify. *S. v. Deanes*, 508.

Although the admission of a child rape victim's out-of-court statements was approved in a case in which the child did not testify at trial, there is no per se rule that a child victim's statement to a social worker is admissible. *Ibid.*

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina