NORTH CAROLINA REPORTS

VOLUME 325

SUPREME COURT OF NORTH CAROLINA

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1990

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OF
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1. Appointed Chief Judge 12 January 1990.
2. Appointed 17 January 1990 to a new position.

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CASES REPORTED

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I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 15th day of December 1989 and said persons have been issued license certificates.

JESSICA BAGG ..... Raleigh
STEVEN HUME MCFARLANE ..... Raleigh

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 license certificates of this Board.

TERRY RICHARD KANE ..... Charlotte
applied from the State of Tennessee
License Date: January 12, 1990
RONALD NEAL WALKER ..... Cobb, Wisconsin
applied from the State of Wisconsin
License Date: January 12, 1990

Given over my hand and seal of the Board of Law Examiners this the 24th day of January 1990.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 2nd day of March 1990, and said person has been issued a license certificate.

MICHAEL WALDO STRICKLAND ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 20th day of March 1990.

FRED P. PARKER III
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. EVERETT RANDOLPH HUFF

No. 372A87

(Filed 26 July 1989)

1. **Criminal Law § 92.4— consolidation of murder charges against defendant—transactional connection**

There was sufficient evidence of a transactional connection to support the trial court's joinder of two first degree murder charges against defendant for trial where the evidence tended to show that defendant buried his infant son during the day and shot his mother-in-law before she had retired that same night, and that both killings resulted from defendant's common plan to resolve problems created by his perception that divorce from his wife was inevitable and that his son would be placed in the wife's custody and continuously exposed to the wife's family whom he viewed as perverted.

Am Jur 2d, Criminal Law §§ 20, 21.

2. **Criminal Law § 92.4— consolidation of murder charges against defendant—defenses not hindered**

The joinder for trial of charges against defendant for the first degree murder of his infant son and first degree murder of his mother-in-law did not hinder defendant's ability to present his defenses. There was no danger that the jury cumulated

the evidence of premeditation and deliberation in the two cases in order to convict him of the first degree murder of his mother-in-law where there was ample evidence of premeditation and deliberation in both cases. Nor did the consolidation force defendant into presenting in the same trial conflicting defenses of insanity as to the murder of his son and lack of premeditation and deliberation as to the murder of his mother-in-law where the evidence shows that defendant presented both defenses to both charges, and that defendant's experts offered substantial evidence which tended to establish insanity and that defendant's ability to premeditate and deliberate was impaired.

Am Jur 2d, Criminal Law §§ 20, 21.

3. **Constitutional Law § 66; Criminal Law § 98— capital case—accused's right to be present at trial—waiver not permitted**

The accused cannot waive the right to be present at a capital trial, and the court has a duty to insure defendant's presence throughout the trial.

Am Jur 2d, Criminal Law §§ 692, 693, 698.

4. **Constitutional Law § 66; Criminal Law § 98— capital case—accused's right to be present at trial—confrontation clause**

The confrontation clause of Art. I, § 23 of the N. C. Constitution is the sole source of a criminal defendant's nonwaivable state right to be present at every stage of his capital trial and of the corollary duty imposed on the trial court to insure his presence.

Am Jur 2d, Criminal Law §§ 698, 721.

5. **Constitutional Law § 66; Criminal Law § 98— capital case—violation of accused's right to be present—harmless error rule**

The proper standard for reversal in reviewing violations of a defendant's state constitutional right to be present at all stages of his capital trial is the "harmless beyond a reasonable doubt" standard. Therefore, a new trial will be awarded for such a violation unless the State proves that the error was harmless beyond a reasonable doubt. Insofar as prior decisions and language in our case law are inconsistent with this opinion, they are overruled.

Am Jur 2d, New Trial § 103.

6. Constitutional Law § 66; Criminal Law § 98— capital trial—violation of accused's right to be present—harmless error

The trial court erred in permitting defendant to be absent during part of the presentation of the prosecution's evidence in defendant's capital case, but such error was harmless beyond a reasonable doubt where the record shows that defendant became distressed while a detective was reading his confession in which he admitted that he killed his son and his mother-in-law; the trial court excused defendant from the courtroom at the request of defendant and defense counsel after an attempt was made to calm defendant during a recess; defendant remained out of the courtroom during the remainder of the detective's testimony and during a medical examiner's testimony concerning an autopsy on defendant's son; the trial court carefully informed the jury in open court that defendant was absent at his own request and at the request of his attorneys; the court reporter was present and transcribed the events which occurred during defendant's absence; defendant's attorneys were in court and participated throughout defendant's absence to protect his interests; and the trial judge told counsel that they could confer with defendant as to the possibility of his return at any time and that he would entertain their request to allow defendant to return at any time.

Am Jur 2d, Criminal Law § 700.

7. Constitutional Law § 74; Criminal Law § 5.1— insanity defense—expert testimony—rebuttal by State—evidence from court-ordered psychiatric examination—no violation of right against self-incrimination

When a defendant relies on the insanity defense and introduces expert testimony on his mental status, the prosecution may introduce expert testimony derived from prior court-ordered psychiatric examinations for the purpose of rebutting that testimony without violating defendant's right to be free from compelled self-incrimination under the Fifth Amendment to the U. S. Constitution and Art. I, § 23 of the N. C. Constitution. Judicial balance and fundamental fairness require that the State have an opportunity to rebut defendant's psychiatric testimony with psychiatric testimony of its own.

Am Jur 2d, Criminal Law § 79.

8. Criminal Law § 5.1— insanity defense—rebuttal of expert testimony—multiple examinations of defendant

A fair opportunity for the State to rebut defendant's expert psychiatric testimony may include more than one examination of defendant where sound reasons exist for more than one evaluation of defendant's mental status.

Am Jur 2d, Criminal Law § 79.

9. Constitutional Law § 48; Criminal Law § 5.1— testimony concerning court-ordered psychiatric examination—no violation of right to effective assistance of counsel

Defendant's right to the effective assistance of counsel was not violated by the admission of a psychiatric evaluation team's testimony concerning information obtained during a second court-ordered psychiatric examination of defendant because that evaluation was ordered for the purpose of determining defendant's capacity to proceed rather than his sanity at the time of the crimes where (1) defendant had the opportunity to discuss with his lawyer whether to submit to the second examination and to discuss the scope of the examination, and (2) under the decision of *State v. Jackson*, 77 N.C. App. 491 (1985), defendant was on notice that by placing his sanity at issue, the State was empowered to order its own examination and that the scope of that examination would include the basis to rebut his insanity defense. Sixth Amendment to the U. S. Constitution; Art. I, § 23 of the N. C. Constitution.

Am Jur 2d, Criminal Law §§ 752, 984, 985.

10. Constitutional Law § 28— due process—Fifth Amendment—protection against federal government

Defendant's claim that the trial court's instructions in his prosecution in state court for state crimes violated the due process clause of the Fifth Amendment to the U. S. Constitution was without merit since the Fifth Amendment protects individuals only against due process violations by the federal government.

Am Jur 2d, Constitutional Law § 806; Criminal Law § 825.

11. Criminal Law § 163— instructions—absence of objection—plain error rule

Where defendant did not object at trial to the instructions which he now assigns as error, he waived his right to appellate review of such instructions except under the plain error standard.

Am Jur 2d, Appeal and Error §§ 553, 562, 623.

12. Criminal Law § 111.1— two murder charges—instructions—joint determination of guilt not permitted

The trial court's instructions in a trial of defendant on two charges of first degree murder could not reasonably have been understood by the jury to permit a joint determination of guilt on the two murder charges, although the trial court on occasion referred to a single "victim," stated that the State has the burden of "proving the case" and that "the decision in the case must be unanimous," and referred to a single offense in giving pattern jury instructions on insanity, where the court's instructions and mandates, taken as a whole, and the verdict sheet submitted to the jury made clear that the jury was to consider each charge separately in the determination of defendant's guilt or innocence.

Am Jur 2d, Appeal and Error §§ 623, 815.

13. Criminal Law § 135.8— especially heinous aggravating circumstance—sufficient guidelines for jury

The trial court's submission of the "especially heinous, atrocious or cruel" aggravating circumstance in a first degree murder case did not allow the jury unguided discretion in determining what facts are sufficient to find that the circumstance exists where the jury was instructed that it applies only to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Appeal and Error §§ 815, 817; Trial § 608.

14. Criminal Law § 135.8— first degree murder of infant—especially heinous aggravating circumstance—sufficiency of evidence

The evidence was sufficient to support the court's submission of the especially heinous, atrocious or cruel aggravating circumstance in a first degree murder case where it tended to show that the nine-month-old victim died by suffocation after

defendant, the child's father and primary caregiver, buried him alive, and that the child was struggling for his life while suffocating in the earthen grave and thus experienced extreme physical and psychological torture immediately before his death.

Am Jur 2d, Homicide § 485; Trial § 608.

15. Criminal Law § 135.8— especially heinous aggravating circumstance—consideration of victim's age

The jury could properly consider the age of the nine-month-old victim in determining the weight of the aggravating circumstance that the first degree murder of the victim was especially heinous, atrocious or cruel.

Am Jur 2d, Homicide §§ 9, 48.

16. Criminal Law § 135.7— meaning of mitigating circumstances—erroneous instruction cured

Error by the trial court in using the term "best deserving" of the death penalty in instructing the jury as to the meaning of "mitigating circumstances" was cured by a following instruction using the term "less deserving."

Am Jur 2d, Homicide § 562.

17. Criminal Law § 135.9— nonstatutory mitigating circumstance—peremptory instruction—findings of existence and mitigating value

The trial court's peremptory instructions on nonstatutory mitigating circumstances in a first degree murder case were not erroneous in requiring the jury to determine both that the evidence supports the existence of the nonstatutory circumstance and that the circumstance has mitigating value in order to "find" such circumstance.

Am Jur 2d, Homicide § 498.

18. Criminal Law § 135.7— first degree murder—instructions on duty to recommend death sentence

The trial court in a first degree murder case did not err in instructing that the jury must recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances (issue three) and if it found that the aggravating circumstances were

sufficiently substantial to call for the death penalty when considered with the mitigating circumstances (issue four).

Am Jur 2d, Homicide § 513.

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

Due process is not violated by requiring the defendant in a capital case to prove mitigating circumstances by a preponderance of the evidence; nor is it constitutional error to instruct the jury that it must reach unanimous agreement before finding mitigating circumstances.

Am Jur 2d, Homicide §§ 508, 514.

20. Criminal Law § 135.7— capital case—nonunanimous sentence verdict—unanimity instructions—unanimous verdict not coerced

The trial judge's unanimity instructions following the jury's return of a nonunanimous verdict recommending life imprisonment in a first degree murder case on Friday afternoon did not coerce a unanimous sentencing verdict where the court further instructed the jury before it retired to deliberate for the last time on Monday morning that if the jury determined "that with a reasonable amount of additional deliberations you will not be able to reach a unanimous recommendation, you should give the Bailiff a note to that effect, and the Bailiff will bring you back into the courtroom."

Am Jur 2d, Trial §§ 1054, 1055.

21. Criminal Law §§ 102.12, 135.4— capital case—failure to reach unanimous sentence verdict—life imprisonment—jury argument prohibited

The trial court properly prohibited defense counsel from informing the jury in argument that the capital punishment statute authorizes the trial court to impose a life sentence if the jury is unable to return a unanimous sentence verdict.

Am Jur 2d, Homicide § 513.

22. Criminal Law § 135.4— capital case—nonunanimous sentence verdict—further deliberations—refusal to impose life sentence

The trial court did not violate N.C.G.S. § 15A-2000(b) by failing to impose a life sentence for a first degree murder when the jury returned a nonunanimous verdict on Friday after-

noon after two hours of deliberation or when the trial was reconvened on Monday morning after the jury had deliberated an additional forty-five minutes where the jury considered two charges of first degree murder, and a total of three aggravating circumstances and forty-eight mitigating circumstances were submitted in the two cases.

Am Jur 2d, Homicide §§ 549 et seq.

23. Criminal Law § 102.6— capital case—jury argument—jury as conscience of community

The prosecutor's jury argument during the sentencing phase of a capital trial that the jury is the voice and conscience of the community by its verdict in the guilt-innocence phase and its punishment decision was not improper.

Am Jur 2d, Homicide § 463.

24. Criminal Law § 135.9— capital case—mitigating circumstances —prosecutor's definition not erroneous

The prosecutor's jury argument defining a mitigating circumstance as evidence that lessens or reduces the severity of the crime during the sentencing phase of a first degree murder case did not imply that the jury would have to find that evidence was sufficient to reduce the crime of first degree murder to some lesser included offense in order to find that it had mitigating value and was not erroneous.

Am Jur 2d, Homicide § 463.

25. Criminal Law § 135.9— capital case—jury argument—differentiation of statutory and nonstatutory mitigating circumstances —absence of error

The prosecutor's jury argument that the statutory mitigating circumstances submitted in a first degree murder case had "been passed into law by the legislature," so that the legislature had therefore provided for their consideration by the jury, and that the nonstatutory mitigating circumstances were "created and urged" upon the jury by defense counsel did not imply that the nonstatutory mitigating circumstances were unworthy of the jury's consideration and was not improper.

Am Jur 2d, Homicide § 463.

26. Criminal Law § 128.2— capital case—improper testimony—denial of mistrial

The trial court did not err in denying defendant's motion for a mistrial in this first degree murder case when defendant's former girlfriend testified that a card with the word "killed" inscribed upon it in black and red ink to approximate dripping blood had been placed in her mailbox while defendant was in jail awaiting trial where the trial court immediately sustained defendant's objection, granted defendant's motion to strike, and appropriately instructed the jury.

Am Jur 2d, Homicide § 316.

27. Criminal Law § 135.4— capital case—separate juries not required—death qualification of jurors

The trial court did not err in denying defendant's motion for separate juries for the guilt-innocence and penalty phases of his first degree murder trial and his motion to prohibit the State from "death qualifying" the jurors.

Am Jur 2d, Criminal Law § 527.

28. Criminal Law § 5— test of insanity constitutional

The North Carolina law on insanity is not unconstitutional.

Am Jur 2d, Criminal Law §§ 46 et seq.

29. Criminal Law § 5.1— insanity and guilt issues—bifurcated trial not required

The trial court did not err in denying defendant's motion for a bifurcated trial on the issues of insanity and guilt-innocence.

Am Jur 2d, Criminal Law § 73.

30. Criminal Law § 135.3— excusal of jurors for capital punishment views

The trial court did not err in excusing jurors for cause in a first degree murder trial because of their opposition to capital punishment.

Am Jur 2d, Homicide § 466.

31. Criminal Law § 135.4— constitutionality of death penalty statute

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

Am Jur 2d, Homicide § 556.

32. Criminal Law § 135.8; Indictment and Warrant § 13.1— capital case—aggravating factors—bill of particulars not required

The trial court did not err in denying defendant's motion for a bill of particulars from the State disclosing the aggravating factors upon which it proposed to rely in seeking the death penalty.

Am Jur 2d, Homicide § 554.

33. Criminal Law § 135.10— murder of infant son—death penalty not disproportionate

A sentence of death imposed on defendant for the first degree murder of his infant son was not disproportionate to the penalty imposed in similar cases where the son died from suffocation after being buried alive; defendant was also found guilty of the first degree murder of his mother-in-law committed the same day; and the jury found as aggravating factors that defendant had previously been convicted of a felony involving the use of violence to the person and that the murder of his son was especially heinous, atrocious or cruel.

Am Jur 2d, Homicide § 554.

Chief Justice EXUM concurring.

Justice WEBB concurring.

Justice FRYE dissenting as to sentence.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from convictions and judgments entered thereon imposing a sentence of death for the murder in the first degree of Crigger Huff and a sentence of life imprisonment for the murder in the first degree of Gail Strickland, entered by *Brewer, J.*, at the 8 June 1987 Criminal Session of Superior Court, CUMBERLAND County. Heard in the Supreme Court 13 December 1988.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

James R. Parish and Gregory A. Weeks for defendant-appellant.

MEYER, Justice.

Defendant was convicted of two counts of first-degree murder, both of them upon the theory of premeditation and deliberation.

Conviction on the first count was for the murder of defendant's infant son, Crigger Huff. Conviction on the second count was for the murder of defendant's mother-in-law, Gail Strickland. The court submitted and the jury found two aggravating circumstances in the murder of Crigger Huff: that defendant had been previously convicted of a felony involving the use of violence to the person and that the murder was especially heinous, atrocious or cruel. The court submitted and the jury found a single aggravating circumstance in the murder of Gail Strickland: that defendant had been previously convicted of a felony involving the use of violence to the person. In both cases, the court submitted the same twenty-four possible mitigating circumstances. The jury found the same two mitigating circumstances in both cases: that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and that "[d]efendant was under a great deal of stress at the time of the offenses." Upon the jury's recommendation, the trial court sentenced defendant to death for the murder of the infant, Crigger Huff, and to life imprisonment for the murder of Gail Strickland. We find no error.

The State's evidence tended to show the following:

On 1 January 1984 defendant and Debra Strickland were married in Boston, Massachusetts. Their son, Crigger Stephen Huff, was born eight days later in Fayetteville, North Carolina. Since the child was premature, he was transferred to North Carolina Memorial Hospital in Chapel Hill where he remained until the end of February. Defendant and his wife lived in Greensboro with her mother, Gail Strickland, until the baby's discharge from the hospital, at which time they returned to Fayetteville to live in a house owned by Mrs. Strickland in the Montclair subdivision.

In August 1984, Debra Huff, having enlisted in the U.S. Air Force, left Fayetteville for six weeks of basic training in San Antonio, Texas. Three or four weeks before she left, her mother, Gail Strickland, moved back to Fayetteville to live with defendant and Crigger and to help defendant care for the baby while Debra was away on military duty. Mrs. Strickland found a job as a surgical nurse at a local hospital.

On 25 October 1984, Dorothy Pate, Gail Strickland's co-worker, drove to Strickland's residence between 12:15 and 12:30 p.m. to see why she had not come to work at the hospital that morning. When no one answered Pate's knock at the front door, she looked

through the screen door in the back and saw Gail Strickland lying on a sofa in front of a television, which was operating. Pate called her name, got no response, noticed blood on Gail Strickland's neck, and then left to call the emergency number and to wait in her car until a Cumberland County Sheriff's Deputy arrived.

Deputy Ronald Sykes reached the Strickland house at 12:37 p.m., shortly after an ambulance had arrived. The ambulance crew had already examined Gail Strickland and had determined that she was dead. She was found sitting with her head leaning back. There was an open wallet on the floor and a pocketbook on a chair. Deputy Sykes called for the homicide detectives and then went outside to keep onlookers away from the house. While Deputy Sykes was outside, defendant arrived. He told Sykes who he was and said he had come to the house because he had been told something was wrong.

On 26 October 1984, pathologist Fred Ginn performed an autopsy on Gail Strickland's body. One gunshot wound to the head had caused her death. The bullet had entered behind the left ear lobe and had traveled to the right side of her head, almost horizontally.

Detective Sergeant Robert Bittle of the Homicide Division arrived at the Strickland house about 1 p.m. on 25 October. In a canvass of the neighborhood, his team had discovered that Debra Strickland Huff was stationed at Lackland Air Force Base in San Antonio, Texas, and that Crigger and defendant had been staying with Gail Strickland. The next day they located defendant at his parents' house, also in the Montclair subdivision, and spoke with him. Defendant told detectives that he and his mother-in-law had had a disagreement on 24 October. She had gotten mad at him when she discovered that he had gone through her closet looking for letters Debra Huff had written; she had asked him to leave, had helped him to pack, and he had left for his father's house. He said he had not seen Gail Strickland since 4 or 5 p.m. on 24 October. He told detectives that Crigger was staying with friends.

On 26 October, detectives kept the defendant under surveillance. They saw him walking in the Montclair neighborhood, making several trips between his parents' house and a neighborhood store.

Shortly after 7 p.m. on 26 October, Detective Bittle, after receiving a call from defendant's father, Everett Huff, Sr., went to his house. Defendant was there, seated at the dining room table

with his back to the wall, banging his head against it and crying, "He's dead, he's dead!" He was hysterical and in tears. Emergency medical technicians who were called to examine defendant found his blood pressure elevated, but no treatment was required.

About twenty minutes later, defendant stood and told Detective Bittle: "I will show you." Bittle understood defendant to mean that he would show the officers the location of the baby's body. Defendant led the investigative team behind the house and about 500-600 yards along some railroad tracks. It was about 8 p.m. and getting dark. Defendant pointed to a trail and said, "the grave is at the end." The detectives looked fruitlessly for a few minutes, then defendant pointed out a spot covered over with leaves and twigs. He cleared away the leaves and twigs from an oval-shaped area of recently turned dirt in the hard ground. Two of the officers began digging. About eighteen inches down, the officers found the body of Crigger Huff. The infant's left hand covered his face and mouth. The emergency medical team member present confirmed that the child was dead, and that he had been dead for some time.

Defendant was arrested, charged with both murders, and jailed that night.

Several days later, the police searched the area around the residence of Everett Huff, Sr. Hidden in a doghouse, they found the rifle later determined to be the one with which Gail Strickland had been shot. They also found a spade in the brush near the grave, which defendant said he had used to bury the child.

On 11 February 1985, defendant told a jailer that he wanted to speak to a detective, and the jailer contacted Detective Bruce Daws, the Chief Homicide Investigator. Daws came to the jail, assumed custody of defendant, took him to the homicide office and advised defendant of his Miranda rights, which defendant waived in writing. Then defendant gave Detective Daws and Detective Bittle a nineteen-page statement in which he told the officers that he had killed Crigger Huff and Gail Strickland.

Detective Bittle read defendant's lengthy statement into the record at the trial. In the statement, defendant explained that he had first met Debra Strickland outside her house in the Montclair subdivision. Since she was living in Greensboro and came back to Fayetteville only on weekends, he asked her to go out the next weekend. They started dating and had sexual relations.

After they had been seeing each other for a few weeks, Debra went to Texas to take part in a skating competition. When she returned, she told defendant that she was pregnant. He asked her if the child was his; she said that it was, and they planned to marry in January 1984 when Debra was to move back to Fayetteville. Defendant offered Debra money for an abortion, explaining that "I had a doubt in my mind about it being my baby," but she refused it.

After the two were married, defendant related, "things were rough" financially. When Debra was pregnant she thought she did not have to work, but defendant talked with her about going into the Air Force since she had a college degree and since fringe benefits were available for the family. Debra did not want to enlist at first, but finally agreed. For his part, defendant got a job first at the pizza parlor and later at the bowling alley at Pope Air Force Base. Defendant and Debra's relationship was also "rough." Defendant stated that their conversations turned into arguments about other men defendant believed could have fathered the child. He said that Debra would not look at him when he talked to her, did not like to go out with him, and did not like defendant's going out with his brother to drink beer and smoke marijuana. Faced with these problems, he asked himself, "why did I marry her?"

Defendant described a visit that their family made to Debra's mother, Gail Strickland, who was, according to defendant, "living with a bisexual." During the visit, the housemate grabbed Debra on the behind. Although Debra was unperturbed, defendant confronted her about it, asking, "Why did you let him do that[?]" and stating, "he could be the father of my baby." Defendant asked Gail Strickland about "that bisexual grabbing Debbie's ass." Her mother explained to defendant that "[Debra and her mother's housemate] were dance partners and that they had to develop a physical relationship." Because "God don't approve of homosexuals," defendant told Debra that he was leaving with Crigger, and Debra accompanied them home. Referring to this incident, defendant stated, "No wonder her husband killed himself, he got to wondering about his family."

Defendant stated that he and Debra's mother, Gail Strickland, had had an uneasy relationship from the beginning. He said she "disapproved of me." When he confronted her, she told him, "Randy, I don't like you. I never have." He thought she did not like him

"because of prison, tattoos, outward appearance and getting high." Before Debra left for basic training, defendant told her that he did not know if he could live with her mother after Debra went into the Air Force. After Debra left, defendant believed Mrs. Strickland was trying to run him off. She "laid down the rules," requiring defendant to tell her where he was going when he went out and to give her advance notice if he was going to have friends over, though she did not like it when they came over. Defendant claimed that she accused him of smoking marijuana with his friends in the house, but he said that her accusation was false; he had been smoking marijuana *outside* the house.

Defendant stated that people in the neighborhood had tried to tell him about Debra's family: that her mother "screwed around on her husband," that "they were weird, [and] that there was something evil about them and the house. No one liked them."

Defendant reported that he and Gail Strickland argued over custody of the baby. When he told her he was moving out and was going to take the baby with him, she replied, "The baby stays. If you take him out of the house, I will call the police." Defendant told her to call the police, that he was the parent and had custody. Then she again tried to deter him by saying she did not want the baby at defendant's parents' house because defendant's brother Jason (whom she did not like) was there. Furthermore, she said if defendant moved out, she would follow to be "near her grandbaby."

Defendant stated that on Tuesday, 23 October, he had gone through Gail Strickland's closet looking for letters from Debra to her mother, but found none. The next day, Wednesday, 24 October, defendant found letters from Debra to her mother in a file cabinet in the baby's room. After reading the letters, defendant concluded that Debra was being unfaithful to him and that she planned to divorce him and to marry someone else. Defendant thought continuously about the letters as he fed Crigger his breakfast that morning, and when the baby started to cry, "his crying made my mind race and things started coming to me. Why are they treating us like this? He is going to suffer down the road if we divorce. He don't need to be around such filth, the homosexuals, the incest." Defendant drove with the baby to his parents' house, where, "The thought came to my mind, no one loved him or us. So, I decided no one could have him." Defendant got the shed key from his parents' china cabinet, unlocked the shed, got a shovel, and re-

turned the key to its place. After defendant drove around awhile with the baby,

> I took the shovel out of the car and dug a hole. I got Booba, that's what I called Crigger, and took him to where I dug the hole. We sat by a tree and I talked with him awhile. I let him play in the leaves for awhile. He was crunching the leaves. I picked him up and brushed him off, I didn't get all the leaves off of him. I guess, I didn't care about myself anymore. I picked him up and held him real tight and told him good-bye. I told him I loved him; he was looking at me. I kissed him, I hugged him, and prayed. I started to lay him in the hole, but I hesitated and jerked back. I did lay him in the hole. He started playing with the dirt and playing with the roots that was cut with the shovel. After that, I didn't look at him no more. I shoveled the dirt in on him and put the sod on top. I cried. I was going to dig him back up but I didn't. I threw the shovel away from him. I left, got in the car and drove around.

Defendant stated that he went to the post office, smoked "a joint," and returned to Gail Strickland's house. There, confronted by Gail Strickland, defendant told her he had looked in her closet for Debra's letters to her. Strickland told him that she could not trust him; she wanted him to move out of her house with the baby. Defendant packed his things; Gail Strickland packed the baby's things. Defendant went to his parents' house and told his mother, "I got kicked out." He stored his things there, went to a thrift shop where he sold some of the baby's things, threw the rest in a dumpster, and returned to his parents' house.

Defendant recalled, "Later that night, it dawned on me the implications. I had lost out; . . . I was going to leave." Defendant said that he got his dad's gun to take with him, because "I know the type of people you meet on the road," and put the gun in the doghouse at his parents' house. Then defendant left his parents' house and walked to the neighborhood store. When he got to Gail Strickland's house, defendant stated he saw someone else's car parked in front and he did not stop. On return to his parents' house, defendant again "decided I was going to leave. I got a few things together and I got the gun and put it in the car."

Defendant stated that he then drove to Brittany Place in the Montclair subdivision and parked the car. He walked up Montclair

Road with the gun, but seeing one of Gail Strickland's neighbors playing with numchucks, he walked past Strickland's house a second time, walked on to the store, and got a drink.

Then defendant stated that he walked up to his mother-in-law's house.

> I wanted to talk to her. I went to the front door and knocked, but I didn't get any answer. . . . I went around to the back screen door. She was sleeping on the couch. Johnny Carson was on the TV. So, it must have been eleven-thirty or twelve o'clock. I called her name, 'Gail, can I talk to you?' I pulled out the gun and shot her. I left, walked back to the car and drove around.

Defendant concluded his statement by saying that he returned to his parents' house. There he cleaned the gun, wiped the fingerprints off, put the gun back in the box and put the box back in the doghouse. Then he returned once again to Strickland's house where he went through Gail Strickland's purse, dumped its contents on the floor, and left again on foot.

Dr. Page Hudson, professor of pathology at East Carolina University and formerly the Chief Medical Examiner for the State of North Carolina, conducted the autopsy on Crigger Huff. In Dr. Hudson's opinion, the cause of the child's death was suffocation. The finding was consistent with Crigger Huff being buried alive. Further findings revealed virtually no sand in the mouth, nose, airway, or upper intestinal tract. The absence of sand led Dr. Hudson to draw two possible conclusions: first, that the child might have been dead before being covered up; second, that the child might have died rather quickly before it could breathe a great deal of sand into its nose or mouth or swallow some sand into its esophagus.

The defense introduced evidence of defendant's mental state at the time of the offense.

Dr. James C. Groce, a staff psychiatrist in the Forensic Unit at Dorothea Dix Hospital who examined defendant in January 1986, testified that defendant suffered from a chronic mental illness—paranoid schizophrenia. Although he was unable to form a definite opinion about defendant's sanity at the time of the crimes, he did believe that the mental illness was impairing defendant's think-

ing at the time of the offenses and that defendant probably had had a psychotic break.

Dr. Groce concluded that several of defendant's beliefs were not based in fact but were delusions. These delusions were symptoms of his illness. Defendant told Dr. Groce that he felt his mother-in-law was a lesbian. She was living with a man, and therefore, since she was a lesbian, the man she lived with must be a homosexual. Defendant was sure of that for awhile, but when the man living with his mother-in-law touched defendant's wife on the behind, defendant thought that must mean that the man was not a homosexual, but a bisexual. He also told Dr. Groce that he killed his son "to protect him from the sexual abuse of the lesbians and bisexuals who he was afraid would have control of him and raise him and mistreat him, and also because he knew that this was the way he could guarantee his son going to Heaven." Dr. Groce thought that defendant had other delusions as well.

Dr. Brad Fisher, a clinical psychologist, examined defendant twice—on 5 November 1984, about ten days after the crimes, and again about six months later, on 19 June 1985. He also concluded that defendant suffered from paranoid schizophrenia typified by delusional thinking. He testified that "in the areas where [defendant] had . . . deluded thinking—[on the subjects of] his mother-in-law, his son, his wife and their interconnections"—that defendant was severely limited in his "ability to differentiate right and wrong." He also concluded that defendant had had a stress-induced psychotic break.

Dr. Selwyn Rose, a psychiatrist, examined defendant for the first time in 1984, nine days after the arrest, and interviewed him quarterly for a two-and-one-half-year period after that. In December 1985, he placed defendant on medication to treat his illness, which he also diagnosed as paranoid schizophrenia. Dr. Rose thought that many of defendant's beliefs were delusions, not based in fact, symptoms of his disturbed thinking. Among the delusions he identified were defendant's beliefs that the Strickland family members were involved in all kinds of sexual practices, that because defendant was unloved, Crigger was also unloved by the family, that defendant's wife was unfaithful to him, that Gail Strickland had driven her husband to his death, and that Mr. Strickland had spoken to him from the grave and had told defendant to avenge his death by killing her. Crigger's birth on the same date as the

father's death had a profound and important symbolic meaning to defendant. Dr. Rose believed that defendant shot his mother-in-law because he thought she was evil and sexually perverted. He testified that since defendant's illness made him incapable of rational thinking, he was also incapable of premeditating and deliberating the deaths of his son and mother-in-law. He also testified that defendant killed both during a single psychotic break. In Dr. Rose's opinion, because of the severity of defendant's mental illness, he was unable at the time of the crime to understand the difference between right and wrong or to understand the nature and quality of his actions.

Chaplain Joseph H. McGoughan of the United States Air Force testified that he had received a call from Debra Strickland Huff's platoon sergeant at Lackland Air Force Base in San Antonio, Texas. McGoughan had been asked to talk to defendant about his frequent telephone calls to his wife, which were interfering with her training. On the morning of 24 October defendant came with the baby to talk with the chaplain. Defendant was upset. He told the chaplain that he had made the phone calls to Debra because he had found pictures of other men with her in her negligee. One of the men was her father. He had also found letters from Debra to her father which he interpreted to be "more than a father-daughter-type of love." He thought she had been seeing other men and doubted that he was Crigger's father. The chaplain had examined the letters and had found none of the incestuous overtones defendant reported.

Aileen Sizemore, Gail Strickland's neighbor, testified that she had talked with defendant about a week before the deaths. He had discussed his difficulties in getting along with his mother-in-law and his problems with his wife. He told her that he did not want his baby to be with "Gail because Gail was hanging around gay people." Although Sizemore told defendant, "Randy, that is not true . . . , [h]e seemed to be convinced about it." She recounted his telling her that he thought the Strickland family was "weird," and that Debra was seeing someone in Texas. She had also seen him after Gail's body was discovered. He had sobbed and cried and could not talk very much.

Eugene Mitchell, a longtime friend of the Huff family, testified that he had visited defendant in jail on Saturday, 27 October. He thought defendant had seemed depressed, slow to respond, and very different from the happy father defendant had seemed to be several weeks before.

Ramona Huff, defendant's mother, testified that after Debra left defendant had been concerned about his marriage and had believed Debra was involved with another man. Defendant had told his mother that he had seen Debra playing with the baby's penis while changing his diaper and that incident had upset him. On Wednesday, 24 October, about noon, defendant had come to his mother's place of work to talk with her. He told her that "Gail threw me and Crigger out," that Crigger was staying with friends, and when she offered to take them in, he told her, "No, the baby stays." Defendant and his mother left in separate cars for her house. While driving by Gail Strickland's house, Ramona Huff saw a man squatting down outside the back porch, and when she circled back to see if defendant had stopped by Strickland's, the man was gone and her son was not there either. She found him already home when she arrived. That night defendant was watching television and his mother had lain down on the sofa in the same room. When he got up about 4 a.m., she awoke and asked him where he was going. He told her he was going to sleep with Crigger and left the house. The next morning he returned "with dirt all over his clothes [from] where he had slept with Crigger." She testified that "from Wednesday night on Randy was not Randy . . . it was just like it wasn't registering with him."

On rebuttal the State called five lay witnesses to testify to defendant's mental state at the time of the offenses: Dan Ford, Mary Ellen Meyers, Shelly Brocki, Detective Robert Bittle, and Detective Jack Watts. Dan Ford, Chief Jailer with the Cumberland County Sheriff's Department, oversaw defendant's hour-long in-processing at the jail after his arrest on 26 October 1984. Mary Ellen Balch Meyers, a friend of defendant from the neighborhood, stopped for a few minutes to offer him a ride on 25 October. Meyers and defendant had often talked about defendant's personal problems in the month or two before the killings. Both Ford and Meyers testified that in their opinions defendant knew what he was doing was wrong when he killed Gail Strickland and Crigger Huff. Shelly Brocki, who had dated defendant in the summer of 1983, had talked to him twice for a few minutes on 25 October 1984: the first time when she saw him walking on the roadside before she knew Mrs. Strickland was dead and then about ten o'clock that night at the gas station. She said he was "pale and he didn't look like he normally looked," but she noticed no odd or irrational behavior. In early 1987, defendant had phoned her and had told her "that his lawyers

were trying to get him off on the insanity plea, but he had spoken with God and he knew that wasn't right and that he wanted the death penalty." Detective Robert Bittle had had three contacts with defendant during 25 October and 26 October: a thirty-minute interview in the police car about 3 p.m. on 25 October, visual surveillance of the defendant on the morning of 26 October, and a four to four-and-one-half hour contact on the night of 26 October. During the four-hour contact, Detective Bittle was with the defendant at Everett Huff, Sr.'s house, accompanied defendant to the baby's grave and was with him during in-processing at the jail. Based on his observations of the defendant on 25 and 26 October, Detective Bittle believed that the defendant knew the nature of his acts when he killed his child and his mother-in-law and he also knew the difference between right and wrong in regard to those acts. Detective Jack Watts was with Detective Bittle on 25 October during defendant's interview in the police car and during the evening of 26 October. Based on his observations of the defendant on 25 and 26 October, Detective Watts believed that defendant knew the nature of his acts when he killed his child and his mother-in-law and that he also knew the difference between right and wrong in regard to those acts.

The prosecution also called three expert witnesses who had examined defendant at Dix Hospital to determine his mental state at the time of the offenses: psychologist Dorothy Humphrey, psychiatrist Bob Rollins, and social worker Debbie Keith. Debbie Keith testified that she gathered information for the psychiatrist's use in evaluating defendant. Both Humphrey and Rollins believed defendant had a personality disorder with schizotypal features. As far as they knew, he was not taking psychotropic medication when they saw him in August 1986. Dr. Rollins did not believe that defendant was or had been a paranoid schizophrenic. Humphrey and Rollins both testified that defendant probably knew the nature and quality of his act when he buried his son and that he knew the difference between right and wrong as to his act of burying his son and of shooting his mother-in-law. Dr. Rollins also found that defendant was depressed.

After deliberating for less than two hours and forty-five minutes, the jury found the defendant guilty of the premeditated and deliberate murder of his infant son, Crigger Huff, and of the premeditated and deliberate murder of his mother-in-law, Gail Strickland.

During the sentencing phase, the State called Tracey Sams, defendant's former girlfriend, to testify. She stated that defendant tried to kill her, by shooting into a car which she was driving, after she broke off her relationship with him in November 1979. The State also introduced the judgment of defendant's conviction for discharging a firearm into an occupied vehicle.

Defendant also presented evidence during the sentencing phase. Linda Oxendine, defendant's sister's childhood friend, testified that she and other neighborhood children congregated at the Huffs' house to drink beer and smoke marijuana during defendant's teen years. Defendant's parents knew about the drug use and did nothing to stop it. Terry Oxendine testified that, in the few months they were together at the bowling alley at Pope Air Force Base, defendant was a good co-worker and was well liked by the customers. Marsha Wright, defendant's supervisor at the pizza parlor at Pope Air Force Base, testified that defendant was a good worker. Charles Montooth, defendant's junior high school principal, testified to defendant's sometimes neglected appearance during his junior high school years, to his poor attendance, and to his lack of parental support. Defendant's older sister related that his early childhood was characterized by family violence; their father had had a drinking problem until defendant was thirteen.

GUILT PHASE

I.

In his first assignment of error, defendant contends that the trial court erred in allowing the two murder charges to be joined for trial. Defendant contends that joinder of these charges violated N.C.G.S. § 15A-926(a) and deprived him of due process guaranteed by the fifth and fourteenth amendments of the United States Constitution and by article I, sections 18 and 19 of the North Carolina Constitution. We disagree.

In ruling on a motion to join, the trial judge must first determine if the statutory requirement of a transactional connection is met. *E.g., State v. Silva*, 304 N.C. 122, 126, 282 S.E. 2d 449, 452 (1981). On appeal, the question of whether offenses are transactionally related so that they may be joined for trial is a fully reviewable question of law. *Id.*

N.C.G.S. § 15A-926(a) provides:

> Two or more offenses may be joined . . . for trial when the offenses . . . 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.

N.C.G.S. § 15A-926(a) (1988).

Once the trial judge concludes the offenses are transactionally connected, he or she must determine if the defendant can receive a fair hearing on each charge if the charges are tried together. *State v. Greene*, 294 N.C. 418, 421, 241 S.E. 2d 662, 664 (1978); *State v. Davis*, 289 N.C. 500, 508, 223 S.E. 2d 296, 301, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976). If consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. *Pointer v. United States*, 151 U.S. 396, 38 L.Ed. 208 (1894); *Dunaway v. United States*, 205 F. 2d 23 (D.C. Cir. 1953); *State v. Greene*, 294 N.C. 418, 421, 241 S.E. 2d 662, 664 (1978); *State v. Davis*, 289 N.C. 500, 508, 223 S.E. 2d 296, 301, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976). However, the trial judge's decision to consolidate for trial cases having a transactional connection is within the discretion of the trial court and, absent a showing of abuse of discretion, will not be disturbed on appeal. *State v. McNeil*, 324 N.C. 33, 40, 375 S.E. 2d 909, 914 (1989).

Defendant argues joinder was improper for two reasons: because the charges were not transactionally related and because joinder hindered his ability to present his defense. Neither argument has merit.

[1] First, we agree with the trial court that there is sufficient evidence of a transactional connection to support joinder of the two homicide charges for trial. Like the defendant in *State v. McNeil*, 324 N.C. at 40, 375 S.E. 2d at 914, defendant committed both offenses for the same purpose as part of a single scheme or plan. In *McNeil*, we found a transactional connection between two robbery/murders that were committed to satisfy defendant's need for cash to pay his rent and other bills. In this case, the evidence tends to show that defendant was troubled by serious and persistent problems: in getting along with his mother-in-law, Gail Strickland, in maintaining a relationship with his wife, Debbie, and in his feelings that his child was unloved by the family. Defendant saw as inevitable a divorce from Debbie followed by a custody battle over their son Crigger. He believed Crigger would

be placed in his wife's custody and continuously exposed to his wife's family whom he viewed as perverted. The evidence also shows that defendant saw these as interrelated problems to which he developed a unified solution. To spare the child the custody battle and what he considered the taint from exposure to the Strickland family, he killed Crigger. That night, he went to Gail Strickland's house and shot her. As in *McNeil*, the connecting thread running through these acts was defendant's common scheme or plan to resolve the problems created by his perception of his situation.

Further, a transactional connection exists because the two crimes are so closely related in time that they appear to be parts of a continuous criminal episode. *State v. Avery*, 302 N.C. 517, 276 S.E. 2d 699 (1981) (series of crimes during a two-day period of escape from prison); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980) (offenses one after the other on the same afternoon); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978) (two sexual assaults within three hours); *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (four offenses within two and a half hours), *death penalty vacated*, 429 U.S. 809, 50 L.Ed. 2d 69 (1976). The evidence tends to show that defendant buried his child during the day on 24 October and that he shot his mother-in-law before she had retired that same night.

[2] Defendant also argues that he was hindered in his ability to present his defenses. First, he argues that he was prejudiced by the consolidation because he would have had a better chance for a conviction of second-degree murder instead of the first-degree murder of Gail Strickland had the two charges not been consolidated for trial. He contends that the jury was unable to separate the "strong" evidence of premeditation and deliberation in the killing of Crigger Huff from the weak evidence of premeditation in the killing of Gail Strickland and so cumulated the evidence of premeditation and deliberation in the two cases in order to convict him of the first-degree murder of Gail Strickland.

Second, defendant argues that a fair determination on the issue of his insanity at the time of the killing of Crigger Huff was hindered by joinder of the additional homicide charge and by having to defend the two together. He asserts that he was forced into the unconscionable dilemma of presenting dissimilar main defenses: insanity as to the homicide of Crigger Huff and lack of premeditation and deliberation as to the homicide of Gail Strickland.

We address both contentions. First, we disagree with defendant's assertion that the evidence of premeditation and deliberation was weak in the killing of Gail Strickland. "Premeditation" is defined as "thought beforehand, for some length of time, however short." *State v. Quesinberry*, 319 N.C. 228, 230, 354 S.E. 2d 446, 448 (1987) (citations omitted). A defendant acts with "deliberation" if his act is carried out while he is in a " 'cool state of blood,' without legal provocation, and . . . to accomplish some unlawful purpose. The intent to kill must arise from 'a fixed determination previously formed after weighing the matter.' " *Id.* (citations omitted). Because premeditation and deliberation are mental processes, they are rarely susceptible of proof by direct evidence. *Id.* at 231, 354 S.E. 2d at 448. Several circumstances from which the jury may infer premeditation and deliberation are (1) lack of provocation on the part of the deceased, *id.*; (2) the conduct and statements of the defendant before and after the killing, *id.*; and (3) ill-will or previous difficulty between the parties, *State v. Gladden*, 315 N.C. 398, 430, 340 S.E. 2d 673, 693, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986). There are numerous circumstances from which a jury might infer that defendant premeditated and deliberated the killing of Gail Strickland. Defendant's statement and other testimony reveal no evidence that Gail Strickland provoked the defendant: to the contrary, defendant's statement indicated that he shot her while she slept on the sofa. From defendant's conduct before the killing, the jury could infer that he had planned to go to Gail Strickland's house to shoot her: He obtained a gun from his parents' house, passing by her house several times until he could enter unobserved. Defendant's conduct after the killing is also evidence of premeditation and deliberation: On return to his parents' house, he cleaned the gun, wiped off the fingerprints, and hid it in the doghouse. He returned to the Strickland house, went through Gail Strickland's purse, and dumped the contents on the floor. The jury could infer that his return to the house after the killing to dump the contents of the purse was an attempt to make the killing appear to have occurred in the course of a robbery. Defendant's statement, corroborated by many witnesses and controverted by none, is substantial evidence of ill-will and of previous difficulties between defendant and Mrs. Strickland. Having found ample evidence of premeditation and deliberation in the killing of Gail Strickland, we also find that there was no danger that the jury cumulated the evidence of premeditation and deliberation in the two cases in order to convict defendant of the first-degree murder of Gail Strickland.

Nor do we find that consolidation of the two charges denied defendant a fair determination on the issue of his insanity at the time of the killing of Crigger Huff or on the issue of his lack of premeditation and deliberation at the time of the killing of Gail Strickland by having to present conflicting defenses in a single trial. Contrary to defendant's assertion, the evidence shows that defendant did not present insanity as to the homicide of Crigger Huff and lack of premeditation and deliberation as to the homicide of Gail Strickland. Defendant presented two defenses on both charges, the defense of insanity and the defense of lack of premeditation and deliberation. Defendant's expert witnesses offered substantial evidence which tended both to establish insanity and that defendant's ability to premeditate and to deliberate was impaired. Defendant's expert witnesses testified that the two killings occurred during a single episode of psychosis, that defendant was suffering from the mental condition of paranoid schizophrenia typified by delusions, that defendant did not know at the time of the offense if the acts of killing Crigger Huff and Gail Strickland were right or wrong, and that his thinking was impaired at the time of the offenses. Dr. Rose also specifically testified that defendant's mental condition made him incapable of premeditating and deliberating the deaths of his son and mother-in-law. The issues were fairly presented for the jury's consideration. The jury apparently simply chose not to believe this evidence but chose to believe the evidence presented by the State to the contrary.

For these reasons, we hold that neither of defendant's arguments of possible prejudice to the presentation of his defenses, alone or in combination, is sufficient to show that the judge abused his discretion in allowing consolidation of the charges for trial.

Having found no statutory violation, we now turn to defendant's contention that consolidation of these two homicide charges for trial constitutes various constitutional violations. Defendant merely asserts that the facts of the two murders and the dissimilar defenses to each hindered a fair determination of his guilt or innocence which he asserts violated the fifth and fourteenth amendments of the United States Constitution and sections 18 and 19 of article I of the North Carolina Constitution. Defendant makes no argument or explanation of how consolidation of the offenses for trial violates any one of these provisions. We thus decline to address defendant's assertions.

II.

In his second assignment of error, defendant contends that the trial court committed reversible error in permitting defendant to be absent during part of the presentation of the prosecution's evidence in defendant's capital case. We agree that under article I, section 23 of the North Carolina Constitution the trial court erred in permitting defendant to be absent during his capital trial, but find that the State has shown that the error was harmless beyond a reasonable doubt.

These are the circumstances of defendant's absence. During the prosecution's case-in-chief Detective Bruce Daws was allowed to read to the jury the nineteen-page statement of the defendant in which he admitted killing Crigger Huff and Gail Strickland. As Detective Daws read defendant's description of an argument he had had with Mrs. Strickland, defendant banged on the defense counsel table, called Mrs. Strickland a "bitch," stood up, attempted to overturn the defense counsel table, and began to cry. Court was recessed and the jurors were sent out of the courtroom. Defendant's counsel and the bailiff attempted to calm the defendant, and court was then reconvened. As Detective Daws resumed reading defendant's statement describing events leading up to defendant's burying his child, defendant began to weep audibly.[1] As the wit-

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1. The record reflects the following (Detective Daws reading defendant's statement):

"I turned around and went back. I went by a friend's house, Myron West, no one was at home. Drove around places I used to go, neighborhoods. I drove back to Wind Tree Place behind Montclair, drove back to some dirt piles,—"

(THE WITNESS CRYING OUT LOUD, SAYING THE FOLLOWING.)

DEFENDANT: Don't say it, please?

(DEFENDANT CRYING OUT LOUD.)

DEFENDANT: Please don't say it? Please don't? Please don't?

(DEFENDANT CRYING OUT REAL LOUD AGAIN.)

DEFENDANT: Please, Mr. Daws, don't say it, please? (Pause.) Please, Mr. Daws, don't say it, please?

(MR. BRITT AND MS. TALLY APPROACHING THE BENCH, AND AFTER CONFERENCE WITH THE COURT.)

ness continued to read, defendant cried out, repeating, "Please, don't say it? Please don't? Please don't?" Counsel approached the bench; the jury was excused; defendant was removed from the courtroom, and the trial court agreed to defendant's and defense counsel's request to allow the trial to proceed in defendant's absence.[2] The trial judge also agreed to instruct the jury that the trial was proceeding in defendant's absence at his request and at his attorneys' request. The trial judge advised counsel to approach the bench whenever defendant was ready to return and that they could have a recess at any time to confer with the defendant to determine if he wished to return. The jury was returned to the courtroom and the requested instruction given. Defendant remained absent during the remainder of Detective Daws' testimony. Detective Daws continued reading defendant's statement and was excused when he had completed it. A second prosecution witness, Dr. Page Hudson, testified to the results of his autopsy of Crigger Huff's body. During Dr. Hudson's testimony, counsel requested a bench conference; the trial court excused the jury, and noted for the record that defendant remained absent at his own request. The jury returned and the trial resumed until it was recessed a short time later for a ten-day period. Defendant acknowledges that he was present when the court reconvened ten days later for the presentation of defendant's evidence. Defendant argues that his absence during the conclusion of Daws' reading of the statement and during Dr. Hudson's testimony was reversible error.

COURT: Ladies and gentlemen, I am going to ask that you go with the Bailiff to the Jury Deliberation Room.

(JURY RETIRED.)

(THE DEFENDANT LEAVES COURTROOM IN CUSTODY OF BAILIFFS.)

MR. BRITT: Your Honor, after consulting with Mr. Huff, we request that we proceed, at least with this portion of the trial, in his absence. That is his wish.

COURT: The Court notes for the record that it is at the request of the Defendant, the Court is proceeding in his absence. The Court specifically notes for the record that the Defendant is not being removed from the courtroom by the Court.

2. We do not address the applicability of N.C.G.S. § 15A-1032, "Removal of Disruptive Defendant" (1988). While defendant's conduct here could be characterized as disruptive, the trial court did not excuse defendant from the courtroom based on his disruptive conduct but did so in response to the request of defendant and his attorneys. Nor do we address the question of whether there can be "constructive" presence made necessary by reason of defendant's disruptive conduct.

The confrontation clause of the North Carolina Constitution provides in pertinent part: "In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony. . . ." N.C. Const. Art. I, § 23 (1984). Although the United States Supreme Court has stated that the confrontation clause of the federal constitution guarantees each criminal defendant the fundamental right to personal presence at *all critical stages* of the trial, *e.g.*, *Rushen v. Spain*, 464 U.S. 114, 117, 78 L.Ed. 2d 267, 272 (1983), our state constitutional right of confrontation has been interpreted as being broader in scope, guaranteeing the right of every accused to be present at *every stage* of his trial. *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612 (1987); *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962); *State v. Cherry*, 154 N.C. 624, 70 S.E. 294 (1911); *State v. Dry*, 152 N.C. 813, 67 S.E. 1000 (1910); *State v. Pierce*, 123 N.C. 748, 31 S.E. 847 (1898); *State v. Mitchell*, 119 N.C. 786, 25 S.E. 783 (1896); *State v. Kelly*, 97 N.C. 404, 2 S.E. 185 (1887); *State v. Jenkins*, 84 N.C. 812 (1881); *State v. Craton*, 28 N.C. (6 Ired.) 165 (1845).

We have interpreted the state constitutional protection afforded the capital defendant as being even broader, guaranteeing the accused not only the right to be present at each and every stage of trial, but also providing that defendant's right to be present cannot be waived, and imposing on the trial court the duty to insure defendant's presence at trial. *E.g.*, *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612.

In the first case which we were able to find addressing the issue of defendant's absence during a capital trial, Judge Battle[3] stated the history, the rationale, and the source of the right. *State v. Blackwelder*, 61 N.C. (Phil. Law) 38 (1866) (per curiam). He explained,

> that the general impression among the profession in this State is, and always has been, that he [the capital defendant] has such right [to be present at the bar at all times during his trial]; and that the practice has always been in conformity to this impression. The point has never been directly adjudicated, but in the case of *S. v. Craton*, 6 Ire., 104, [28 N.C. 165, 169

3. Prior to 1869, members of the Court other than the Chief Justice were known officially as "Judges of the Supreme Court."

> (1845),] the implication in favor of the existence of the right is so strong that we must regard it as equivalent to a positive decision.

Id. at 39. This rule, Judge Battle wrote, is "but a full development of the principles contained in the 7th section of the Declaration of Rights [a predecessor to article I, section 23]: 'That in all prosecutions every man has a right to be informed of the accusation against him, and to confront the accusers with witnesses and other testimony'; and as such, it ought to be kept forever sacred and inviolate." *Id.*

Our cases teach us that this constitutional requirement of defendant's presence at his capital trial protects not only the defendant, but public interests as well: "Defendant's presence at his trial for a capital felony . . . is a matter of public as well as private concern. Public policy requires his attendance at such a trial." *State v. Moore*, 275 N.C. 198, 209, 166 S.E. 2d 652, 659 (1969) (citation omitted). Among the public interests protected by the requirement is the public's interest in preserving human life. *State v. Kelly*, 97 N.C. 404, 406, 2 S.E. 185, 186 (1887) ("the rule that he [the accused] must be so present in capital felonies is *in favorem vitae* . . . founded in the tenderness and care of the law for human life . . ."); *accord*, *State v. Paylor*, 89 N.C. 539, 541 (1883) ("in favor of life, this rule is never relaxed"). The requirement of the criminal defendant's presence at his capital trial also protects the integrity of the system by preserving the appearance of fairness and by optimizing the conditions for finding the truth.

[3] Because public interests are implicated in the capital trial, the constitutional right of the accused to be present at his capital trial has been elaborated to safeguard these public concerns. Our Court has repeatedly stated that the accused cannot waive the right to be present at a capital trial, *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612 (1987); *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962); *State v. O'Neal*, 197 N.C. 548, 149 S.E. 860 (1929); *State v. Cherry*, 154 N.C. 624, 70 S.E. 294 (1911); *State v. Dry*, 152 N.C. 813, 67 S.E. 1000 (1910), which the law permits him to do with other, personal trial rights, *State v. Moore*, 275 N.C. 198, 208-09, 166 S.E. 2d 652, 659 (defendant's federal constitutional right to confront the witnesses against him at trial is "a personal privilege for the benefit of the accused which does not affect the general public," and may be waived by him). Furthermore, the Court im-

poses a duty on the trial judge to insure defendant's presence throughout the trial. *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612 (1987); *State v. Paylor*, 89 N.C. 539 (1883); *State v. Jenkins*, 84 N.C. 812 (1881); *State v. Blackwelder*, 61 N.C. (Phil. Law) 38 (1866); *State v. Craton*, 28 N.C. (6 Ired.) 165 (1845).

[4] Defendant has argued that the requirement of defendant's presence at his capital trial is rooted both in the state constitutional confrontation requirement and in a separate line of North Carolina cases rooted in the custom and traditions of practice of this state. We are aware that at least one ancient case, *State v. Kelly*, 97 N.C. 404, 406, 2 S.E. 185, 186 (1887), has stated in dictum that the requirement of defendant's presence at his capital trial is different from and broader than the state constitutional provision. However, more recently, this Court has clearly stated that the rule's source is the confrontation clause: " 'In the application of this fundamental principle (*the right of confrontation*) it has been held that in a capital felony the prisoner cannot waive his right to be present at any stage of the trial.' " *State v. Ferebee*, 266 N.C. 606, 609, 146 S.E. 2d 666, 668 (1966) (emphasis added) (quoting *State v. O'Neal*, 197 N.C. 548, 549, 149 S.E. 860, 860 (1929)). In light of the language in *Ferebee* and in *Blackwelder*, 61 N.C. at 39, anchoring the right in the confrontation clause, the statement in *Kelly* cannot be regarded as authoritative. We hold that article I, section 23 is the sole source of the criminal defendant's non-waiveable state right to be present at every stage of his capital trial and of the corollary duty imposed on the trial court to insure his presence.

In our prior cases involving violations of defendant's right to be present at his capital trial, this Court has applied two different standards of reversal: the reversible error per se standard and the harmless error standard. In the three capital cases we were able to find involving violations of defendant's right to be present, two very old cases held that violation of the right to be present at a capital trial was reversible per se, and the Court ordered a new trial in each case. *State v. Dry*, 152 N.C. 813, 67 S.E. 1000 (1910) (defendant given permission by the trial judge to absent himself during jury selection in a capital murder trial); *State v. Blackwelder*, 61 N.C. (Phil. Law) 38 (1866) (murder charge; court instructed jury during defendant's absence from the court-

room).[4] In a recent case, *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612 (1987) (capital murder; admonitions to the jury delivered in absence of defendant, counsel, and court reporter), the Court analyzed the error to determine if the defendant had been harmed. In that case, the Court required the State to show that the error in defendant's trial was harmless beyond a reasonable doubt. *Id.* at 140, 357 S.E. 2d at 613. The State failed to do so, and the Court ordered a new trial for defendant. *Id.*

[5] We have reexamined our previous decisions and conclude that the proper standard of reversal is the harmless error standard. We first review the federal cases. In *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705 (1967), the United States Supreme Court rejected the argument that errors of constitutional dimension necessarily require reversal of criminal convictions. Since *Chapman*, the Supreme Court has "reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 89 L.Ed. 2d 674, 684 (1986), *quoted in Rose v. Clark*, 478 U.S. 570, 576, 92 L.Ed. 2d 460, 469 (1986). "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. at 681, 89 L.Ed. 2d at 684-85 (citations omitted), *quoted in Rose v. Clark*, 478 U.S. at 577, 92 L.Ed. 2d at 470. Despite the strong interests

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4. The reversible error per se rule was also sometimes applied in noncapital felony cases involving defendant's absence during trial. *State v. O'Neal*, 197 N.C. 548, 149 S.E. 860 (1929) (defendant charged with prohibition laws violation; defendant absent from courtroom on verdict's return); *State v. Jenkins*, 84 N.C. 812 (1881) (defendant charged with burning a mill; jury returned verdict in defendant's absence). In other noncapital felony trials, the Court has required the defendant to show how the error prejudiced him. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985) (noncapital murder; defendant absent during voir dire of witness); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962) (three counts of felonious breaking or entering, four larceny counts; after defendant entered guilty plea, judge conducted a presentence investigation out of defendant's presence); *State v. Pierce*, 123 N.C. 748, 31 S.E. 847 (1898) (defendant charged with burning a ginhouse; defendant absent during his counsel's closing argument); *State v. Paylor*, 89 N.C. 539 (1883) (defendant, charged with burning a granary and with burning a stable, was absent during closing argument).

that support the harmless error doctrine, the United States Supreme Court in *Chapman* also recognized that some constitutional errors require reversal without regard to the evidence in the particular case, 386 U.S. 18, 23, n.8, 17 L.Ed. 2d 705, 710, n.8 (citing *Payne v. Arkansas*, 356 U.S. 560, 2 L.Ed. 2d 975 (1958)) (introduction of coerced confession); *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963) (complete denial of right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749 (1927) (adjudication by biased judge). This limitation recognizes that some errors necessarily render a trial fundamentally unfair, *Rose v. Clark*, 478 U.S. at 577, 92 L.Ed. 2d at 470, or protects important values that are unrelated to the truth-seeking function of the trial.[5] However, in review of violations of the criminal defendant's federal constitutional right to be present at critical stages of trial, the United States Supreme Court has rejected a reversible error per se rule and has held that the proper standard requires the prosecution to establish that the error was harmless beyond a reasonable doubt. *Rushen v. Spain*, 464 U.S. 114, 78 L.Ed. 2d 267 (1983).[6] In construing a provision of the state Constitution, we find highly persuasive the meaning given and the approach used by the United States Supreme Court in construing a similar provision of the federal Constitution. *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 474, 206 S.E. 2d 141, 146 (1974). Accordingly, we hold that the proper standard of reversal in reviewing violations under article I, section 23, of defendant's right to be present at all stages of his capital trial is the rigorous standard prescribed for review of violations of defendant's right to be present at trial under the federal Constitution. *See* N.C.G.S. § 15A-1443(b) (1988). We will order a new trial unless the State proves, and we find, that the error was harmless beyond a reasonable doubt. An error is harmless if "beyond a reasonable doubt . . . [it] did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed.

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5. *See id.* at 587-88, 92 L.Ed. 2d at 476-77 (Stevens, J., concurring); *Vasquez v. Hiller*, 474 U.S. 254, 262, 88 L.Ed. 2d 598, 608 (1986) (intentional discrimination in the selection of grand jurors); *Batson v. Kentucky*, 476 U.S. 79, 100, 90 L.Ed. 2d 69, 90 (1986) (racial discrimination in the selection of the petit jury); *Payne v. Arkansas*, 356 U.S. 560, 568, 2 L.Ed. 2d 975, 981 (1958) ("coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment").

6. *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97, 114-18, 78 L.Ed. 674, 682-85 (1934), unless the deprivation, by its very nature, cannot be harmless, *see, e.g., Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963).

2d 705, 710 (1967). Insofar as our decisions and the language in our case law are inconsistent with this opinion, they are overruled.

N.C.G.S. § 15A-1443, entitled "Existence and showing of prejudice," consists of three subsections: subsection (c) deals with invited error, and because a non-waiveable right is at issue here, is not applicable; subsection (b) states the standard for reversal in review of violations of the United States Constitution; and subsection (a) states the standard for "errors relating to rights arising other than under the Constitution of the United States."[7] While the General Assembly has no authority to fix the standard for reversal in review of violations of the federal Constitution, it did so in N.C.G.S. § 15A-1443(b) in an apparent attempt to reflect the United States Supreme Court's decision in *Chapman*, 386 U.S. 18, 17 L.Ed. 2d 705. In contrast, the General Assembly made no express attempt to fix the standard for violations of the state Constitution, but by implication, the standard appears to be prescribed by subsection (a), "errors relating to rights arising other than under the Constitution *of the United States*." (Emphasis added.) However, under our constitutional form of government, "[o]nly this Court may authoritatively construe the Constitution of North Carolina with finality," *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 610, 304 S.E. 2d 164, 170 (1983), and it is for this Court, and not for the legislature, to say what standard for reversal should be applied in review of violations of our state Constitution. Accordingly, for the reasons already discussed in this opinion, the proper standard for reversal in reviewing violations of defendant's state constitutional right to be present at his capital trial is the "harmless

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7. N.C.G.S. § 15A-1443 provides:

> (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.
>
> (c) A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.

beyond a reasonable doubt" standard prescribed in this opinion, and not the standard apparently prescribed in N.C.G.S. § 15A-1443(a).

[6] Applying this standard to the violation in this case, we find nothing in the record that would lead us to believe that defendant was prejudiced by his absence. First, we note that all proceedings took place in open court. The trial court carefully informed the jury in open court that the defendant was absent at his own request and at the request of his attorneys. The testimony of the State's witnesses was offered in open court. Second, everything that took place is reflected in the record. The court reporter was present and transcribed the events which occurred during defendant's absence. Third, the record shows that defense counsel were in court and participated throughout defendant's absence to protect his interests, and that the trial judge told counsel they could confer with the defendant as to the possibility of his return at any time. Although the members of the jury did not have the opportunity to observe defendant's demeanor during Detective Daws' entire testimony, they were able to observe defendant's distress during the first half of Detective Daws' testimony. The trial court's excusal of defendant from the courtroom at defendant's and defense counsel's request after an attempt to cure the problem by a recess indicates that defendant and counsel did not believe that defendant's distress would pass, or his demeanor change, were he to remain in court for the balance of Detective Daws' testimony. The trial court's action in permitting the defendant to remain absent from the courtroom during Dr. Hudson's testimony, and defendant's and defense counsel's failure to request that defendant return, indicate that they did not believe defendant's distress or demeanor would change during Dr. Hudson's testimony. Neither do we. The State argues, with perhaps some merit, that what defendant could have offered in his emotional state could have been detrimental to the presentation of his case; that had he been required to remain, his attorneys' attention would have been diverted from the State's witness' testimony to their distraught client; and that defendant would not have been able to assist his counsel in defending against the testimony of these two witnesses. Neither Detective Daws nor Dr. Hudson offered surprise testimony; Detective Daws merely read to the jury defendant's own statement. Dr. Hudson testified to his autopsy results. Both the statement and the autopsy report had been made available to the defendant before trial.

Although defendant's absence was error, we believe that the public interests implicated in our strict rule that the defendant be present at every stage of his capital trial were preserved at this trial. The trial judge undertook to perform his duty to assure defendant's presence. He made every effort to be fair to the defendant and to emphasize to all onlookers, to the jury, and to the parties that the defendant was afforded proper safeguards. He recessed the trial to allow the defendant the opportunity to calm himself; he twice instructed the jury that the defendant was absent not on court order but on the request of defendant and his counsel. He made certain that the record reflected that defendant's absence was at his own request and not on court order. He stressed to defense counsel that he would entertain their request to allow defendant to return at any time and that he would recess the court at any time to allow defendant's return to the courtroom. Based on the foregoing analysis and considerations, we conclude that the State has shown that the error was harmless beyond a reasonable doubt. Defendant's assignment of error is overruled.

III.

In defendant's third assignment of error, he contends that the trial court erred in denying his motion to suppress the testimony of the psychiatric evaluation team which examined him at Dix Hospital in August 1986. He contends, in issues of first impression to this Court, that the admission of this evidence violated his right to be free from compulsory self-incrimination and his constitutional right to effective assistance of counsel.

A. Fifth Amendment

[7] The first issue raised by the defendant is whether his right to be free from compelled self-incrimination under the fifth amendment of the United States Constitution and article I, section 23 of the North Carolina Constitution was violated by the admission of the treatment team's testimony as to statements made during his second court-ordered psychiatric examination after defendant had introduced expert testimony of insanity.

These are the pertinent facts: After defendant had filed notices on 1 November 1985 of his intent to rely on the insanity defense and of his intent to introduce expert testimony supporting it, on 9 January 1986 the court ordered defendant committed, on the prosecution's motion, to the Forensic Unit of Dorothea Dix Hospital

to determine his mental state at the time of the offenses. Under that order, defendant was examined in January 1986, at Dix Hospital by a treatment team headed by psychiatrist James C. Groce and including psychologist Dorothy Humphrey.

Seven months later, on 19 August 1986, because of defense counsel's questions as to defendant's capacity to proceed to trial set for that month, the court ordered defendant committed to the Forensic Unit at Dix Hospital a second time—this time for examination as to his capacity to proceed to trial pursuant to N.C.G.S. § 15A-1002.[8] On defendant's second admission, the Dix Hospital staff advised defendant that anything he told them could be revealed at trial. However, the form signed by defendant on his second admission also provided that any information relating to his examination would be released by the hospital only on his written authorization. The treatment team examining him included psychiatrist Bob Rollins, psychologist Dorothy Humphrey, and social worker Debbie Keith.

At trial, the defense introduced evidence of defendant's mental state at the time of the two offenses through the testimony of three expert witnesses. Dr. Groce, who had examined defendant upon his first commitment to Dix, testified that defendant suffered from chronic mental illness which he had diagnosed as subchronic paranoid schizophrenia. He believed that when he had examined defendant at Dix Hospital in January 1986, defendant's illness had been in remission, partially as a result of the medication he had been taking. Dr. Groce was not able to form a definitive opinion about defendant's sanity at the time of the crimes and identified several reasons why he could not. First, the symptoms of defendant's illness could have changed in the year since the deaths; second, the antipsychotic medication defendant had been taking would have improved his thinking if he did have a mental illness; and third, the absence of information from objective sources made it impossible to compare defendant's subjective report against objective reports of the same events. No witness was available who could describe defendant's comments and behavior at the time of the deaths. Dr. Groce did believe that defendant's mental illness

8. Judge Giles Clark's order of 19 August 1986 was not included in the record on appeal submitted by the parties. A third order, entered on 14 January 1987 by Judge Coy E. Brewer, Jr., was mistakenly included in support of this assignment of error.

was causing symptoms sufficient to impair his thinking at the time of the deaths and that the medication had since improved his thinking.

Dr. Brad Fisher, a clinical psychologist, examined defendant within ten days of the crimes and again about six months later. He testified that defendant suffered from paranoid schizophrenia typified by delusional thinking. In the areas where defendant had deluded thinking—on the subjects of his mother-in-law, his son, his wife and their interconnections—defendant was severely limited in his ability to differentiate right from wrong.

Dr. Selwyn Rose, a psychiatrist, had examined defendant for the first time nine days after his arrest and had interviewed him quarterly for the two-and-one-half-year period before trial. In December 1985, he had placed defendant on medication to treat his illness, which he had diagnosed as paranoid schizophrenia. Dr. Rose testified that since defendant's illness made him incapable of rational thinking, he was also incapable of premeditating and deliberating the deaths of his son and mother-in-law. Because of the severity of defendant's mental illness, he was unable at the time of the crimes to understand the difference between right and wrong or to understand the nature and quality of his actions.

All three experts testified that defendant killed his son and his mother-in-law during a single psychotic break.

Defendant did not testify.

To rebut defendant's expert testimony, the prosecution called three members of the treatment team that had examined defendant at Dorothea Dix Hospital in August 1986 during his second court-ordered commitment: psychologist Dorothy Humphrey, psychiatrist Bob Rollins, and social worker Debbie Keith. On the basis of their examination of defendant in August-September 1986, both Humphrey and Rollins testified that defendant had a personality disorder with schizotypal features. Dr. Rollins did not believe that defendant was or had been suffering from paranoid schizophrenia, as defendant's experts had testified. Both testified that defendant probably knew the nature and quality of his act when he buried his son and that he knew the difference between right and wrong as to his act of burying his son and of shooting his mother-in-law. Ms. Humphrey had administered but had discounted the results of the Minnesota Multiphasic Personality Inventory (MMPI) administered to defendant because a validity scale for scoring defendant's

responses indicated they were not accurate measures of his condition. Dr. Rollins also found that defendant was depressed. Debbie Keith testified that she had gathered data for the psychiatrist's use in evaluating the defendant.

The effect of this expert testimony offered by the prosecution was to rebut defendant's evidence of insanity presented through defendant's experts' testimony.

Defendant contends that under *Estelle v. Smith*, 451 U.S. 454, 68 L.Ed. 2d 359 (1981), the treatment team's testimony resulting from the second court-ordered examination was inadmissible unless the personnel at Dix had advised defendant of his *Miranda* rights, specifically, that he had a right to remain silent and that anything he said could and would be used against him in court. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966).

The Dorothea Dix admission form which defendant signed is not included in the record on appeal before us. The witness Dr. Rollins was asked to read from the form on both direct and cross-examination, and he did so as follows:

> MR. VANSTORY: Sir, what is the standard procedure employed at Dorothea Dix for advising patients of confidentiality?
>
> . . . .
>
> THE WITNESS [DR. ROLLINS]: The patient is informed by the technician admitting the patient of the applicable standard and the patient is asked to sign acknowledgment at that time that that has been done, and additionally, it is done by the physician.
>
> . . . .
>
> A I explained to Mr. Huff the confidentiality.
>
> Q What did you tell him in that regard, sir?
>
> A I explained that he had been sent here by his attorney, and that if I was called to testify in court, anything he told me could be revealed.
>
> . . . .
>
> Q Is there a form in Everett Randolph Huff's file indicating that he was talked to by such technician?

A Yes. There is a form for each admission.

Q What does the form say, sir?

A "Any information we obtain by you may be revealed in court. You do not have to answer any questions or reveal any information. Members of our staff may be called as witnesses in court by either your attorney or the District Attorney. We may or may not give the court an opinion about your mental responsibility at the time of the alleged crime, depending upon available information. We may try to answer any questions raised by your attorney or the District Attorney. We sometimes are asked to make specific recommendations to the court about the disposition of your case, and future medical treatment. Usually, our findings deal with the capacity to proceed and responsibility at the time of the alleged crime, render an opinion [if] possible, among other unrelated issues." (sic)

Q And is there a place for a person after being so advised to acknowledge his understanding of that?

A Yes, sir.

Q Do you see the signature of Everett Randolph Huff?

A Yes, sir.

. . . .

MR. VANSTORY: And when you say, for each admission, how many admissions are you talking about?

A Three.

Q What are the dates of them?

. . . .

THE WITNESS: . . . The first is January the 14th, 1986. The second is August the 15th, 1986. And the third is January 15, 1987. . . .

. . . .

Q All right. Let me put this to you. Do you see anywhere on that form or forms where it says the clients are advised information will be disclosed only upon the client's written authorization?

A Yes. It says, ". . . have no unauthorized publicity on or use of your treatment records. Your treatment records are deemed confidential and may be disclosed only upon a written request for release by you."

Q And that was related to Everett Randolph Huff on each of his admissions?

A Yes, sir.

Defendant contends (1) that the second examining team did not formally advise defendant of his rights but instead advised him only that anything he told them could be revealed at trial, (2) that the form he signed informed him that information gathered during the examination was confidential and would be released only on his written authorization, and (3) that their testimony as to information defendant related to them during his second evaluation was obtained in violation of his right to be free of compelled self-incrimination. While we disagree with defendant's characterization of this evidence, more importantly we disagree with his conclusion.

We do not find *Smith*, 451 U.S. 454, 68 L.Ed. 2d 359, controlling. In *Smith*, defendant was ordered to undergo a psychiatric examination to determine his competency to stand trial for first-degree murder. He was found competent, tried by a jury, and convicted. At the capital sentencing hearing the psychiatrist who had conducted the competency examination testified for the State of Texas. Based on the court-ordered competency examination, he stated that defendant would pose a future threat to society. The jury resolved the issue of future dangerousness against the defendant (as well as two other issues), which under Texas law made the death penalty mandatory. On appeal, the United States Supreme Court held that the admission of the doctor's testimony violated defendant's fifth amendment privilege against compelled self-incrimination because defendant was not advised before the court-ordered psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital-sentencing proceeding.

This case is materially different on its facts. In *Smith*, the defendant had not placed his sanity in issue; here, unlike *Smith*, defendant had given notice of his intent to assert the insanity defense and to rely on expert testimony to support it. Furthermore,

the Supreme Court expressly distinguished *Smith* from a case such as this one:

> Nor was the interview analogous to a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist.

Estelle v. Smith, 451 U.S. at 465, 68 L.Ed. 2d at 370. Moreover, the Supreme Court's holding was specifically limited to account for these factual differences: "A criminal defendant, *who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence*, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.* at 468, 68 L.Ed. 2d at 372 (emphasis added). Accordingly, we conclude that if *Smith* has any bearing upon this case, it is that its dicta suggest that defendant has no fifth amendment protection in these circumstances.

A number of federal circuit courts have considered the issue. *See United States v. Byers*, 740 F. 2d 1104, 1111 (D.C. Cir. 1984) (plurality), and cases cited therein. They have uniformly, though admittedly for different reasons, held that no fifth amendment violation occurs where the defendant is compelled to undergo a psychiatric examination by the State after pleading insanity.

In *Byers*, Judge (now Justice) Scalia, writing for the D.C. Circuit Court of Appeals, examined the four rationales relied upon by the federal circuit courts: (1) waiver, (2) nontestimonial nature of the evidence, (3) estoppel, (4) evidence admitted to show only insanity (as opposed to guilt) is not covered by the privilege against self-incrimination. The waiver rationale finds that a defendant "waives" the fifth amendment protection by voluntarily making psychiatric evaluation an issue in the case. The nontestimonial evidence rationale characterizes the psychiatric interview as "real or physical" evidence which is neither a "communication" nor "testimony" and, therefore, unprotected by the privilege against self-incrimination. The estoppel rationale finds that defendant's im-

plicit reliance upon the theory that statements made in psychiatric examinations are "real or physical evidence" in order to have his expert's testimony received despite the hearsay rule creates an estoppel against his objection to the Government's reliance upon the "real or physical evidence" theory to overcome the fifth amendment bar. The final rationale defines the scope of the privilege against self-incrimination narrowly, reaching only statements introduced to show that the defendant actually committed the offense in question, but not statements brought in on the issue of sanity.

After declining to rely on any of these four rationales, the D.C. Circuit concluded that the courts advancing them intended them as "devices . . . for weaving *a result demanded on policy grounds* unobtrusively into the fabric of the law." *Id.* (emphasis added). They have, declared the D.C. Circuit, denied the fifth amendment claim primarily because of "the unreasonable and debilitating effect it would have upon society's conduct of a fair inquiry into the defendant's culpability." *Id.* The reason for rejecting the fifth amendment argument appears to be based purely on the practical need to rebut defendant's experts' evidence of insanity. Expert testimony is so uniquely impressive upon jurors that it needs to be rebutted by evidence from experts. This policy has been described as the need to strike a " 'fair state-individual balance' (one of the values underlying the Fifth Amendment set forth in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596, 12 L.Ed. 2d 678[, 681] (1964))," *id.*, as a matter of "fundamental fairness," *id.*, and as a matter of "judicial common sense." *Id.* As the court said in *Pope*:

> It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second if the government is to have the burden of proof, . . . and yet it is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden.

Pope v. United States, 372 F. 2d at 720, *quoted in United States v. Byers*, 740 F. 2d at 1113.

For this reason alone, the D.C. Circuit in *Byers* held that when "a defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists . . . ; and when he introduces into

evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received . . . as well." *United States v. Byers*, 740 F. 2d at 1115.

Citing *Byers*, the United States Supreme Court has since approved the introduction of psychological reports based on defendant's mental examination if the report is introduced for the purpose of rebutting defendant's mental defense. *Buchanan v. Kentucky*, 483 U.S. 402, 97 L.Ed. 2d 336, *reh'g or modification denied*, 483 U.S. 1044, 97 L.Ed. 2d 807 (1987). The Court stated that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested." *Id.* at 422-23, 97 L.Ed. 2d at 355.

In *Buchanan*, defendant was attempting to establish a mental defense. Defendant did not testify. His only witness was a social worker who read from psychological reports completed after an examination following a previous arrest. On cross-examination the prosecutor attempted to rebut the testimony by having the social worker read from a psychological report prepared on examination after a joint motion for involuntary civil commitment following the murder for which defendant was being tried.

The facts in *Buchanan* differ only slightly from the case at bar. The defendant here, as in *Buchanan*, has placed his mental status in issue by introducing expert testimony on his mental status. The prosecution has no way to rebut the defense unless it too may introduce expert testimony on defendant's mental status. As in *Buchanan*, the expert testimony here reported the experts' observations about defendant's mental state but did not describe any statements defendant made about the crimes with which defendant was charged.

Accordingly, for the reasons made clear in the D.C. Circuit's analysis in *Byers*, and approved by the United States Supreme Court in *Buchanan*, we hold that when a defendant relies on the insanity defense and introduces expert testimony on his mental status, the prosecution may introduce expert testimony derived from prior court-ordered psychiatric examinations for the purpose of rebutting that testimony without implicating the fifth amendment of the United States Constitution or article I, section 23 of the North Carolina Constitution.

The North Carolina Court of Appeals addressed similar issues in *State v. Jackson*, 77 N.C. App. 491, 335 S.E. 2d 903 (1985), which did not reach this Court. Though the result reached by the Court of Appeals was correct, certain rationales employed in that decision have been rejected by the United States Supreme Court and now by this Court.[9]

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9. In *Jackson*, 77 N.C. App. 491, 335 S.E. 2d 903, defendant gave notice of his intent to rely on the insanity defense and to introduce expert testimony to support it. On defendant's motion, the court ordered that a psychiatrist be paid to examine the defendant as to his sanity at the time of the offense. On the State's motions, the superior court issued two substantially identical orders, each for psychiatric examination to determine defendant's competency and his sanity at the time of the offenses. The testimony of psychiatric experts for the defense and for the State was admitted at trial.

The defendant first argued that the superior court orders directing the psychiatric examination as to defendant's sanity at the time of the offense exceeded the superior court's statutory authority. The defendant did not raise a fifth amendment claim on this issue.

In *Jackson*, the Court of Appeals properly concluded that if a defendant gives notice of his intent to assert the insanity defense that it is "not only reasonable, but necessary, that the prosecution be permitted to obtain" its own psychiatric examination of the defendant. *Id.* at 498, 335 S.E. 2d at 907. Otherwise, the State would be unable to "discover fraudulent mental defenses or [to] offer expert psychiatric testimony to rebut the defendant's evidence." *Id.* The Court of Appeals also properly held that if the defendant has placed his sanity at issue the trial court has the authority as part of its power to oversee the proper administration of justice to order a psychiatric exam. *Id.* at 498, 335 S.E. 2d at 907-08.

The defendant also raised the issue now before us: whether under *Estelle v. Smith*, 451 U.S. 454, 68 L.Ed. 2d 359, the admission of testimony by the State psychiatrist as to defendant's statements during the exam and of the opinions based on those statements violated defendant's fifth amendment right against self-incrimination when defendant has introduced psychiatric testimony on his sanity. *State v. Jackson*, 77 N.C. App. at 498, 335 S.E. 2d at 908.

The Court of Appeals first concluded that because *Smith* was materially different on its facts, it did not control. The panel then held that by defendant's introduction of psychiatric testimony to information obtained during his examination, defendant waived his right under the fifth amendment to exclude the State psychiatrist's testimony to information during defendant's court-ordered examination.

We agree with the Court of Appeals that Jackson's own introduction of psychiatric testimony distinguishes his case from *Smith*. However, for the reasons articulated by Judge Scalia in *Byers*, 740 F. 2d at 1109-15, we conclude that the fifth amendment protection against self-incrimination does not extend to psychiatric testimony introduced to rebut defendant's expert psychiatric testimony—not because he waived that right, but because judicial balance and fundamental fairness compel this result.

The Court of Appeals also concluded that the admission of the State psychiatrist's testimony was not error. The court reasoned that the fifth amendment barred

[8] Defendant further argues that the prosecution had a fair opportunity to rebut any psychiatric testimony offered by defendant from information developed during the first court-ordered evaluation. We do not agree that the first psychiatric examination of defendant necessarily afforded the prosecution a "fair opportunity" to rebut defendant's insanity defense. The conclusions of any mental health expert, his diagnoses and postdictions, are only as reliable as the data on which those conclusions are based. If there is reason to believe that defendant's evaluation was based on incomplete or distorted data, then there is good reason to reevaluate the individual in light of more complete or more accurate data. The skill of the clinician interpreting the raw data can also affect the validity of a diagnosis or other clinical judgment. Furthermore, retesting is often useful in defining the parameters of a mental illness. Although the underlying condition may always be present, the mental illness may over time manifest itself with symptoms of varying intensity. Knowing the parameters of the illness may increase the reliability of an expert's postdictions about a defendant's mental condition.

Sound reasons existed in this case for a second evaluation of defendant's mental status. Testimony from the experts who examined defendant the first time acknowledged the limitations of that examination. Dr. Groce was uncertain what effect defendant's medication had had on defendant's condition. He testified that he could not confidently say if defendant knew the difference between right and wrong when he killed Crigger Huff and Gail Strickland because he lacked objective data against which to compare defendant's reports of the events. Ms. Humphrey discounted the results of the Minnesota Multiphasic Personality Inventory (MMPI) administered to defendant because a validity scale for scoring defendant's responses indicated they were not accurate measures of his condition. There was also reason to believe that a second evaluation would be helpful in defining the parameters of defendant's illness since the character of his thinking had changed since the first

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the admission of defendant's statements to establish guilt; it did not extend to statements admitted as the basis of the psychiatrist's opinion of defendant's sanity; since the trial court instructed the jury to consider the testimony only to the extent that it tended to establish sanity, there was no error. This rationale was implicitly rejected in *Smith*, 451 U.S. at 462-63, 68 L.Ed. 2d at 368-69. *United States v. Byers*, 740 F. 2d at 1112-13. For that reason, we also reject it as a basis for the admission of the State's psychiatric testimony.

evaluation at Dix: defendant's expert, Dr. Rose, who had been seeing defendant quarterly, stated in his affidavit supporting counsel's motion to commit defendant to Dix Hospital that "the stress of the impending trial and other factors including suicidal ideation, have led to an acute deterioration of his mental condition." More information about the parameters of defendant's illness could have increased the reliability of the expert's postdictions about defendant's sanity at the time of the offenses. Given the sound reasons for reevaluation generally, and in this case, we conclude that a fair opportunity to rebut may include more than one examination of the defendant.

B. Sixth Amendment

[9] Defendant also argues that his right to effective assistance of counsel under the sixth amendment to the United States Constitution and under article I, section 23 of the North Carolina Constitution was violated by the admission of the second treatment team's testimony as to information obtained during his second court-ordered psychiatric examination because that admission was for the purpose of determining his capacity to proceed, as opposed to his sanity at the time of the crime.

The sixth amendment, made applicable to the states through the fourteenth amendment, provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. Article I, section 23, the parallel provision in the North Carolina Constitution, contains similar language. Our interpretation of the state provision has generally tracked the United States Supreme Court's interpretation of the federal provision.

This "right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' *Kirby v. Illinois*, 406 U.S. 682, 688-698 (1972) (plurality opinion); *Moore v. Illinois*, 434 U.S. 220, 226-229 (1977)." *Estelle v. Smith*, 451 U.S. 454, 469-70, 68 L.Ed. 2d 359, 373. In addition, the sixth amendment insures that the accused "need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

United States v. Wade, 388 U.S. at 226-27, 18 L.Ed. 2d at 1157, *quoted in Estelle v. Smith*, 451 U.S. at 470, 68 L.Ed. 2d at 373.

In *Estelle v. Smith*, 451 U.S. 454, 68 L.Ed. 2d 359, the United States Supreme Court also held that the sixth amendment was violated by the State's introduction of a psychiatrist's testimony at the penalty phase of defendant's trial. The defendant had not placed his mental state in issue and his attorney had neither been informed that the order for psychiatric examination had been entered nor did he have notice that the scope of the examination would include a determination of defendant's future dangerousness.

Although defendant asserts that *Smith* controls the outcome in this case, we disagree. Instead, we find that *Buchanan v. Kentucky*, 483 U.S. 402, 97 L.Ed. 2d 336, also states the principles that control our sixth amendment analysis. The defendant in *Buchanan* argued that his right to counsel had been violated under *Estelle v. Smith*, 451 U.S. 455, 68 L.Ed. 2d 359, by the admission of this report. However, the Court held that no right to counsel violation had occurred, and that the fact situation presented in *Smith* was critically different from that presented in *Buchanan*. "In *Smith*, defendant had not received the opportunity to discuss with his counsel the examination or its scope." *Buchanan v. Kentucky*, 483 U.S. at 424, 97 L.Ed. 2d at 356. In contrast, in *Buchanan*, defendant had the opportunity to discuss with counsel the nature of a psychiatric examination; in fact, "counsel himself requested the psychiatric evaluation by . . . [the psychiatrist]." *Id.* In *Buchanan*, the Court said, "It can be assumed—and there are no allegations to the contrary—that defense counsel consulted with petitioner about the nature of this examination." *Id.*

The defendant argues, as the defendant did in *Buchanan*, that he was denied effective assistance of counsel because counsel did not anticipate that the examination results might be used to rebut his insanity defense. The Supreme Court rejected Buchanan's argument, stating that "the proper concern of this [Sixth] Amendment" does not focus on the potential uses to which the prosecution might put the psychiatric report but on "the consultation with counsel. . . . Such consultation [with counsel], to be effective, must be based on counsel's being informed about the scope and nature of the proceeding [referring to defendant's examination]. . . . To be sure, the effectiveness of the consultation [between defendant and attorney] also would depend on counsel's awareness of the possible

uses to which petitioner's statements in the proceeding could be put." *Buchanan v. Kentucky*, 483 U.S. at 424-25, 97 L.Ed. 2d at 357. The Court concluded, "Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a 'mental status' defense . . . , he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* at 425, 97 L.Ed. 2d at 357 (footnote omitted).

Turning to the case before us, we conclude that defendant had the opportunity to discuss with his lawyer whether or not to submit to the second court-ordered examination and to discuss its scope as well. As in *Buchanan*, there are no allegations that defendant did not have the opportunity to talk with his lawyer about whether to submit to the examination. Furthermore, under the decision of the Court of Appeals in *State v. Jackson*, 77 N.C. App. 491, 335 S.E. 2d 903, defendant was on notice that by placing his sanity at issue, the State was empowered to order its own examination and that the scope of that examination would include forming the basis to rebut his insanity defense. The absence of express language in the second order specifying defendant's examination to determine his mental state at the time of the offenses is not significant under the Supreme Court's decision in *Buchanan*. Under these circumstances, we conclude that there was no violation of the state and federal guarantees of effective assistance of counsel.

IV.

Fourth, defendant assigns as error the instructions to the jury during the guilt determination phase of the trial. First, he contends that the trial court's instructions could reasonably be understood by a juror to permit a joint determination of guilt on the two murder charges; second, and following from the first, he asserts that the trial court's failure in a capital trial to instruct the jury to consider separately the defendant's guilt or innocence on each charge is prejudicial per se. Defendant contends that the effect of these two alleged errors was to relieve the State of its burden of proof as to each offense, and so to violate his rights. We disagree.

The specific rights defendant contends he was denied are the right to due process under the fifth and fourteenth amendments of the United States Constitution and under article I, sections 18 and 19 of the North Carolina Constitution and the right to be free from cruel and unusual punishment under the eighth amend-

ment of the United States Constitution and under article I, section 27 of the North Carolina Constitution. We disagree.

Article I, section 19 of the North Carolina Constitution and the fifth and fourteenth amendments of the United States Constitution secure for the criminal defendant the right to due process of law. *State v. Patton*, 260 N.C. 359, 132 S.E. 2d 891 (1963). The concept of due process affords the defendant certain procedural protections, among them the guarantee that he may not be convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 25 L.Ed. 2d 368, 375 (1970); *State v. Mize*, 315 N.C. 285, 292-94, 337 S.E. 2d 562, 567 (1985). The due process clause of the fifth amendment protects individuals from due process violations by the federal government, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 467, 91 L.Ed. 422, 428 (1947), and the fourteenth amendment through its due process clause protects them against due process violations by the states, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422. In capital trials, the concept of due process also implicates defendant's right to be free from cruel and unusual punishment. *Id.* at 463, 473-74, 91 L.Ed. at 426, 431-32 (Burton, J., dissenting). The prohibition against cruel and unusual punishment embodied in the eighth amendment is made applicable to the states through the due process clause of the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 8 L.Ed. 2d 758 (1962).

It is the responsibility of the trial court to instruct the jury on the burden which the prosecution must carry. *Davis v. United States*, 160 U.S. 469, 488, 40 L.Ed. 499, 506 (1895); *State v. Mize*, 315 N.C. at 292, 337 S.E. 2d at 567. *See also* N.C.G.S. §§ 15A-1231, -1232 (1988). If we find on appeal that a juror could reasonably have construed the trial judge's instructions to permit the jury to convict without proof beyond a reasonable doubt of every element necessary to constitute the crime with which a defendant is charged, then we must set the verdict aside as an unconstitutional violation of his due process rights. *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed. 2d 39 (1979). The trial court's instructions are taken as a whole. *State v. Davis*, 321 N.C. 52, 59, 361 S.E. 2d 724, 728 (1987).

[10] The due process clause of the fifth amendment of the United States Constitution provides that "[n]o person shall be . . . deprived

of life, liberty, or property, without due process of law." As part of the first eight amendments to the United States Constitution, it protects individuals only against due process violations by the federal government. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 467, 91 L.Ed. at 428. However, the federal government has had no involvement in defendant's prosecution in state court for state crimes on state indictments. For that reason, defendant's claim that this jury instruction violates the fifth amendment of the federal Constitution is without merit and is overruled.[10]

Defendant contends that these jury instructions violate article I, section 18 of the North Carolina Constitution. Article I, section 18 of the North Carolina Constitution provides in pertinent part that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." This constitutional provision generally guarantees access to the courts for redress of civil wrongs. *See Bolick v. Barmag Corp.*, 54 N.C. App. 589, 284 S.E. 2d 188 (1981), *aff'd*, 306 N.C. 364, 293 S.E. 2d 415 (1983). Defendant does not explain how this guarantee has been violated, and so we do not address his claim.

Defendant also contends that these jury instructions violate the due process clause of the fourteenth amendment of the United States Constitution and its parallel provision, article I, section 19 of the North Carolina Constitution. Since defendant was being tried on two charges, he objects specifically to various instructions which refer to a single victim, a single case, or a single decision to be made. These references in the singular were misleading, he contends, and could have led a juror to believe that a juror is permitted to make a joint determination of guilt. Defendant argues that, on occasion, the trial judge referred to a single "victim," although there were two victims; that he said that the State has the burden of "proving the case," although there were two cases for the State to prove; and that he instructed the jury that the "decision in the case must be unanimous," although the jury was required to make two decisions, one in each of *two* cases. Defendant also assigns as error the giving of a single joint instruction on insanity.[11] He

10. Defendant has asserted violations of the due process clause of the fifth amendment in the following assignments of error: I, IV, VII, VIII, IX, X, XI, XII, as well as in all preservation issues. For the reasons stated above, these assignments of error are also without merit.

11. *[I]n this case*, you will consider *evidence that the Defendant was legally insane at the time of the alleged offenses* only if you find that the State

also identifies points in the jury instructions at which a clarifying instruction could appropriately have been given.

[11] Defendant did not object at trial to the instructions which he now assigns as error. As a result, we find that he has waived his right to appellate review of the question except under the "plain error" standard set forth in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).[12] After thoroughly reviewing the instructions for plain error, we find none.

[12] There is a danger in any trial in which offenses are joined that the jury will convict by cumulating the charges or by cumulating the evidence. The trial judge did not specifically instruct the jurors to consider each charge separately. However, the instructions which he did give achieved that result; taken as a whole, they make clear that in the determination of defendant's guilt or innocence the jury was to consider each charge separately.

At the beginning of the charge to the jury, the trial judge established the context in which each juror was to understand the subsequent instructions: he instructed them that the defendant had pled not guilty to *two* counts of first-degree murder. He proceeded to instruct the jury as to the verdicts it would be permitted to return on each of these two counts. A second time he stated that the "defendant has been accused of *two* charges of first degree murder." (Emphasis added.) He then referred to *both* cases and treated them as independent entities. He said, "it is your duty *in each case* to return one of the following verdicts." (Emphasis added.) The implication was clear that one verdict in each case was required.

The trial judge proceeded to the instruction on first-degree murder. He instructed on the first element, an intentional killing by the defendant of the victim with malice. After giving the general instruction which applied to both cases, he specifically referred to the Gail Strickland case and gave the specific instruction which

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has proved beyond a reasonable doubt each of the things about which I have already instructed you.

(Emphasis added.)

12. Under the "plain error" doctrine, the appellate court may review a "grave error which amounts to a denial of a fundamental right of the accused," which has otherwise not been preserved for review. *Id.* at 660, 300 S.E. 2d at 378 (citation omitted).

applied only in the shooting death (the inferences a jury is permitted when a deadly weapon is used). He said, "In your consideration of the case in which Gail Strickland is the victim . . . ." By referring to the Gail Strickland case by name, he distinguished it from the case in which Crigger Huff was the victim and indicated that the jury should consider the evidence of the Gail Strickland case separately from the evidence in the Crigger Huff case.

In the jury instruction on premeditation and deliberation, the fifth element of first-degree murder, the trial judge ir dicated that each case was to be considered separately. He said, "in determining *in each case* whether the state has proven the existence of these elements." (Emphasis added.) In conclusion, he said, "If you find no specific intent *in either case*, you may not find this defendant guilty of first degree murder *in that case*." (Emphasis added.)

The trial judge then gave his instruction on the insanity defense. His instruction tracked the language in the pattern instruction on insanity.[13] The pattern instruction is tailored for the trial of a single offense. It provides that the defendant must be insane at the time of the alleged "offense" (in the singular) and repeatedly refers to a single offense. Initially, the trial judge adapted the pattern instruction and instructed the jury: "in this case [in the singular] you will consider evidence that the defendant was insane at the time of the alleged offenses [in the plural]." He then returned to the language of the pattern instruction which referred to a single offense. The defendant contends that the trial judge erred both by altering the instruction as he did and by failing to alter the instruction more radically to fit the trial of joined offenses. We disagree. The insanity instruction, considered in the context of the jury instructions as a whole, indicates that the jury was instructed to consider defendant's insanity as to each separate offense.

Finally, the trial judge described the contents of the verdict sheet to the jury. He said,

> On the verdict sheet will be a list of the alternative verdicts in each of the cases, which are as follows: As to Count Number One, case in which the alleged victim is Crigger S. Huff, the following possible verdicts: guilty of first-degree murder, or guilty of second-degree murder, or not guilty . . . . As to

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13. N.C.P.I.—Crim. 304.10 (Replacement April 1986).

> Count Number Two, in which the alleged victim is Gail S. Strickland, the following possible verdicts: guilty of first-degree murder, or guilty of second degree murder, or not guilty.

The format of the verdict sheet and the trial judge's instruction describing it are additional evidence that the instructions as a whole made clear that the jury was to consider each charge separately. The record on appeal shows that the verdict form lists each charge separately and states the permitted verdicts under each charge. This separate treatment clearly requires that the two charges be addressed separately.

In summary, the instructions and mandates of the trial court in this case as a whole indicate that the jury was to consider each charge separately. Accordingly, we find no plain error.

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

SENTENCING PHASE

V.

[13] In his fifth assignment of error defendant argues that the trial court erred in submitting the aggravating circumstance "especially heinous, atrocious or cruel," N.C.G.S. § 15A-2000(e)(9) (1988), in the murder of Crigger Huff. Defendant contends that the submission of this aggravating circumstance to the jury was constitutional error because N.C.G.S. § 15A-2000(e)(9) as construed by our Court and applied in this case failed to inform jurors adequately what facts are sufficient to find that the circumstance exists, and therefore allowed them the unguided discretion prohibited in capital cases by the guarantees against cruel and unusual punishment. Defendant's argument is without merit.

We recently considered the same issue in *State v. Fullwood*, 323 N.C. 371, 399-400, 373 S.E. 2d 518, 535 (1988). In that case, we concluded that the sentencing instruction given accorded with our construction of "especially heinous, atrocious, or cruel," and that our construction properly limited the exercise of the sentencer's discretion in the manner approved by the Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 49 L.Ed. 2d 913 (1976).

We approved the following sentencing instruction in *Fullwood*, 323 N.C. at 400, 373 S.E. 2d at 535: "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.*"

The sentencing instruction in the case before us is virtually identical to the one approved in *Fullwood*, and contains the limiting construction of the aggravating circumstance approved in *Fullwood*. The trial court in this case instructed the jury as follows:

> However, it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> 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 case. This murder must have been a conscious [sic] and pitiless crime which was unnecessarily torturous to the victim.

We thus hold that under *State v. Fullwood*, 323 N.C. at 399-400, 373 S.E. 2d at 535, the instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance here properly informed the jurors of the type and quality of facts that are sufficient to find that the circumstance exists.

[14] Defendant also argues that the trial court erred in submitting the aggravating circumstance of "especially heinous, atrocious or cruel" because the facts of the case do not support its submission. Neither do we find merit in this argument.

In determining if there is sufficient evidence to submit an aggravating circumstance to the jury, the trial judge must consider the evidence in the light most favorable to the State. *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984).

In construing this statute, this Court has said that "a finding that this aggravating circumstance exists is only permissible when the level of brutality involved exceeds that normally found in first degree murder or when the first degree murder in question was conscienceless, pitiless, or unnecessarily torturous to the victim." *State v. Hamlet*, 312 N.C. 162, 175, 321 S.E. 2d 837, 846 (1984).

Applying these rules to the case before us, we conclude that the evidence, viewed in the light most favorable to the State,

tended to establish that the killing of the infant Crigger was conscienceless, pitiless, and unnecessarily torturous to the victim. The facts tend to establish that the killing was both conscienceless and pitiless. Crigger Huff died by suffocation after defendant, the child's father and primary caregiver, buried the nine-month-old infant alive. Defendant's killing of his own child in this manner violates the unique bond parents feel for their own children and is a denial of the normal parental need to protect one's own children. Distinct from the violation of the parental relationship, the killing betrays the trust that a baby has for its primary caregiver.

The evidence also supports a finding that the killing was unnecessarily torturous to the baby. Although Dr. Hudson acknowledged that the lack of sand in Crigger's mouth and nose could indicate that death could have occurred quickly, he also noted that the baby's hand, found placed over his mouth, could have prevented sand from entering the child's mouth and nose. Thus, viewed most favorably to the State, the evidence tends to show that the infant was struggling for his life while suffocating in the earthen grave. It is reasonable to infer that the child experienced extreme physical and psychological torture immediately before his death.

[15] Defendant also argues that the age of the victim was improperly considered in determining if the killing was "especially heinous, atrocious or cruel." We do not agree. This Court rejected a similar argument in *State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987). There the victim of a rape and murder was a seven-year-old child. Defendant was convicted, and as the sole aggravating circumstance the jury found that the murder was committed during the rape. Defendant was sentenced to death. On appeal, Zuniga argued that the brutality of the crime could not be used to compare it to other crimes in the proportionality pool where the especially heinous, atrocious, or cruel factor was found by the jury. Rejecting this claim, the Court noted that although the brutality of the murder was not presented in aggravation, the brutality of the rape could be considered. Moreover, the Court stated, "[L]ikewise, the jury could properly have found that the age of the victim of the rape gave added weight to the factor submitted." *Id.* at 275, 357 S.E. 2d at 924. The same reasoning applies here. The jury could properly consider the age of Crigger Huff in determining the weight of the aggravating circumstance that the act was especially heinous, atrocious or cruel.

Thus, we hold that the evidence was sufficient for the trial court to submit the aggravating circumstance of especially heinous, atrocious, or cruel.

VI.

[16] In defendant's sixth assignment of error, he contends that the trial court erred in instructing the jury as to the meaning of "mitigating circumstances." This error, he contends, denied him due process of law, equal protection under the laws, and his right to be free from cruel and unusual punishment under the appropriate federal and state constitutional provisions. We disagree.

The defendant asserts that the instruction was confusing because in the first paragraph the trial court used the term "best deserving" of the death penalty and in the second paragraph it used the term "less deserving." The trial court gave this instruction:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first-degree murder, which may be considered as extenuating, reducing the moral culpability of the case, and making it *best deserving* of the extreme punishment than other first-degree murders.
>
> A mitigating circumstance is also any fact or set of facts relating to the Defendant's age, character, education, environment, habit and mentality and other aspects of the Defendant's life, which may be considered extenuating and reducing the moral culpability of the killing or making the Defendant *less deserving* of the extreme punishment of death than other persons who have committed aggravated first-degree murder.

(Emphasis added.)

Defense counsel acknowledge that they do not know whether the instruction was accurately transcribed by the court reporter or whether the instruction was given as it reads. In either case, they contend, these conflicting instructions on a material feature of the case entitle defendant to a new sentencing hearing. We do not agree.

First, we consider the standard for our review. Defendant did not object at trial to these instructions or seek a correction. Where defendant has taken no action during trial to preserve an error for our review, he has the burden on appeal to show that

the error was deemed preserved for our review without his objection at trial, or that the error was plain error. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). If a defendant fails to object to jury instructions at trial, we review the instruction challenged on appeal under the plain error doctrine. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 376 (1983). Under the plain error doctrine, our review will be limited to those errors

> "in the exceptional case where, after reviewing the entire record, it can be said that the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has ' "resulted in a miscarriage of justice or in the denial to appellant of a fair trial" ' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' . . . ."

Id. at 660, 300 S.E. 2d at 378 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982)), *quoted in State v. Oliver*, 309 N.C. at 334, 307 S.E. 2d at 312.

Defendant has not met his burden of showing plain error. Assuming, for argument's sake, that the transcript is correct and that the trial judge misspoke, we find that any error he made was cured by the instruction which followed. Accordingly, we hold that there is no reasonable ground to conclude that the jury was misled or that defendant was prejudiced. *See State v. Davis*, 290 N.C. 511, 544, 227 S.E. 2d 97, 117 (1976).

VII.

[17] In his seventh assignment of error, defendant contends that the trial court's alleged error in its peremptory instruction on fourteen nonstatutory mitigating circumstances[14] violated the eighth and fourteenth amendments of the United States Constitution and the parallel provisions of the North Carolina Constitution.

The following instruction is representative of the peremptory instructions given by the court on the nonstatutory mitigating circumstances:

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14. The trial court, in fact, gave peremptory instructions on only twelve mitigating circumstances.

> If you find, unanimously, by a preponderance of the evidence, that the Defendant cooperated with law enforcement officers by making the statement on February 11, 1985 and all the evidence shows that this is true, and if you find that this has mitigating value, you would so indicate by having your foreman write, "Yes" in the space after this mitigating circumstance on the form. If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate by having your foreman write, "No," in the space.

Of the twenty-four potentially mitigating circumstances submitted, the jury found two mitigating circumstances.[15] Neither circumstance was among those nonstatutory factors peremptorily instructed upon by the trial judge.

This Court has said that when all the evidence offered suffices, if true, to establish a controverted fact, and no evidence is offered to the contrary, then the court may give a peremptory instruction. *State v. Johnson*, 298 N.C. 47, 74, 257 S.E. 2d 597, 617 (1979). A peremptory instruction tells the jury that if it finds that the fact exists as all the evidence tends to show, it will answer the question put to it in the manner directed by the trial judge. *Chisholm v. Hall*, 255 N.C. 374, 376, 121 S.E. 2d 726, 728 (1961). However, a peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility. *E.g., id., quoted in State v. Johnson*, 298 N.C. at 74, 257 S.E. 2d at 617.

Similarly, we have said that before the jury "finds" a nonstatutory mitigating circumstance, it must make two preliminary determinations: (1) that the evidence supports the existence of the circumstance *and* (2) that the circumstance has mitigating value. *State v. Fullwood*, 323 N.C. 371, 396-97, 373 S.E. 2d 518, 533-34 (1988). Only after the jury has made those two determinations is it proper for the foreman to answer "yes" on the verdict form, and so "find" the mitigating circumstance. *Id.* This two-part requirement for the finding of a *nonstatutory* mitigating circumstance is in contrast to our position in *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), where we

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15. The jury found that (1) the capital crime was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and (2) that the capital crime was committed while defendant was under a great deal of stress, N.C.G.S. § 15A-2000(f)(9).

held that on uncontroverted evidence of a *statutory* mitigating circumstance, it is error to instruct the jury that it must determine if the circumstance has mitigating value. Because the legislature has determined that the statutory circumstance has mitigating value, the effect of a peremptory instruction on a *statutory* mitigating circumstance is to remove the question of whether the circumstance has mitigating value. *Id.*

Defendant contends that the peremptory instructions given by the trial court were deficient under *Kirkley* because they failed to remove from the jury's consideration whether the circumstances existed. Defendant asserts that since the trial judge found that the evidence of these mitigating circumstances was uncontroverted, it was error to require the jury both to find that the circumstance existed *and* to find that the circumstance had mitigating value. In light of our recent decision in *Fullwood*, we disagree. Our holding in *Kirkley* concerning the effect of a peremptory instruction on statutory mitigating circumstances does not control the outcome in the case at bar. Our opinion in *Fullwood* on nonstatutory mitigating circumstances governs the decision here.

N.C.G.S. § 15A-2000(f)(9) is the statutory "catchall" provision for mitigating circumstances. *State v. Fullwood*, 323 N.C. at 396, 373 S.E. 2d at 533. It is defined as "[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), and includes those circumstances which are not specifically designated in the statute. *State v. Fullwood*, 323 N.C. at 396, 373 S.E. 2d at 533. Since 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, *id.*, the trial court did not err here by instructing the jury to do exactly what in *Fullwood* we said it must do.

Defendant also asserts that the court's peremptory instructions are deficient because they misstated the law and, when considered with the recommendation form, could have confused the jury and led it to a misapplication of the law. We disagree. The instruction was a clear and correct statement of the law.

Finally, defendant contends that the sentencer was precluded by this instruction from considering relevant mitigating evidence in violation of the eighth and fourteenth amendments. *Eddings v. Oklahoma*, 455 U.S. 104, 71 L.Ed. 2d 1 (1982). This argument has

no merit. The trial court submitted the twelve circumstances requested by defendant for the jury to consider in mitigation. The eighth and fourteenth amendments do not require that the sentencing jury "find" each circumstance which the court submits as potentially mitigating; our Constitution requires only that the sentencer be permitted to consider any relevant mitigating evidence. *See Raulerson v. Wainwright*, 732 F. 2d 803, 806-07 (11th Cir.), *cert. denied*, 469 U.S. 966, 83 L.Ed. 2d 302 (1984); *State v. Fullwood*, 323 N.C. at 396, 373 S.E. 2d at 533. Clearly, that requirement was met here.

We note that defendant failed to object to these peremptory instructions at trial. For that reason, he has failed to preserve the error for review except under the plain error doctrine. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). Since we conclude that defendant has failed to show any error at all, this assignment of error is overruled.

VIII.

[18, 19] In defendant's eighth assignment of error, he argues that various aspects of the court's instructions individually and in combination impaired the jury's fair consideration of evidence in mitigation of the crime and so violated the eighth and fourteenth amendments. This Court has previously considered and rejected all of defendant's contentions. First, defendant attacks the court's instructions that the jury must recommend a sentence of death if it found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances (issue three) and if it found that the aggravating circumstances were sufficiently substantial to call for the death penalty when considered with the mitigating circumstances (issue four). He contends that it was error to charge the jury that it was its duty to recommend a death sentence if issue four was answered affirmatively. This argument has been rejected repeatedly by this Court. *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); *State v. Pinch*, 306 N.C. 1, 32-34, 292 S.E. 2d 203, 227 (1982); *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 (1982). Second, defendant attacks the court's instruction requiring the jury to find each mitigating circumstance unanimously and by a preponderance of the evidence. He contends that the two requirements of unanimity and proof by a

preponderance of the evidence unconstitutionally limited the jury's consideration of mitigating circumstances in issue three,[16] and thus tainted the jury's response on issue four.[17] This Court has held that due process is not violated by requiring the defendant to prove mitigating circumstances by the preponderance of the evidence. *State v. Kirkley*, 308 N.C. at 224, 302 S.E. 2d at 160; *see State v. Brown*, 320 N.C. 179, 216, 358 S.E. 2d 1, 25 (1987). This Court has also rejected defendant's second argument that it was constitutional error to instruct the jury that it must reach unanimous agreement before finding mitigating circumstances under issue two. *State v. McLaughlin*, 323 N.C. 68, 108, 372 S.E. 2d 49, 74-75 (1988).

Accordingly, this assignment of error is overruled.

IX.

[20] In his ninth assignment of error, defendant contends that the trial court's instructions, taken as a whole and in context, coerced the jury into returning a unanimous sentence.

These are the circumstances that defendant contends resulted in a coerced verdict. After two hours of deliberation as to the sentence, the jury returned to the courtroom to deliver its verdicts. The jury recommended that defendant be sentenced to life imprisonment for the killing of Gail Strickland, and this exchange followed:

> CLERK: Is this the unanimous recommendation of the jury as to the victim, Gail Strickland?
>
> FOREMAN: (Shook head negatively.) It's not unanimous, but—I don't believe it had to be unanimous.
>
> COURT: Yes, the recommendation of the jury must be that answers to each of the issues must be unanimous and the recommendation of the jury must be unanimous.

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16. Issue three on the recommendation form asks: "Do you unanimously find beyond a reasonable doubt the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggraviting [sic] circumstance or circumstances found by you?"

17. Issue four on the recommendation form asks: "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?"

Is the recommendation of the jury not a unanimous recommendation?

FOREMAN: Yes, it is. It was our understanding, your Honor, that if we didn't have a unanimous recommendation of the death penalty, that the alternate penalty would be life in prison.

COURT: Well, it is the jury's responsibility to deliberate to attempt to reach a unanimous recommendation as to punishment in the case. And so, at this point, if the jury's recommendation is not a unanimous recommendation, it would be my responsibility to ask that you retire to the Jury Deliberation Room and to continue your deliberations to see if a unanimous recommendation can be reached.

Thank you very much. If you would return to the jury room.

(3:48 P.M. JURY LEFT COURTROOM.)

The trial court gave only the foregoing instruction and denied defense counsel's motions to instruct that a life sentence would be imposed if the jury were unable to reach a unanimous decision or, alternatively, to impose life sentences in both cases.

About forty-five minutes later, at 4:30 p.m., after the jury had been brought back into the courtroom to be recessed for the weekend, the trial judge a second time asked the foreman if the jurors had been unanimous in their earlier verdict, and the foreman again indicated that the verdict had not been unanimous. The trial judge repeated his instruction that the jurors' sentences must be unanimous; the foreman told the judge that the jurors had been confused over the requirement of unanimity, and all jurors indicated to the judge that the additional instructions had clarified that the sentence had to be unanimous.[18] Then, on defense counsel's re-

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18. COURT: Okay, ladies and gentlemen. Before I release you for the day, I need to make a couple of inquiries and to discuss a couple of matters with you.

First, for purpose of clarification, I would inquire of the foreperson of the jury, whether at the time the jury returned to the courtroom with a purported verdict, was the jury unanimous in its "No" answer to Issue Number Four in either of the two cases?

FOREMAN: Could I check?

(PAUSE)

COURT: Okay. Before you answer, let me—Issue Number Four, of course, reads: "Do you unanimously find beyond a reasonable doubt that

quest, the trial court gave an additional instruction on the deliberative process:

> While it is the responsibility of the jury to deliberate together reasonably and with a view to reaching a unanimous recommendation, if that can be done without violence to individual

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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 circumstances found by you?"

The question that I am asking, since on each of the form [sic] at that time, the word, "No," was written, I am inquiring in either case, was it the unanimous determination of the jury—

FOREMAN: (Shaking head negatively.) No, sir.

COURT: —with all twelve jurors agreeing that "No" should be the answer to that question?

FOREMAN: No, sir.

COURT: As to either of the two cases, was it the unanimous recommendation of the jury that life imprisonment be the appropriate punishment?

FOREMAN: No, sir.

COURT: For purposes of clarification, in your—as you proceed in your deliberations, as to Issue Number Four, for the issue in either case to be answered, "Yes," that must be the unanimous—all twelve jurors agreeing—answer to the issues. For it to be answered, "No," all twelve jurors must also agree that that is the appropriate answer.

Now, additionally, for the jury to recommend the death penalty in either case, that must be the unanimous recommendation of the jury. For the jury to recommend life imprisonment, in either case, that must be the unanimous recommendation of the jury.

The jury may not recommend the death penalty in either case unless that is the unanimous recommendation of the jury with all twelve jurors agreeing, consistent with appropriate answers to the issues that would support that recommendation that were also reached unanimously with all twelve jurors agreeing.

The jury may not affirmatively recommend life imprisonment in either case unless that is the unanimous recommendation of the jury, supported by unanimous answers to the issues which, consistent with my instructions, would support an affirmative recommendation of life imprisonment.

I do emphasize that in either case, the jury may not recommend the death penalty without the unanimous recommendation of all of the jurors.

Now, at this point, do you have any questions on behalf of the jury?

FOREMAN: No, sir. I would say that we were a little bit confused about the fact that it had to be unanimous.

> judgement, no juror should surrender their [sic] sincere and honest convictions as to the weight or effect of the evidence or the appropriate recommendation in the case simply for the purpose of obtaining unanimity in this case.

Then the jury was recessed for the weekend.

On Monday morning the court reconvened. Defense counsel requested that the court repeat its instruction that no jurors should surrender their conscientious convictions to achieve unanimity, but the trial court declined to do so, stating that it had given the requested instruction immediately before the weekend recess. Defense counsel also renewed their request that, since the jury had not yet returned a verdict, the court order jury deliberations to cease and impose life imprisonment, which the court also declined to do. Instead, the court asked the jury to continue its deliberations and further instructed the jury as follows:

> At such time as you have reached a unanimous recommendation as to punishment in the two cases that you are considering, you should give a note to that effect to the Bailiff . . . . *At such time as you determine that with reasonable amount of additional deliberations, you will not be able to reach a unanimous recommendation as to punishment*, you should give the Bailiff a note to that effect, and the Bailiff will bring you back into the courtroom.

(Emphasis added.) The jury retired to the jury deliberation room, and in less than an hour returned with a verdict of death in the murder of Crigger Huff and a verdict of life imprisonment in the murder of Gail Strickland.

COURT: And I can certainly understand that. At this time, have I adequately clarified that point?

FOREMAN: In my mind, yes, sir.

(Jurors nodding head.)

COURT: Would that be true of all of the jurors? If so, please raise your hand?

(All twelve jurors raise their hand.)

COURT: Okay. Thank you very much.

Okay. It is my understanding, at this point, that it is the request of the jury that we recess for the day and reconvene at ten o'clock Monday morning. Is that correct, Mr. Foreman?

FOREMAN: Yes, sir.

Defendant contends that the judge's unanimity instruction immediately following the jury's return of a nonunanimous verdict coerced the return of a unanimous verdict. He contends that that instruction in context told the jurors in effect that they could not return if they were unable to agree, that they could not return with a nonunanimous verdict, and that their only two alternatives were to return with a unanimous life sentence or with a unanimous death sentence.

In *State v. Smith*, 320 N.C. 404, 358 S.E. 2d 329 (1987), we concluded that the judge's unanimity instruction given after the jury asked what would happen if it could not reach a unanimous verdict probably resulted in a coerced verdict.[19] If a jury asks what will happen if it fails to reach a unanimous verdict, the trial court "must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court." *Id.* at 422, 358 S.E. 2d at 339. Since the trial court did not so instruct in *Smith*, we concluded that the instructions in the context of the jury's inquiry "probably were misleading and probably resulted in coerced unanimity."

However, in contrast, we believe that the instructions given in the case at bar, taken as a whole, were a correct statement of the law, could not reasonably have been misunderstood by a juror, and did not result in a coerced verdict. Any misunderstanding that might have resulted from the judge's instruction on unanimity

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19. In *Smith*, the jury asked the trial court this question: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" The court responded with this instruction:

> [A]s I instructed you, the decision that you reach must be unanimous. You may not reach a decision in response to any inquiry propounded to you by a majority vote. All twelve of you must agree unanimously in accord with the instruction I have given you.
>
> You all have a duty to consult with one another and deliberate with a view to reaching an agreement, if it can be done without violence to individual judgments. Each of you must decide these matters for yourselves, but only after impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, each of you should not hesitate to reexamine your own views and change your opinion if it is erroneous, but none of you should surrender your honest convictions as to the weight of effect the evidence [sic], solely because of the opinion of your fellow jurors, or for the mere purpose of returning a recommendation.

Id. at 420-21, 358 S.E. 2d at 338.

following the jury's initial return of the verdicts was cured by two subsequent instructions. On Monday morning, the trial court gave the instruction recommended in *Smith*: "If you determine that with a reasonable amount of additional deliberations you will not be able to reach a unanimous recommendation, you should give the Bailiff a note to that effect, and the Bailiff will bring you back into the courtroom." The *Smith* instruction was given before the jury retired to deliberate for the last time and, for that reason, could not have been, as defendant asserts, "too little, too late." The effect of this instruction was to make clear to the jurors that they were free to disagree. For this reason, we conclude that the trial court's instructions did not result in a coerced verdict.

[21] Next, defendant contends that the trial court erred in prohibiting defendant from informing the jury in argument that the capital punishment statute authorizes the trial court to impose a life sentence if the jury is unable to return a unanimous verdict. We find no error.

N.C.G.S. § 84-14 provides that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." N.C.G.S. § 84-14 (1985). Justice (now Chief Justice) Exum explained that,

> The origins of this provision are obscure but in *State v. Miller*, 75 N.C. 73, 74 (1876) Justice Reade said: "Some twenty five years ago a circuit judge restrained a lawyer from arguing the *law* to the *jury*, suggesting that the argument of the law ought to be addressed to the court, as the jury had to take the law from the court. Umbrage was taken at that, and the Legislature passed an act allowing counsel to argue both the law and the facts to the jury."

State v. McMorris, 290 N.C. 286, 287, 225 S.E. 2d 553, 554 (1976).

Subsequent cases construing N.C.G.S. § 84-14 have delineated the scope of the law that counsel may argue to the jury. Counsel may argue only the law that is applicable to the facts in the case; *id.; State v. Crisp*, 244 N.C. 407, 412, 94 S.E. 2d 402, 406 (1956). The penalty prescribed for criminal behavior is part of the law of the case. *State v. McMorris*, 290 N.C. at 287, 225 S.E. 2d at 554. Consequently, the criminal defendant may inform the jury in argument of the statutory punishment provided for the crime for which he is being tried. *Id.* at 287-88, 225 S.E. 2d at 554.

Informing the jury of the statutory punishment for the crime in serious felony cases "serves the salutary purpose of impressing upon the jury the gravity of its duty." *Id.* at 288, 225 S.E. 2d at 554. If imprisonment is an authorized penalty, advising the jury that it is a possible consequence of conviction encourages the jury to "give the matter its close attention and to decide it only after due and careful consideration." *Id.* A trial court's failure to permit defense counsel to advise the jury through argument of the statutory provision fixing the punishment for the offense charged is error. *Id.; accord, State v. Irick*, 291 N.C. 480, 504, 231 S.E. 2d 833, 848 (1977).

The statute fixing the penalty for capital crimes, N.C.G.S. § 15A-2000 (1988), authorizes the sentencing jury in capital trials to return one of two sentencing recommendations: either death or life imprisonment. The trial judge's duty is to impose the recommended sentence. *Id.* N.C.G.S. § 15A-2000 also authorizes defense counsel to argue at the sentencing phase of the capital trial the two authorized penalties of life imprisonment and death. N.C.G.S. § 15A-2000(a)(4) provides: "The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Defendant contends that this Court in *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553, stated that counsel may in his argument to the jury read *any* statutory provision fixing punishment for the offense charged. Defendant is mistaken. The language in *State v. Britt*, 285 N.C. 256, 273, 204 S.E. 2d 817, 829 (1974), quoted in *State v. McMorris*, 290 N.C. at 288, 225 S.E. 2d at 555, is not broad and sweeping, but rather narrow and concrete. In *Britt*, we stated that "[c]ounsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law *relevant to such case*, including *the* statutory provision fixing the punishment for the offense charged." *Id.* (emphasis added) (citations omitted). In the instant case, the trial court permitted defense counsel to do what we required in *Britt*: to state to the jury the statutory penalty provision relevant to the jury's task in a capital sentencing proceeding—the return of a death sentence or a sentence of life imprisonment. The trial court properly prohibited defense counsel from informing the jury of the default provisions of the capital sentencing statute. The default provision authorizing the trial court to impose a life sentence if the jury cannot reach unanimous agreement on the penalty is not relevant to the jury's

task, and the trial court is not required to allow defense counsel to argue it to the jury.

This construction of the scope of jury argument under N.C.G.S. § 84-14 is theoretically consistent with our position that the courts should not instruct that N.C.G.S. § 15A-2000(b) authorizes the trial court to impose a life sentence if the jury cannot reach unanimous agreement on the proper sentence. *State v. Smith*, 320 N.C. 404, 421, 358 S.E. 2d 329, 338-39 (1987); *State v. Young*, 312 N.C. 669, 685, 325 S.E. 2d 181, 191 (1985); *State v. Moose*, 310 N.C. 482, 502, 313 S.E. 2d 507, 520 (1984); *State v. Williams*, 308 N.C. 47, 73, 301 S.E. 2d 335, 351-52, *cert. denied*, 464 U.S. 865, 78 L.Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L.Ed. 2d 704 (1983); *State v. Brown*, 306 N.C. 151, 184-85, 293 S.E. 2d 569, 590 (1982); *State v. Smith*, 305 N.C. 691, 710, 292 S.E. 2d 264, 276, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982); *State v. Hutchins*, 303 N.C. 321, 353, 279 S.E. 2d 788, 807 (1981); *State v. Johnson*, 298 N.C. 355, 369-70, 259 S.E. 2d 752, 761-62 (1979). In declining to require the trial court to instruct on its authority to impose the life sentence, we have asked what effect the instruction would have: if it would be helpful to the jury in completing its task? Or if it would create problems that would interfere with the jury's task? In answering these questions, we have concluded that the instruction would not help the jury to complete its task, which is to make a sentencing recommendation based upon its consideration of the aggravating and mitigating circumstance(s) it finds to exist. *State v. Johnson*, 298 N.C. at 370, 259 S.E. 2d at 762. We have also concluded that the instruction would create a problem by permitting the jury to avoid coming to the sentencing recommendation. *Id.* The giving of the instruction would "be tantamount to an open invitation for the jury to avoid its responsibility and to disagree." *State v. Smith*, 305 N.C. at 710, 292 S.E. 2d at 276 (quoting *Justus v. Commonwealth*, 220 Va. 971, 979, 266 S.E. 2d 87, 92 (1980)), *quoted in State v. Smith*, 320 N.C. at 421-22, 358 S.E. 2d at 339.

Accordingly, we have held that if the jury inquires about nonunanimity, the jury is to be instructed that if it is unable to come to an unanimous sentencing decision, it is to report that to the trial court,[20] and the trial court is not to instruct it of

20. In his brief, defendant urges the Court to overrule its decision in *Smith*. He maintains that the confusion attending this jury's initial nonunanimous verdict would be eliminated by instructing the jury of the consequences of nonunanimity

the consequences of nonunanimity. *State v. Smith*, 320 N.C. at 422, 358 S.E. 2d at 339.

The case before us represents the intersection of these two legal principles, expressed in N.C.G.S. § 84-14 and in *State v. Johnson*, 298 N.C. at 370, 259 S.E. 2d at 762, and its progeny. Our goal here is to inform the capital sentencing jury of the law, to encourage the jury to take responsibility for its statutory task, to apply the law to the facts of the case, but to do so without diverting the jury from the task with uncertain possibilities affecting the character of the punishment or its duration. Refusing to permit defense counsel to argue the consequences of nonunanimity allows the jury to focus on its grave task without inviting it to escape its responsibilities. Therefore, consistent with those goals, with N.C.G.S. § 84-14 and the cases construing it, with the capital punishment statute, and with *Johnson* and its progeny, we hold that defense counsel is not entitled to argue that the trial court will impose a life sentence if the jury cannot reach a unanimous decision, and that the trial court properly refused to permit counsel to argue the consequences of nonunanimity.

[22] Finally, defendant contends that the trial court violated N.C.G.S. § 15A-2000(b) by failing to impose a life sentence in the killing of Crigger Huff when the jury returned with its nonunanimous verdict after two hours deliberation, or after forty-five minutes additional deliberation, when the trial was reconvened on Monday morning. N.C.G.S. § 15A-2000(b) in pertinent part provides: "If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment." N.C.G.S. § 15A-2000(b) (1988). We find no violation of N.C.G.S. § 15A-2000(b) in this case. What constitutes a reasonable time for jury deliberation in the sentencing stage is left to the trial judge's discretion, *e.g.*, *State v. McLaughlin*, 323 N.C. 68, 103, 372 S.E. 2d 49, 72 (1988), since the trial judge is in the best position to determine how much time is reasonable under the facts of a specific case. *State v. Kirkley*, 308 N.C. 196, 221, 302 S.E. 2d 144, 159. Cases vary in the number of aggravating and mitigating circumstances submitted to the jury for its consideration. *Id.* This Court held in *McLaughlin* that the trial court

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on defendant's request. Aside from that unsupported statement, defendant has advanced no new reasons to warrant reversal of our decision not to so instruct, and we decline to do so.

did not err in not imposing life sentences after the jury had deliberated seven hours on three separate cases. *State v. McLaughlin*, 323 N.C. at 103-04, 372 S.E. 2d at 72. The *McLaughlin* jury considered two aggravating circumstances and six mitigating circumstances in the first case, four aggravating and six mitigating circumstances in the second case, three aggravating and six mitigating circumstances in the third case, for a total of seven aggravating circumstances and eighteen mitigating circumstances. *Id.* In the case at bar, the jury considered two charges. Two aggravating circumstances and twenty-four mitigating circumstances were submitted in the killing of Crigger Huff, and one aggravating circumstance and twenty-four mitigating circumstances in the killing of Gail Strickland, for a total of three aggravating circumstances and forty-eight mitigating circumstances. At the time the jury returned with its nonunanimous verdict, it had deliberated for less than two hours, and at the time the jury reconvened on Monday morning, it had deliberated for less than two hours and forty-five minutes. Under these circumstances, we do not believe the trial court abused its discretion in refusing to dismiss the jury and to impose a life sentence on either occasion.

For the foregoing reasons, defendant's ninth assignment of error is overruled.

X.

[23] In defendant's tenth assignment of error, he contends that the trial court erred in permitting the prosecutor to make prejudicial comments about defendant, the crime, and the community during the prosecutor's penalty phase argument to the jury. Defendant objected on several occasions when the prosecutor urged the jury to speak for the community. The following excerpt is illustrative:

> Today, you speak for the people of North Carolina. You are the moral conscience of our community. By your verdict in [the guilt-innocence] phase . . . , you have indicated that you are completely satisfied, totally convinced, that this Defendant is guilty of first degree murder, and today, you sent out a message—
>
> MR. BRITT: Objection.
>
> COURT: Overruled.

MR. VANSTORY: —and the State contends that it should be a thunderous message—

MR. BRITT: Objection.

COURT: Overruled.

MR. VANSTORY: —to every person within earshot, "No, Randy Huff, we will not tolerate what you did. We think it is bad. We want the world to know it. We think you are deserving of the ultimate penalty provided by law."

Defendant maintains that the prosecutor argued by implication that the jury had an obligation to the community and to the state to return a sentence of death.

We have recently rejected a similar contention in *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, 484 U.S. 970, 98 L.Ed. 2d 406 (1987), wherein the defendant excepted to portions of the jury argument in which the prosecutor told the jury that he spoke for the citizens of this state. We concluded that such an argument "does no more than remind the jurors that 'the buck stops here' and that for purposes of defendant's trial, they are the voice and conscience of the community." *Id.* at 204, 358 S.E. 2d at 18 (quoting *State v. Scott*, 314 N.C. 309, 311-12, 333 S.E. 2d 296, 297-98 (1985)). Here, the prosecutor simply reminded defendant's jury that by its verdict in the guilt-innocence phase and its concomitant punishment decision, it was the voice and conscience of the community. A prosecutor may properly argue that the jury should return a sentence of death in the penalty phase of a capital trial. This assignment of error is overruled.

XI.

[24] In defendant's eleventh assignment of error, he contends that the trial court erred in permitting the prosecutor to state the law with regard to mitigating circumstances incorrectly during his closing argument to the jury. The prosecutor defined a mitigating circumstance as evidence that lessens or reduces the severity of the crime. Defendant asserts that this statement directs the jury that in order to find that certain evidence had mitigating value, it would have to find that the evidence was sufficient to reduce the crime of first-degree murder to some lesser included offense. This assertion is without merit. The prosecutor's definition was merely an acceptable shorthand statement of the charge on miti-

gating circumstances that the trial court subsequently gave to the jury. We have already concluded that no plain error exists in that portion of the charge. Moreover, the prosecutor could properly argue that the weight of any mitigating circumstance was for the jury's determination. *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983).

[25] Defendant also takes issue with the prosecutor's statement that the statutory mitigating circumstances submitted in this case had "been passed into law by the legislature," so that the legislature had therefore provided for their consideration by the jury, and that the nonstatutory mitigating circumstances were "created and urged" upon the jury by defense counsel. Defendant argues that the implication in this statement is that the nonstatutory mitigating circumstances submitted to the jury had not been provided for by the legislature and were thus unworthy of the jury's consideration. Defendant's argument is meritless. Having perused the transcript, we perceive no such implication in the prosecutor's statements. Defendant further asserts that the trial court put its "stamp of approval" on the prosecutor's statements by using similar language in its instructions to the jury. This assertion is equally meritless. With regard to mitigating circumstances, the trial court's charge tracked the pattern jury instructions in force at the time of trial. N.C.P.I.—Crim. 150.10 (Replacement May 1987). We find nothing erroneous in the instructions that the trial court gave as to mitigating circumstances. *See State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). Although the trial court differentiated between the statutory and nonstatutory mitigating circumstances, it did so in a purely factual manner. Furthermore, while instructing on the twenty-four mitigating circumstances, the trial court stated in twelve instances that "all the evidence shows that [the particular nonstatutory mitigating circumstance] is true." There is no implication whatsoever in the trial court's instructions that the nonstatutory mitigating circumstances were unworthy of the jury's consideration. This assignment of error is overruled.

XII.

[26] Defendant brings forward one further argument which he erroneously briefed as a preservation issue: that the trial court erred in denying his motion for a mistrial during the sentencing phase of his trial. The prosecutor called defendant's former girlfriend, who testified that defendant had assaulted her, and later

had shot at her while she was in her car. The girlfriend also testified that she carried threatening letters from defendant in her car. The trial court sustained defendant's objection to this latter testimony. Thereafter, the prosecutor marked for identification a card with the word "killed" inscribed upon it in black and red ink to approximate dripping blood. The prosecutor then asked the girlfriend how she came to receive the card, to which she replied that it had been placed in her mailbox while defendant was in jail awaiting trial. Defendant objected, and his motion to strike was allowed. The trial court instructed the jury not to consider this evidence. Defendant then moved for the mistrial that is the basis of this assignment of error. While conceding that the trial judge did not abuse his discretion in denying the motion for mistrial, defendant now contends that the prejudicial effect of the evidence could not be corrected by the trial court's instruction to the jury and further contends that in this capital-sentencing proceeding, the mistrial should have been granted. We disagree.

The girlfriend's improper testimony was cut off in mid-sentence by defendant's objection. The objection was sustained. Defendant asserts that the prosecutor must have known that the card could not be tied to defendant since he was in jail when it was placed in the girlfriend's mailbox, but he has failed to show how he was prejudiced. The trial court immediately sustained defendant's objection, granted the motion to strike and appropriately instructed the jury. It is not error for a trial court to deny a defendant's motion for mistrial for improper questioning where the trial court has sustained the defendant's objections and instructed the jury not to consider the question. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980).

PRESERVATION ISSUES

[27] Defendant brings forward six issues for preservation purposes. First, defendant contends that the trial court erred in denying his motion for separate juries for the guilt-innocence and penalty phases of his trial and his motion to prohibit the State from "death qualifying" the jurors. This Court has previously resolved these contentions contrary to defendant's position. *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); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *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).

[28] Second, defendant contends that the trial court erred in denying his motion to declare the North Carolina law on insanity unconstitutional. This issue has previously been decided against defendant. *State v. Mancuso*, 321 N.C. 464, 364 S.E. 2d 359 (1988); *State v. Evangelista*, 319 N.C. 152, 353 S.E. 2d 375 (1987).

[29] Third, defendant contends that the trial court erred in denying his motion for a bifurcated trial on the issues of insanity and guilt-innocence. This Court has previously decided this issue adversely to defendant. *State v. Mancuso*, 321 N.C. 464, 364 S.E. 2d 359.

[30] Fourth, defendant contends that the trial court erroneously excused jurors for cause because of their opposition to capital punishment. This argument was decided against defendant's position in *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983).

[31] Fifth, defendant contends that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional. We have previously considered this contention and have decided it adversely to defendant. *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. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982).

[32] Sixth, defendant contends that the trial court erred in denying his motion for a bill of particulars from the State disclosing the aggravating factors upon which it proposed to rely in seeking the death penalty. This contention has been previously rejected. *State v. Holden*, 321 N.C. 125, 362 S.E. 2d 513 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 935 (1988).

In summary, all of these contentions have been decided contrary to defendant's position. We decline to readdress them here. These assignments of error are overruled.

STATUTORY REVIEW

Having found no prejudicial error in the guilt-innocence phase or the sentencing phase of defendant's trial, we now turn to our statutorily mandated review of the judgment and sentence of death imposed upon defendant. N.C.G.S. § 15A-2000(d)(2) (1988). In doing so, we must determine whether the record supports the jury's findings of the aggravating circumstances upon which the sentencing court based its sentence of death, whether the sentence of death was imposed under the influence of passion, prejudice, or any

other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.; State v. Huffstetler*, 312 N.C. 92, 117, 322 S.E. 2d 110, 126 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985).

We have thoroughly reviewed the record, the transcript and the briefs in this case. We have already determined that the record supports the submission of the aggravating circumstances that defendant had previously been convicted of a felony of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988), and that the murder of defendant's son was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9) (1988). Further, the record reveals no indication that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

[33] We finally consider, therefore, whether the death sentence imposed in this case is proportionate to the penalty imposed in similar cases. We have defined this review as follows:

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and defendant's character, background, and physical and mental condition. If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, 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.

State v. Lawson, 310 N.C. 632, 648, 314 S.E. 2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed. 2d 267 (1985).

In conducting the proportionality review, this Court uses as its pool of similar cases all cases tried as capital cases since 1 June 1977 in which a jury has recommended a death or a life sentence or in which a life sentence was imposed pursuant to N.C.G.S. § 15A-2000(b). *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 pool consists of the cases in which this Court has found no prejudicial error in either the guilt phase or the sentencing phase. *State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987). In making the necessary comparison:

> First, this crime and this defendant are compared with the crime and the defendant in cases with similar facts, including cases in which the same aggravating circumstance was found. Second, this case is compared to cases in which this Court has affirmed a sentence of death in order to determine whether this case "rise[s] to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Bondurant*, 309 N.C. 674, 693, 309 S.E. 2d 170, 182 (1983), quoting *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983).

State v. Brown, 320 N.C. 179, 220, 358 S.E. 2d 1, 28 (1987).

In the case sub judice, defendant was found guilty of the first-degree murder of his infant son and the first-degree murder of his mother-in-law. The sentence of death recommended by the jury for the murder of defendant's son was based on the finding of two aggravating circumstances: (1) defendant had previously been convicted of a felony of violence to the person, N.C.G.S. § 15A-2000(e)(3); and (2) the murder of defendant's infant son was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9). Of the twenty-four mitigating circumstances submitted to the jury, two were found: (1) the capital felony was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); and (2) the nonstatutory mitigating circumstance that defendant was under a great deal of stress at the time of the offenses.

This Court has upheld the death sentence in cases where the juries have found that the murders were especially heinous, atrocious, or cruel. In *State v. Spruill*, 320 N.C. 688, 360 S.E. 2d 667 (1987), *cert. denied*, --- U.S. ---, 100 L.Ed. 2d 934 (1988), for example, the defendant was convicted of the first-degree murder of his former girlfriend. The evidence showed that the defendant cut the victim's throat so that she drowned in her own blood. Here, by comparison, the evidence established that the victim died from suffocation after being buried alive. *See 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) (jury found this aggravating circumstance where defendant repeat-

edly hit his mother-in-law over the head with an iron pan); *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) (defendant beat victim with tire tool, cut her with knife, raped her, ran over her body with a car, and left her to die in a lonely field); *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed. 2d 247 (1983) (brutal slaying of heavily intoxicated woman who was utterly defenseless).

Moreover, the pool includes affirmed death penalty cases in which the jury found as an aggravating circumstance that the defendant had previously been convicted of a felony involving the use of violence to another person. *See State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, 484 U.S. 970, 98 L.Ed. 2d 406 (1987) (this aggravating circumstance supported death sentence where victim shot in his home); *State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279, *cert. denied*, 484 U.S. 918, 98 L.Ed. 2d 226 (1987) (multiple killings); *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) (female victim robbed by defendant while on her way to work).

Although our research has revealed no cases already in the pool in which the victim was buried alive, certain comparisons in this case pertaining to the nature and quality of the murder of defendant's infant son may be made with other cases in the pool. In *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982), for example, a nine-year-old child and her young mother were brutally stabbed and slashed to death. The bodies were extensively mutilated. The pathological evidence showed that many of the wounds were inflicted before death. These murders were pitiless and apparently motiveless. In *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110, the victim was battered to death by a prolonged series of blows to the head with an iron pan. This Court characterized the murder as a senseless, unprovoked assault by an adult male on a sixty-five-year-old female in her home. Although the bloody violence in *Brown* and *Huffstetler* is not present in the case before us, the evidence nevertheless establishes that defendant murdered his helpless, defenseless infant son without pity, condemning him to die by suffocation by burying him alive. Defendant himself described how he took his child to the place where he had dug a hole for the grave. After allowing the child to play in the leaves under a nearby tree, defendant

picked him up and "told him good-bye." The child was looking at defendant. Defendant laid the child in the hole and the child began to play with the dirt and cut roots. Defendant did not look at his infant son again; he shoveled the earth in on the child and placed the sod on top. He threw the shovel away and left in his car. The nature and quality of defendant's murder of his infant son is such that we conclude that this is not a proper case in which to exercise our statutory authority to set aside the sentence of death.

Finally, as we recently stated:

> This Court has found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E. 2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E. 2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E. 2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). In none of these cases was the defendant convicted of more than one murder.

State v. McNeil, 324 N.C. 33, 59-60, 375 S.E. 2d 909, 925 (1988).

The case of *State v. Allen*, 322 N.C. 176, 367 S.E. 2d 626 (1988), like the case before us, involved the killing of an infant child by his parent, and the defendant received a life sentence. Unlike *Allen*, this case involves two first-degree murders.

Our comparison of this defendant and this crime with defendants and crimes in cases with similar facts compels this Court to conclude that the death sentence imposed upon his conviction of the first-degree murder of his infant son is not excessive or disproportionate and must be affirmed.

We hold that defendant received a fair trial and sentencing proceeding, free from prejudicial error. The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Defendant's death sentence is not disproportionate to the penalty imposed in similar cases. Accordingly, in both the guilt-innocence and sentencing phases of defendant's trial, 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 for the first time the mitigating circumstance unanimity instruction issue, 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), *cert. granted*, --- U.S. ---, 103 L.Ed. 2d 180 (1989), 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 WEBB concurring.

I concur in the result reached but I disagree with the majority reasoning that it was error for the court to allow the defendant to be removed from the courtroom during one stage of the trial. The majority has held this was harmless error. I would hold that it was not error.

I believe it should be obvious that a defendant in a capital case or any other case cannot be allowed to stop a trial by the disruptive tactics the defendant used in this case. I believe it would be better to place the decision on this actual reason than rationalizing it on some other ground.

I believe we should hold there is an exception to the rule that a defendant in a capital case cannot waive his right to be present at all stages of the proceedings. This exception should be that if a defendant becomes so disruptive that the trial cannot continue the defendant may be removed from the courtroom. Applying this exception to the case, there would be no error.

Justice FRYE dissenting as to sentence.

I concur in the result reached as to the guilt phase of the trial but find it necessary to dissent as to the result reached regarding the sentencing phase. As to the sentencing phase, defendant contended that the two requirements of unanimity and proof of miti-

gating circumstances by a preponderance of the evidence unconstitutionally limited the jury's consideration of mitigating circumstances in Issue Three, and thus tainted the jury's response on Issue Four. The majority rejects defendant's argument regarding unanimity on the authority of *State v. McLaughlin*, 323 N.C. 68, 108, 372 S.E. 2d 49, 74-75 (1988). For the reasons stated in my dissenting opinion in *McLaughlin*, I continue to believe that the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L.Ed. 2d 384 (1988), is applicable to the North Carolina death sentencing procedure. I also note that the United States Supreme Court has granted certiorari in the case relied on by the majority of this Court in *McLaughlin*. *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L.Ed. 2d 180 (1989).

STATE OF NORTH CAROLINA v. WAYNE ALAN LAWS

No. 653A85

(Filed 26 July 1989)

1. Constitutional Law § 66— murder—judge's ex parte communications with jurors—no error

A murder defendant's constitutional rights to be present at all stages of his trial were not violated where the trial judge, at the end of the day during jury selection, sent home all those who were still prospective jurors and indicated that he would talk privately with those who had been dismissed from jury service; or where the record indicates that the trial court had routinely inquired about any problems individual jurors might have that the court needed to know about and no such problems were expressed by the jurors or discussed with the court.

Am Jur 2d, Criminal Law § 912; Jury §§ 190, 194.

2. Criminal Law § 9.3— murder—acting in concert—evidence sufficient

The trial court did not err in the guilt-innocence phase of a murder prosecution by instructing the jury that it could find defendant guilty not only for having personally committed the murders but also on the separate theory of acting in con-

cert where the uncontroverted evidence tended to show that Texford Watts was in close proximity to the defendant at all pertinent times, from the time they picked up the drunken victims in Watts' car to the time they disposed of evidence after the murders, including evidence tending to incriminate both the defendant and Watts; Watts knew the victims and gave them a ride in his car, driving them to the scene of the murders; physical evidence tended to show that Watts was in very close proximity during the brutal beatings of both victims; Watts picked up the defendant and gave him a ride home after the murders, giving him bloody clothing to dispose of along with the defendant's bloody clothing; and the murder weapon came from the trunk of Watts' car.

Am Jur 2d, Homicide § 486.

3. Homicide § 8.1— murder—voluntary intoxication—evidence not sufficient

The trial court did not err in a murder prosecution by not instructing the jury during the guilt-innocence phase of the trial on voluntary intoxication where the evidence showed only that defendant drank some unknown quantity of beer over a period of several hours and claimed not to remember the killings. This was not sufficient as a matter of law to meet defendant's burden of producing substantial evidence supporting a conclusion that his mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated intent to kill.

Am Jur 2d, Homicide §§ 127, 447, 458, 517.

4. Homicide § 24.1— murder—burden of proving malice—lapsus linguae

The trial court's instruction during a murder prosecution that the law *requires* that a killing intentionally inflicted with a deadly weapon is unlawful and done with malice was a mere lapsus linguae and, given the court's subsequent instructions, a juror could not have reasonably interpreted the trial court's charge as relieving the State of its burden of proving malice beyond a reasonable doubt. The lapsus linguae more likely prejudiced the State since the jury was not told that it could, but was not required, to *infer* malice if it found an intentional killing with a deadly weapon.

Am Jur 2d, Homicide §§ 50, 51, 500.

5. Criminal Law § 91.1; Constitutional Law § 40— preparation of closing argument—failure to continue trial—no error

Defendant in a murder prosecution was not denied effective assistance of counsel because the court refused to continue the trial where defendant's counsel, who presented no witnesses, told the court that the prosecution had informed him that the remainder of the State's evidence would take all of Friday; defendant's counsel had put off working on his closing argument until the weekend and was unprepared when the State concluded its case on Friday morning; the court recessed from 12:30 p.m. until 2:00 p.m. and told defendant's counsel to prepare his argument during that time; defense counsel's argument met an objective standard of reasonableness and was within the range of competence demanded of attorneys in capital cases; and defendant pointed to no specific deficiencies in his counsel's closing argument.

Am Jur 2d, Criminal Law §§ 984 et seq.

6. Jury § 7.6— murder—statements by prosecutor during jury selection—no error

Defendant in a murder prosecution was not entitled to a new trial because of statements the prosecutor made during jury selection which were incomplete statements of the law a jury must apply in a capital sentencing proceeding, but which did not tend to improperly diminish the jurors' responsibility in the process. Furthermore, the trial court gave full and correct instructions with regard to the jury's responsibilities during the sentencing proceeding.

Am Jur 2d, Homicide § 558; Jury §§ 195 et seq.; New Trial § 162.

7. Criminal Law § 102— murder—jury selection—prosecutor's comments

The prosecutor's comment during jury selection in a murder prosecution that he had a personal belief about the case which should not come in did not amount to a gross impropriety requiring the trial court's intervention.

Am Jur 2d, Homicide § 558; Jury §§ 195 et seq.; New Trial § 162.

8. Criminal Law § 102— murder—jury selection—prosecutor's comments

The trial court did not abuse its discretion by failing to intervene ex mero motu in a murder prosecution when, during jury selection, the prosecutor pointed out several persons in the courtroom as being members of the victim's family.

Am Jur 2d, Jury §§ 195 et seq.

9. Criminal Law § 102— murder—jury selection—prosecutor's comment

There was no gross impropriety requiring the trial court to intervene ex mero motu during jury selection in a murder prosecution where defense counsel objected on appeal, but not at trial, to the prosecutor's "speaking objections." Defense counsel's argument that these objections had the effect of ridiculing counsel is tenuous, but assuming that they were improper, their potential for affecting the subsequent trial was de minimis.

Am Jur 2d, Jury §§ 195 et seq.

10. Jury § 6.2— murder—jury selection—prosecutor's question

There was no gross impropriety requiring intervention ex mero motu in jury selection for a murder trial where the prosecutor repeatedly asked whether jurors could vote for the death penalty if the State satisfied the juror beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

Am Jur 2d, Jury §§ 195 et seq.

11. Criminal Law § 102.6— murder—opening arguments—prosecutor's statements—no error

There was no prejudicial error in the prosecutor's opening argument in a murder prosecution from the prosecutor's admonishment of the jury that it was their responsibility to uphold the law even though the victims were alcoholics and street people, or from the prosecutor's explanation that some of his expert witnesses were unavailable because they were testifying in a murder case in another county. N.C.G.S. § 15A-1443(a) (1988).

Am Jur 2d, Trial §§ 202, 204, 293.

12. Criminal Law § 128.2— murder—prosecutorial outburst—mistrial denied

The trial court in a murder prosecution did not err by denying defendant's motion for a mistrial where, at the close of his cross-examination of an accomplice, defense counsel asked the accomplice to admit that he had been charged with the same murders as defendant, asked if the accomplice knew what a liar and a lie were, asked if the accomplice would lie to protect himself, and the prosecutor interjected that he did not want to make an objection but that another judge he named would have defense counsel locked up. Any potential impact was slight and there is no reason to believe that the prosecutor's outburst, while inappropriate, made it impossible for defendant to receive a fair and impartial trial.

Am Jur 2d, Trial § 193.

13. Criminal Law § 102.6— murder—closing argument—reference to victims' families

The prosecutor's closing argument in a murder prosecution did not include gross improprieties requiring a new trial or a new sentencing proceeding where the prosecutor told the jury to try to do justice for the victims and their families. Unlike the victim impact statement in *Booth v. Maryland,* 482 U.S. 496, this statement did not amount to introducing irrelevant details about the personal characteristics of the victims, the emotional impact of the crimes on the victims' families, and the family members' opinions about the crimes and the defendant.

Am Jur 2d, Trial §§ 296 et seq.

14. Criminal Law § 102.6— murder—prosecutor's closing argument—no error

There was no error in a murder prosecution where the prosecutor argued to the jury that defendant committed the killings "for the love of killing" where that was a reasonable and permissible inference to be drawn from the evidence.

Am Jur 2d, Trial § 193.

15. Criminal Law § 102.6— murder—prosecutor's closing argument—no error

There was no error in a murder prosecution from the prosecutor's closing argument regarding defendant's claimed

loss of memory because any suggestion in the prosecutor's statement that the jury should not believe the defendant's claimed loss of memory was a reasonable inference to be drawn from the evidence.

Am Jur 2d, Trial § 193.

16. Constitutional Law § 74— murder—closing argument—comment on defendant's loss of memory

There was no error in a murder prosecution where the prosecutor noted in his closing argument that defendant claimed that he had no memory of events after a certain point, that he had stopped talking, and that officers had left him alone because the prosecutor was simply summarizing defendant's statement and the manner in which it was terminated. The prosecutor made no mention of any invocation of the Fifth Amendment right to remain silent by defendant and defendant's statement to police that he did not remember anything about events subsequent to picking up the victims and his subsequent silence did not constitute an invocation of his right to remain silent.

Am Jur 2d, Trial §§ 237 et seq.

17. Criminal Law § 102.6— murder—prosecutor's closing argument—no gross impropriety

A prosecutor's closing argument in a murder prosecution that nothing could make what had happened any different but that they could make sure that defendant and an accomplice never did that again was not a gross impropriety requiring the trial court to intervene ex mero motu where the prosecutor's argument that the jury should find defendant guilty was supported by evidence and was within the range of a permissible closing argument and the reference to the accomplice, while irrelevant to the trial of defendant, was not prejudicial to the defendant.

Am Jur 2d, Trial §§ 225, 289.

18. Criminal Law § 102.6— murder—closing argument—prosecutor's definition of manslaughter and voluntary intoxication

There was no prejudicial error in a murder prosecution from the prosecutor's inadequate explanation of voluntary

manslaughter because the trial court's subsequent correct charge provided adequate correction of any possible confusion, and any error in the prosecutor's statements of the law of voluntary intoxication was favorable to defendant because defendant was not entitled to an instruction on voluntary intoxication.

Am Jur 2d, Trial § 277.

19. Jury § 6.3— murder—jury selection—belief in literal interpretation of Bible—objection sustained

There was no abuse of discretion in a murder prosecution where the court sustained the prosecutor's objection to defense counsel asking a juror if she believed in the literal interpretation of the Bible where the trial court allowed defense counsel to inquire into the jurors' religious denominations and the extent of their participation in church activities, allowed defense counsel to ask a juror whether she believed in the Bible, and otherwise gave defense counsel wide latitude to question the jurors about their beliefs, attitudes and biases.

Am Jur 2d, Jury § 202.

20. Criminal Law § 135.9— murder—sentencing—nonstatutory mitigating factor—denied

The trial court did not err when sentencing defendant for murder by refusing to submit as a nonstatutory mitigating circumstance that defendant had had a fatherless childhood with no male guidance where, assuming that defendant requested submission of this circumstance and that the request was denied by the trial court, such a finding by the jury would have been based upon speculation and conjecture rather than substantial evidence in the record.

Am Jur 2d, Criminal Law §§ 598, 599.

21. Criminal Law § 135.9— murder—sentencing—mitigating factor—failure to submit no prior criminal activity

The trial court did not err when sentencing defendant for murder by failing to submit the statutory mitigating circumstance that defendant has no significant history of prior criminal activity where a jury finding of no significant history of criminal activity, based solely upon defendant's employer's remarks about marijuana use, would have been based purely

upon speculation and conjecture and not upon substantial evidence. Moreover, the trial court at defendant's request gave the jury a peremptory instruction to find as a nonstatutory mitigating circumstance that defendant had not been previously convicted of a felony involving violence to the person and, because the evidence before the jury was totally silent on the question, the peremptory instruction was erroneous but favorable to defendant, so that defendant received virtually the same benefit he would have received if the jury had found the statutory mitigating circumstance of no significant history of prior criminal activity and without the State being allowed to introduce his criminal record and other evidence of prior criminal activity. N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

22. Criminal Law § 135.9— murder—sentencing—mitigating factor—defendant's age—not submitted

The trial court did not err when sentencing defendant for murder by not submitting to the jury the statutory mitigating circumstance of defendant's age at the time of the crimes where there was no substantial evidence before the jury concerning this circumstance. N.C.G.S. § 15A-2000(f)(7).

Am Jur 2d, Criminal Law §§ 598, 599.

23. Criminal Law § 135.8— murder—sentencing—aggravating factor—especially heinous, atrocious or cruel

In a sentencing proceeding for first degree murder, the submission to the jury of the aggravating factor that the murders were especially heinous, atrocious or cruel was justified by the prolonged brutal attacks which were required to inflict the gruesome injuries and to produce the other gruesome evidence in this case. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598, 599.

24. Criminal Law § 102.12— murder—sentencing—prosecutor's argument

There was no prejudicial error in a sentencing proceeding for first degree murder from the prosecutor's reading from *State v. Huffstetler*, 312 N.C. 92, to bolster his argument that

the jury should find that these murders were especially heinous, atrocious or cruel where, assuming that the prosecutor's unobjected to reading from *Huffstetler* and argument were so grossly improper as to require the trial court to intervene ex mero motu, the defendant failed to show any resulting prejudice in light of the overwhelming evidence of this aggravating factor produced at trial.

Am Jur 2d, Trial §§ 272, 279.

25. Criminal Law § 102.12— murder—sentencing—prosecutor's argument—use of decisional law

There was no error in a sentencing proceeding for first degree murder where the prosecutor argued from *State v. Pinch*, 306 N.C. 1, that the jury could consider the defendant's attack on each victim in aggravation of the murder of the other. A fair interpretation of the prosecutor's reference to the decisional law in context would be that this Court had said that the course of conduct aggravating circumstance exists when the defendant engages in a course of violent criminal conduct against two persons and thereby kills them; that is a fair statement of the law.

Am Jur 2d, Criminal Law §§ 598, 599.

26. Criminal Law § 135.8— murder—sentencing—aggravating factor—required to be weighed

By enacting specific aggravating circumstances to be considered in capital sentencing, the Legislature intended that a jury having found one of those statutory circumstances to exist must give it some weight in aggravation when determining the appropriate sentence to recommend; the amount of weight to be given such a statutory aggravating circumstance is left to the determination of the jury. N.C.G.S. § 15A-2000(b), N.C.G.S. § 15A-2000(c).

Am Jur 2d, Criminal Law §§ 589, 600.

27. Criminal Law § 102.12— murder—sentencing—prosecutor's closing argument

There was no gross impropriety requiring the trial court to act ex mero motu in the closing argument of the sentencing

proceeding of a first degree murder trial where the prosecutor argued that the victims were entitled to the protection of the law, even though they were just average people suffering sickness and weakness. The argument did not inject highly prejudicial, irrelevant and improper matters such as those contained in the victim impact statements prohibited by *Booth v. Maryland*, 482 U.S. 496.

Am Jur 2d, Trial §§ 281, 293.

28. Criminal Law § 102.12— murder—sentencing—prosecutor's closing argument

There was no gross impropriety requiring the trial court to intervene ex mero motu in the closing argument of the sentencing proceeding at a murder trial where the prosecutor stated that it was "pathetic" that consideration of the "especially heinous, atrocious or cruel" aggravating circumstance requires the jury to decide that some murders are worse than others. Any effects of such comment were de minimis in light of the fact that the jury was told at all times that it must follow the law and that the law required that first degree murders be especially heinous, atrocious or cruel for this circumstance to exist.

Am Jur 2d, Trial §§ 225, 289, 317.

29. Criminal Law § 102.12— murder—sentencing—prosecutor's closing argument

There was no gross impropriety requiring the trial court to intervene ex mero motu in the sentencing proceeding of a murder trial based on the prosecutor's alleged misstatement of the law governing the statutory mitigating circumstance of impaired capacity where the jury found the statutory circumstance in mitigation of the crimes despite the prosecutor's comments. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Trial § 277.

30. Criminal Law § 102.12— murder—sentencing—prosecutor's closing argument

There was no error in the sentencing proceeding of a murder prosecution regarding the prosecutor's argument concerning the "any other circumstance" provisions of N.C.G.S.

§ 15A-2000(f)(9) where the prosecutor's statement, taken in its entirety, would have been reasonably interpreted by the jurors only as an admonition to base their finding and weighing of "any other circumstance" in mitigation upon the evidence and not upon their emotions; furthermore, any possible confusion was corrected by the trial court's instructions.

Am Jur 2d, Trial §§ 277, 317.

31. Criminal Law § 102.12— murder—sentencing—prosecutor's closing argument

There was no error in the sentencing proceeding of a murder trial where the prosecutor argued that the death penalty was "the only way . . . we are ever going to be sure that this man . . . will never do what he has done again."

Am Jur 2d, Trial § 289.

32. Criminal Law § 102.12— murder—sentencing—prosecutor's closing argument

There was no gross impropriety requiring the trial court to intervene ex mero motu in the sentencing portion of a murder prosecution where the prosecutor made Biblical references and pointed out that the jury's task was to do what was right by man's law. The prosecutor's references did not amount to a claim that his authority came from God or that to resist his authority was to resist God.

Am Jur 2d, Trial §§ 283-285.

33. Criminal Law § 135.10— murder—death sentence—not arbitrary or disproportionate

A death sentence for two first degree murders was not recommended or entered under the influence of passion, prejudice, or any arbitrary circumstance, and the sentence of death was not disproportionate where defendant brutally and literally beat the brains out of two heavily intoxicated victims for no apparent reason; he mutilated portions of their skulls while beating them to death with a claw hammer and left them lying on a rural dirt road in pools of blood, hair, flesh, brain matter and pieces of skull; each had been beaten about the head, neck and torso with a hammer and suffered injuries far beyond those required to incapacitate or even kill them;

one victim also had six broken ribs; at least one of the victims was already incapacitated and lying motionless on the ground when the savage attacks with the hammer began; the defendant had met the victims a few hours before and apparently had no quarrel with them as they traveled to the isolated area where the brutal killings took place; the jury found the aggravating circumstances that each murder was especially heinous, atrocious or cruel and that each was committed during a course of conduct involving crimes of violence against another person; and the jury found mitigating circumstances that defendant had no prior felonies involving violence against persons, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired, the defendant had been a good and responsible employee, and the defendant had financially assisted his family.

Am Jur 2d, Criminal Law §§ 599, 609, 628.

Justice FRYE concurring in the result.

APPEAL of right by the defendant from two judgments sentencing him to death for two convictions of first-degree murder, entered by *Cornelius, J.*, in the Superior Court, DAVIDSON County, on 20 August 1985. Heard in the Supreme Court on 9 May 1989.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Louis D. Bilionis, Assistant Professor of Law, University of North Carolina School of Law, for the defendant.

MITCHELL, Justice.

The defendant was tried on proper indictments at the 12 August 1985 Special Criminal Session of Superior Court, Davidson County, and was convicted of two counts of murder in the first degree. The jury recommended and the trial court entered a sentence of death for each murder. On appeal the defendant brings forward numerous assignments of error which we address *seriatim*. We conclude that the defendant's trial and sentencing were free of prejudicial error.

The State's evidence tended to show that the bodies of Ronnie Waddell, 35, and James Kepley, 57, were found on a rural dirt road in Davidson County on the morning of 19 March 1984. Each had been bludgeoned to death with a hammer which had left telltale wounds about the head and torso. Each had suffered severe lacerations about the head and multiple skull fractures, including large shattered areas of the skull and round "punched out" holes in the skull about an inch in diameter. Pools of blood and pieces of flesh, hair, skull and brain matter were scattered about the bodies. One of the victims had six broken ribs. Autopsies revealed that both victims had died of extensive brain injuries inflicted with a blunt instrument and that both had been heavily intoxicated at the time.

The day after the discovery of the bodies, authorities took Texford Watts into custody and seized a Ford Mustang belonging to Watts and his sister. The defendant Wayne Alan Laws also was taken into custody at about that time. Tire tracks found on the dirt road at the scene of the murders appeared to have been made by tires similar to those on the Mustang. Blood and hair were collected from several areas of the interior and exterior of the vehicle. After taking Watts into custody, authorities also removed several pieces of clothing from a dumpster at the apartment complex where Watts and the defendant lived. Bloodstains, hair, flesh and brain matter were found on the clothing, which included jeans and a shirt belonging to Watts and jeans, a t-shirt, shoes and socks belonging to the defendant Laws.

The victims had relatively rare blood types. Watts' shirt was found to be stained with blood of types consistent with those of both victims. The jeans apparently belonging to Watts were stained with blood consistent with victim Waddell's blood type. The jeans apparently worn by the defendant were stained with blood of types consistent with those of both victims. The t-shirt, shoes and socks identified as the defendant's were stained with blood consistent with the victim Kepley's blood type. Blood found on the Mustang also was consistent with Kepley's blood type.

Hair consistent with that of Waddell was found on Watts' clothing. Hair consistent with that of Kepley was found on the defendant's clothing. Microscopic examination revealed that many of these hairs had been struck repeatedly with a blunt instrument and had been forced from the scalp by blows with a blunt instru-

ment. Fibers collected from the Mustang were consistent with those found on the clothing of the two victims, the defendant and Watts.

At trial, Watts was a witness for the State. Watts testified that he and the defendant lived in the same apartment complex but were not very close friends. They had known each other only a few weeks prior to the murders. Watts testified that on the afternoon of 18 March 1984, he and the defendant drove to Lexington in the Mustang, purchased beer and rode up and down Main Street. After eating dinner in a Lexington restaurant, they headed back to Main Street and were stopped by a police officer who inquired if Watts, who was driving, was drinking. The officer let them go and they went to South Main Street and stopped at a convenience store.

Across the street from the convenience store, the two victims, Waddell and Kepley, were sitting on the curb in front of a restaurant. Watts knew Waddell and recognized Kepley. Watts and the defendant briefly talked with Waddell and Kepley. Waddell tried to sell Watts a tire he had with him and asked Watts for a beer. Watts and the defendant drove away but later saw the victims a little closer to town, still with the tire. Watts and the defendant stopped to talk with the victims, and Waddell asked them to take him somewhere he could get rid of the tire. Waddell and Kepley sat in the back seat of the Mustang, and Waddell began giving Watts directions. It was then dark.

After awhile, they came to a dirt road where there were no houses. Watts stopped the car on the dirt road to get out and relieve himself. Watts testified that after he returned to the car, the defendant Laws got out and asked one of the victims if he also needed to relieve himself. The defendant and both victims left the car, and Watts then heard a noise behind the car which sounded like "licks being passed." When he got out to investigate, Watts saw Kepley lying at the rear of the car, apparently unconscious, and the defendant beating Waddell with his fists a few feet away.

Watts testified that he told the defendant to leave Waddell alone, but the defendant pushed Watts out of the way, got the car keys from the ignition switch, took a claw hammer out of the trunk and began beating Waddell with the hammer. Watts testified that after Waddell fell to the ground, the defendant continued beating him on the head with the hammer. When Watts tried

to stop him, the defendant threatened to kill Watts and struck him on the hand with the hammer. After beating Waddell, the defendant started beating Kepley, who was still motionless on the ground, with the hammer. Watts testified that he ran up the road and hid until he heard no more noises. He said he then returned to the Mustang and drove home.

Conflicting statements which Watts had made to police were introduced at trial. He first told police that, after the attack on the victims, he did not see the defendant again until the next day. He later said that while driving home, he saw the defendant on the side of the road and gave him a ride home.

Watts testified at trial that he had given his bloody clothes, later found in the dumpster, to the defendant at the defendant's request. He said that he had started to telephone police about the killings on the night they occurred but had hung up the telephone before the operator connected him with police. He also testified that when he saw the defendant the next day, the defendant threatened to kill him if he told anyone about the killings.

A statement which the defendant Laws had given to police after his arrest was introduced at trial. He more or less confirmed the events described by Watts, up to the time at which they had stopped to talk to Waddell and Kepley in Lexington. The defendant said he remembered stopping and talking with two people whom he did not know, but he could not remember anything after that because he had been drinking.

During the separate sentencing proceeding required by N.C.G.S. § 15A-2000, the trial court submitted and the jury found two aggravating circumstances as to each murder: that the murder was especially heinous, atrocious or cruel, and that the murder was part of a course of conduct which included commission of other crimes of violence against other persons. Five mitigating circumstances were submitted to the jury: that the defendant had not been convicted previously of a felony involving violence to persons, that the defendant had been a good and responsible employee, that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired, that the defendant helped to support his family, and any other mitigating circumstances which the jury might find from the evidence. The jury found the four specific circumstances submitted but not "any other" circumstances.

Additional evidence and other matters relevant to the defendant's specific assignments of error are discussed at other points in this opinion.

[1] By his first assignments of error, the defendant contends that his state and federal constitutional rights to be present at all stages of his trial were violated on two occasions when the trial court talked privately with jurors. The first such incident occurred during jury selection when the trial judge, at the end of the day, told some jurors to go home and then told others that he would be coming down to talk to them privately about their jury service. The defendant's contention concerning this incident is without merit, as the transcript shows that the trial judge sent all those who still were prospective jurors home and indicated that he was going to talk only to those whom he had dismissed from jury service. These "jurors" had no role in the defendant's trial.

The second incident occurred at the opening of court on the fifth day of trial. The opening was delayed that morning as the trial court dealt with several matters. When the jurors returned to the courtroom, the judge told the jury:

> We're very pleased to have the jury back again. I apologize to you for the delays. There were several matters that required the Court's attention this morning. It took much longer than we anticipated. I think when I was back earlier that each of you told me you were having no problems this morning.

The defendant, citing *State v. Payne*, 320 N.C. 138, 357 S.E. 2d 612 (1987), argues that this revealed an *ex parte* "communication" between the judge and jury which violated his state and federal constitutional rights to be present during the proceedings against him. The defendant's reliance on *Payne* is misplaced. In that case, the trial judge went into the jury room and, with no one else present, gave certain instructions to the jury after it was impaneled. In the present case, the trial court's reference to the incident complained of appears in the context of a record clearly showing that the trial court had routinely inquired about any problems individual jurors might have that the court needed to know about. Furthermore, the trial court's statement itself indicates that no such problems were either expressed by the jurors or discussed with them by the trial court. We conclude that no *ex parte* "communications" in the sense argued for by the defendant

actually took place, even though they may have been invited by the trial court. These assignments of error are without merit.

We note that the trial judge in this capital case began other days of the trial by asking jurors to raise their hands if they had any problems they needed to talk to the court about and telling them that he would discuss such problems *privately* with them. The record indicates there were no such problems raised, nor any such private conversations held. We would caution against any "private" discussions in similar situations.

[2] By his next assignments of error, the defendant contends that it was reversible "plain error" for the trial court to instruct the jury in the guilt-innocence determination phase of the trial that it could find the defendant guilty of the murders not only for having personally committed them but also on the separate theory that he acted in concert with Texford Watts in committing them. The defendant argues that there was no evidentiary support for the theory that he and Watts acted in concert and, therefore, the jury's verdict may have been based on an erroneous theory. The defendant's argument is without merit.

Under the doctrine of acting in concert, if two or more persons are acting together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). To be guilty by reason of acting in concert, it is not necessary for the defendant to do any particular act constituting part of a crime, so long as he is present and acting together with another party or parties, one or more of whom do the acts necessary to constitute the crime pursuant to a common plan or purpose. *Id.* The uncontroverted evidence in this case tended to show that Watts was in close proximity to the defendant at all pertinent times, from the time they picked up the drunken victims in Watts' car to the time they disposed of evidence after the murders, including evidence tending to incriminate both the defendant and Watts. The evidence tended to show that Watts knew the victims and gave them a ride in his car. Watts drove the victims in his car to the scene of the murders. Physical evidence, including blood of the same types as those of both victims, hair and other matter found on his clothing, tended to show that Watts was in very close proximity during the brutal beatings of both victims. The evidence tended to show that

Watts picked up the defendant and gave him a ride home after the murders. Watts gave his bloody clothing to the defendant to dispose of along with the defendant's bloody clothing. Further, the murder weapon came from the trunk of Watts' car. The evidence was sufficient to support a reasonable finding that Watts and the defendant had acted in concert in the commission of these murders.

[3] By his next assignment of error, the defendant argues that the trial court, to ensure a just verdict, should have given an instruction in the guilt-innocence determination phase of the trial concerning whether the defendant's voluntary intoxication affected his capacity for premeditated and deliberate murder with specific intent to kill. There was evidence in this case tending to show that the defendant and Watts had drunk an unspecified quantity of beer. In his post-arrest statement, introduced at trial, the defendant said that because of his drinking he did not remember what happened after he and Watts picked up the victims.

Before it is appropriate for the trial court to give a voluntary intoxication instruction, the defendant must produce substantial evidence which would support a conclusion by the trial court that the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated intent to kill. *State v. Mash*, 323 N.C. 339, 372 S.E. 2d 532 (1988). We conclude as a matter of law that the evidence in the present case—tending to show only that the defendant drank some unknown quantity of beer over a period of several hours and claimed not to remember the killings—did not meet the defendant's burden of production. *See id.* Therefore, it would have been erroneous for the trial court to give an instruction on voluntary intoxication. *Id.*

[4] By his next assignment of error, the defendant contends that the trial court's instruction on malice relieved the State of its burden of proving malice beyond a reasonable doubt, in violation of the defendant's constitutional rights. The defendant argues that this was prejudicial "plain error" and requires a new trial, notwithstanding his failure to object at trial.

During its charge, the trial court gave the following instruction:

> If the State proves beyond a reasonable doubt that the defendant killed the deceased with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that

> proximately caused the deceased's death, the law *requires*, first, that the killing was unlawful and, second, that it was done with malice.

(emphasis added). The defendant contends that the use of the word "requires" created a mandatory presumption of malice despite evidence suggesting the possibility that the two murders were committed in a heat of passion. We disagree.

The trial court's use of the word "requires" was merely a *lapsus linguae* which rendered the instruction ambiguous at worst. The instruction, standing alone, possibly could be interpreted as creating a presumption, as argued by the defendant. But it would more likely be interpreted by lay jurors as creating additional "requirements" for the State's proof by depriving the State of any permissible inference of malice from an intentional killing with a deadly weapon.

The trial court subsequently instructed on heat of passion and voluntary manslaughter and stated that it was the State's burden to prove beyond a reasonable doubt that the defendant did not act in a heat of passion, but instead with malice, and that failure to prove malice would mean that the defendant was guilty of no more than voluntary manslaughter. On two subsequent occasions, the trial court also instructed the jury that, even if the State proved beyond a reasonable doubt that the defendant intentionally struck the victims with the hammer and thereby caused their deaths, the State still had to prove malice beyond a reasonable doubt and, absent such proof, it would be the jury's duty to return verdicts of voluntary manslaughter. Given such instructions, we conclude that a juror could not reasonably interpret the trial court's charge as relieving the State of its burden of proving malice beyond a reasonable doubt. The trial court's *lapsus linguae* more likely prejudiced the State, since the result was that the jury was not told that it could, but was not required to, *infer* malice if it found an intentional killing with a deadly weapon. This assignment is without merit.

[5] By his next assignment of error, the defendant contends that his constitutional rights to effective assistance of counsel were denied when the trial court refused to continue the trial to give the defendant's counsel the weekend to prepare a closing argument for the guilt-innocence determination phase of the trial. The defendant's counsel, who offered no witnesses during this phase, told the

trial court that the prosecutor had informed him that the remainder of the State's evidence would take all of Friday, and that he had put off working on his closing argument until the weekend and was unprepared when the State concluded its case on Friday morning. At 12:30 p.m., the trial court recessed the proceedings until 2:00 p.m. and told the defendant's counsel to prepare his argument during that time. The defendant contends that requiring his counsel to make his closing argument that afternoon denied the defendant effective assistance of counsel.

The test for ineffective assistance of counsel is the same under both the federal and state constitutions. *State v. Braswell*, 312 N.C. 553, 324 S.E. 2d 241 (1985). First, a defendant must show that his counsel's performance fell below an objective standard of reasonableness. *Id.* Second, he must also show that his counsel's deficiencies were so serious as to deprive him of a fair trial. *Id.* The defendant in this case has failed to make either showing.

After examining the transcript of the defense counsel's closing argument, we conclude that it met an objective standard of reasonableness and was within the range of competence demanded of attorneys in capital cases. It was comparable in length to the prosecutor's closing argument and was well organized. The defendant's counsel, who had represented him in the case for almost a year and a half by the time of trial, exhibited good recollection of the critical evidence and vigorously attacked the most serious weaknesses in the State's case and its investigative mistakes. He also vigorously and competently attacked the credibility of Watts, the State's key witness.

The law and evidence in this case were relatively uncomplicated. The State's case consisted almost entirely of Watts' eyewitness testimony, the post-arrest statements given to investigators, and typical expert analysis of a limited amount of physical evidence. The defendant has pointed to no specific deficiencies in his counsel's closing argument, and we detect none.

[6] The defendant next contends that he is entitled to a new trial or, at least, a new sentencing proceeding because of various statements made by the prosecutor during jury selection, which the defendant characterizes as misconduct. No objection was made at trial to any of these statements.

The defendant first cites two statements which he contends could tend to diminish the jurors' sense of responsibility. At one point, the prosecutor said:

> If the State satisfies you beyond a reasonable doubt that the aggravating circumstances are sufficiently substantial to call for the death penalty, then by grannies he ought to die for what he's done. That's not because of some personal feeling, that's because the State has proved to you beyond a reasonable doubt that the law says that he should die.

At another point, the prosecutor said:

> If the State satisfied you beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then you wouldn't be responsible for it, the law is responsible for it.

The defendant's contentions that these statements by the prosecutor diminished the jurors' proper sense of responsibility are without merit. Both statements were incomplete statements of the law a jury must apply in a capital sentencing proceeding, because they failed to point out that the jury is to consider all relevant evidence in deciding whether to recommend a sentence of death and also required to weigh the aggravating circumstances it finds against the mitigating circumstances it finds in deciding whether the aggravating circumstances are sufficiently substantial to call for the death penalty. *See State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988) (containing a more complete statement of the jury's responsibility in a capital sentencing proceeding). Both statements, however, reminded the jurors of the State's burden of proof and of their responsibility for weighing the evidence and arriving at findings that would determine the defendant's fate. The additional statements that the law determines the defendant's fate should certain findings be made by the jury did not tend to improperly diminish the jurors' responsibility in the process. *Id.* (contrasting the types of statements which do tend to diminish the jurors' sense of responsibility, usually by implying that, even if the jury failed to bear its responsibility, the appellate process would save the defendant). This is particularly true in light of the fact that the prosecutor's incomplete statement of the law applicable to capital sentencing procedures came immediately after he had read a correct jury form to them which more fully and accurately explained the law relevant to the jury's function in the sentencing proceeding

in a capital case. Further, before the jury began its consideration of the case, the trial court gave full and correct instructions with regard to the jury's responsibilities during the sentencing proceeding in this defendant's case.

[7] The defendant next assigns as error the prosecutor's "personal opinion, prejudicial irrelevancies, and obstreperous behavior" which the defendant contends tainted the jury selection process. Defense counsel did not object at trial.

The defendant first complains of a statement by the prosecutor that:

> [T]he State must satisfy you beyond a reasonable doubt that this is, quote, "so bad that the man needs to die for it." There's nothing automatic about it. I have a personal belief about that myself, that should not come in here in this case.

The defendant argues that this statement, when taken with an earlier statement by the prosecutor that he was asking the jury to impose the death penalty, amounted to the prosecutor's improper expression of his personal opinion that the death penalty should be imposed. We do not agree.

In a trial for first-degree murder it is the right and duty of the prosecuting attorney to seek the death penalty if there is evidence of aggravating circumstances, and the prosecutor may argue vigorously that it should be imposed. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). Furthermore, we have held that when arguments by the prosecutor are not objected to at trial, they must amount to gross impropriety before we will conclude that the trial court abused its discretion by failing to intervene *ex mero motu* to prevent an argument which the defense counsel did not consider objectionable at the time. *Id.* The contested comment here did not amount to gross impropriety requiring the trial court's intervention. *See id.* at 369, 259 S.E. 2d at 761 (prosecutor's sentencing argument that the death penalty should be imposed because this was "one of the worst murder cases I've ever seen" and that the murder was, "if I've ever seen one . . . especially heinous, atrocious and [sic] cruel" was not so grossly improper that intervention by the trial court *ex mero motu* was required).

[8] The defendant further contends that when the prosecutor pointed out to the jury several persons in the courtroom as being members of one victim's family, he introduced facts not supported

by evidence, improperly aroused the sympathy of the jurors, and violated the defendant's constitutional rights. We find no merit in the defendant's contention that the prosecutor's brief identification of members of one victim's family was unconstitutional under *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed. 2d 440 (1987). In *Booth*, the capital sentencing process was found to be impermissibly tainted by irrelevant and highly prejudicial information contained in a "victim impact statement" used as evidence, which described in detail characteristics of the elderly victims and their family, how the family members reacted to the murders of the elderly couple, and how the murders thereafter changed the lives of the family members. The mere identification of family members present in the courtroom at the opening of the proceedings did not constitute the use of highly prejudicial and irrelevant evidence as prohibited by *Booth*. Certainly, it was not so grossly improper that the trial court abused its discretion by failing to intervene absent any objection.

[9] The defendant further contends that the prosecutor deliberately and improperly ridiculed defense counsel by raising unnecessary "speaking objections" to several questions posed by defense counsel to jurors during jury selection. He argues that, even though these objections were generally overruled by the trial court, they still had the effect of ridiculing his counsel. As the defense counsel did not contend at trial that any of these speaking objections were improper, they must amount to gross impropriety before we will conclude that the trial court abused its discretion by failing to intervene *ex mero motu*. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). The defendant's argument that these speaking objections had the effect of ridiculing counsel is tenuous, but assuming *arguendo* that they were improper, they did not rise to the level of gross impropriety and their potential for affecting the subsequent trial was *de minimis*.

[10] The defendant next contends that during jury selection the prosecutor improperly sought to "hype the case and to stake out and precondition the jurors" by repeatedly asking the following question or variations thereof:

> If the State satisfied you beyond a reasonable doubt . . . that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, then I take it you could give the defendant the death penalty for beating two human beings to death with a hammer, is that correct?

We reject these contentions of the defendant and conclude that such questions by a prosecutor are proper. *See State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 384 (1987). Furthermore, assuming *arguendo* that such questions amounted to error, they did not constitute gross impropriety requiring the trial court to intervene *ex mero motu*. *Id.*

[11] By his next assignments of error, the defendant contends that prosecutorial misconduct during the guilt-innocence determination phase of his trial requires a new trial or, at least, a new sentencing proceeding, notwithstanding the absence of any objections. The defendant first contends that the prosecutor in his opening statement improperly attempted to arouse sympathy for the victims when he admonished the jurors that even though the evidence would indicate that the victims were "alcoholics" and "street people," it was still the jury's responsibility to uphold the law against their murders. We conclude, however, that the argument was a permissible admonition to the jury to uphold the law, regardless of any prejudices it might have against people such as the victims, and to base its verdict upon the circumstances of the crime and the defendant's culpability. *See South Carolina v. Gathers*, No. 88-305, --- U.S. ---, --- L.Ed. 2d --- (12 June 1989), 49 CCH S.Ct. Bull. p. B2964.

The defendant next contends that the prosecutor was personally vouching for the credibility of his case when he explained to the court and jury that some of his expert witnesses were unavailable when scheduled to testify because they were testifying in a murder case in another county. The trial court sustained an objection but instructed the jury that it could consider that some of the State's witnesses were delayed because of other proceedings. The defendant's suggestion that this amounted to improper buttressing of the State's case is tenuous, at best. The insignificance of the prosecutor's explanation, joined with the trial court's prompt instruction, assured that there was no reasonable possibility that the outcome of the trial was affected. Therefore, any possible error was harmless. N.C.G.S. § 15A-1443(a) (1988).

[12] The defendant next contends that it was error to deny his motion for a mistrial after an injudicious outburst by the prosecutor. At the close of his cross-examination of Texford Watts, the defense counsel caused Watts to admit that he had been charged with the same murders as the defendant and then asked Watts if

he knew what a liar and a lie were and whether he would lie to protect himself. The prosecutor interjected that he did not want to make an objection but that another judge he named would have had the defense counsel "locked up." The trial court cut short the prosecutor by saying "objection sustained." It is not clear from the transcript whether the trial court was sustaining an objection which he thought the prosecutor should have made to the line of questioning or one he thought defense counsel should have made to the prosecutor's outburst, or both. After the prosecutor's brief redirect examination of Watts and a short recess, the defense counsel moved for a mistrial.

Whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial court. A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); N.C.G.S. § 15A-1061 (1988). Ordinarily, denial of a motion for mistrial will not be disturbed on appeal absent a showing of abuse of the trial court's discretion. *State v. Boyd*, 321 N.C. 574, 364 S.E. 2d 118 (1988). We see no reason to believe that the prosecutor's outburst in this case, while inappropriate, made it impossible for the defendant to receive a fair and impartial trial. On the contrary, any potential impact was slight. The defendant has failed to show that the trial court abused its discretion by denying a mistrial.

[13] By his next assignments of error, the defendant contends that the prosecutor's closing argument during the guilt-innocence determination phase included "gross improprieties" which require a new trial or new sentencing proceeding, notwithstanding the defendant's failure to object. The defendant first contends that the prohibitions of *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed. 2d 440 (1987), were violated when the prosecutor told the jury: "The only thing you can do now, right here in this courtroom this week, is to try to do justice in this case for Ronnie Waddell and Mr. Kepley and their families." However, unlike the "victim impact statement" which unconstitutionally tainted the sentencing process in *Booth*, this statement by the prosecutor did not amount to introducing irrelevant details about the personal characteristics of the victims, the emotional impact of the crimes on the victims' families, and the family members' opinions about the crimes and

the defendant. The prosecutor's brief reference to the victims and their families did not entitle the defendant to a new trial or sentencing proceeding. *See State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 406 (1987) (reference to the rights of the victim's family during the prosecutor's sentencing argument did not violate *Booth*).

The jury's determination of guilt or innocence and recommendation as to sentence must be based on the evidence introduced and not upon any suggested accountability to the victim's family. *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). The prosecutor's statement, in the context in which it was made, did not amount to a grossly improper appeal to the jury's sympathy for the victims and their families. Therefore, the statement did not require the trial court to intervene *ex mero motu*.

[14] The defendant next contends that the prosecutor improperly asserted his personal opinion when he argued to the jury that the defendant committed the killings "for the love of killing." Counsel may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom. *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); *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. denied*, 459 U.S. 1189, 74 L.Ed. 2d 1031 (1983). That the defendant in this case killed "for the love of killing" was a reasonable and permissible inference to be drawn from the evidence. The State's evidence tended to show that the defendant knew neither victim, that there was no animosity between the defendant and the victims prior to the attacks, that the defendant spontaneously and for no apparent reason decided to kill the victims, that he brutally mutilated and beat holes in the skulls of the victims with a hammer, and that the injuries inflicted upon the victims were far beyond what was necessary to incapacitate or even to kill the victims. *Cf. State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987) (prosecutor's suggestion that the defendant enjoyed killing the victim permissible when evidence tended to show that the defendant stabbed the victim in the neck after raping her).

[15] The defendant's next contentions focus on a portion of the prosecutor's closing argument, which came after the prosecutor had summarized Watts' testimony and reminded the jury that

Watts had admitted to being involved to some extent in the murders. The prosecutor argued:

> What did the defendant say on the other hand? Well, I was out with Watts and we were riding around and we were drinking beer and then we met up with two people, and I sure don't remember anything else. Well, no, he don't want to remember anything else. And he stopped talking and the officers stopped talking to him, as they must do.

The defendant argues that, by making this argument, the prosecutor was improperly calling the defendant a liar. The prosecutor's reference to the defendant's lack of memory stopped short of calling him a "liar" or asserting the prosecutor's personal knowledge that he was lying. *Cf. State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967) (counsel may argue to the jury that they should not believe a witness but must stop short of calling him a "liar"). Any suggestion in the prosecutor's statement that the jury should not believe the defendant's claimed loss of memory was a reasonable inference to be drawn from the evidence in light of his detailed account of events up to the point at which he met the victims, his alleged abrupt and total lack of recall after picking up the victims, his behavior subsequent to picking up the victims, and testimony by Watts indicating that the defendant did remember what he had done and later threatened to kill Watts if he told anyone about the killings.

[16] The defendant further argues that his claim that he could not remember anything else to tell authorities during post-arrest questioning was an assertion of his constitutional right to remain silent and that his exercise of that right was improperly used against him when the prosecutor noted that he stopped talking and the officers left him alone. We do not agree.

It is impermissible to suggest that the defendant's guilt can be inferred from his exercise of his Fifth Amendment right to remain silent in the face of accusations. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966); *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975), *appeal after remand*, 289 N.C. 512, 223 S.E. 2d 303, *vacated in part on other grounds*, 429 U.S. 912, 50 L.Ed. 2d 278 (1976). In this case, however, the prosecutor made no mention of any invocation of that right by the defendant. The defendant's statement to police that he did not remember anything about events subsequent to picking up the victims, and his subse-

quent silence, did not constitute an invocation of his right to silence. *See State v. Robbins*, 319 N.C. 465, 356 S.E. 2d 279, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 226 (1987); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, 459 U.S. 1056, 74 L.Ed. 2d 622 (1982). The prosecutor, contrasting Watts' credibility with that of the defendant, was simply summarizing the defendant's statement and the manner in which it terminated.

[17] The defendant next argues that it was beyond the bounds of fair play for the prosecutor to make the following statements:

> Nothing we can do will make this any different. But what we can do is, we can do justice. We can make sure that Wayne Laws won't ever do this again. We can make sure that Mr. Watts won't ever do this again. And that's my job.

The defendant, who did not object at trial, contends that the statements were the prosecutor's personal opinion and assurances that the defendant did the crime, that Texford Watts did the crime and that the prosecutor would make sure Watts was also punished. The prosecutor's argument that the jury should find the defendant guilty was supported by evidence and within the range of permissible closing argument. The reference to Watts was irrelevant in this trial of the defendant Laws but not prejudicial to the defendant. None of the statements amounted to gross impropriety requiring the trial court to intervene *ex mero motu* and none raised any significant possibility of unfair prejudice affecting the verdict or the jury's sentencing recommendations.

[18] The defendant next challenges the prosecutor's definition of "voluntary manslaughter." During closing argument, the prosecutor at one point said, "Kind of like, I didn't mean to do it, but, if I did, I'm sorry I did it. That's what voluntary manslaughter is." The prosecutor's explanation of voluntary manslaughter was inadequate but not so grossly improper as to require the trial court to intervene *ex mero motu*. The trial court's subsequent correct charge on the law of voluntary manslaughter provided adequate correction to any possible confusion created by the prosecutor's language.

The defendant also complains that the prosecutor at another point misstated the law of voluntary intoxication as it affects capacity for first-degree murder. As we have concluded that the defendant was not entitled to an instruction on voluntary intoxication, however, any error was favorable to the defendant and harmless.

[19] By his next assignment of error, the defendant contends that he was deprived of his constitutional rights to select a fair and impartial jury when the trial court sustained the prosecutor's objection to the defense counsel's asking a juror if she believed in literal interpretation of the Bible. The trial court has broad discretion in controlling the questioning of prospective jurors, and its decisions will be upheld absent a showing of abuse of discretion. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316, *vacated and remanded on other grounds*, --- U.S. ---, 102 L.Ed. 2d 18, *reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988). Counsel's right to inquire into the beliefs of prospective jurors to determine their biases and attitudes does not extend to all aspects of the jurors' private lives or of their religious beliefs. *Id.* In *Lloyd*, we upheld the trial court's refusal to allow defense counsel to inquire into jurors' religious denominations and the extent of their participation in church activities. The trial court in this case allowed defense counsel to make such inquiries, and even allowed him to ask a juror whether she believed in the Bible. Furthermore, defense counsel was otherwise given wide latitude to question the jurors about their beliefs, attitudes and biases. We conclude that the defendant has shown no abuse of discretion in the trial court's ruling on this one particular question.

[20] We now turn to the defendant's assignments of error concerning his sentencing proceeding. By his first assignment of error, the defendant contends that it was error for the trial court to refuse to submit, as a non-statutory mitigating circumstance, that the defendant "grew up with a fatherless childhood and did not have any male guidance during the time that he was growing up." The only evidence arguably relating to this circumstance came during the sentencing phase from his lone witness, Thomas Hedrick, who was his employer. Hedrick stated that he had never met the defendant's father and, when asked what he knew about the defendant's father, he replied:

> Well, the only thing I know, he skipped out and went to the State of Washington when they was all small, and left them in the mountains to live off of welfare, up around Canton . . . .

The trial court must submit a requested non-statutory mitigating circumstance if a jury could reasonably find it to have mitigating value and there is substantial evidence to support a reasonable finding by the jury that the circumstance exists. *State v. Benson*,

323 N.C. 318, 372 S.E. 2d 517 (1988). However, the defendant must make a timely request that such non-statutory mitigating circumstances be specifically included on the written sentencing form and specifically included in the jury instructions; otherwise, such circumstances will be deemed to receive proper consideration under the "any other circumstance" provision of N.C.G.S. § 15A-2000(f)(9). *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979).

Although it is not clear from the transcript, it appears the defense counsel requested that this non-statutory mitigating circumstance be submitted. Assuming *arguendo* that the defendant requested submission of this non-statutory mitigating circumstance and that such request was denied by the trial court, we conclude that the trial court did not err. The witness Hedrick only testified that the defendant's father left the family when all the children were small. He did not indicate exactly when that occurred or the age of the defendant at the time. No evidence tended to show that the defendant thereafter had no contact with his father or that there were no other male role models who gave the defendant guidance during his childhood. In fact, Hedrick testified that the defendant had an older brother. Hedrick's lone statement that the defendant's father had "skipped out on" his family at some point was insufficient to support a reasonable finding by the jury that the defendant had a fatherless childhood with no male guidance. Such a finding by the jury would have been based upon speculation and conjecture, not upon substantial evidence in the record.

[21] By his next assignment of error, the defendant contends that he is entitled to a new sentencing proceeding because the trial court did not submit the statutory mitigating circumstance that the "defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988). During his testimony, Hedrick referred to the defendant's use of marijuana. The defendant argues that this was some evidence of criminal activity and, therefore, the trial court was required to instruct the jury to consider whether this amounted to no "significant" history of criminal activity. We disagree.

The trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented to the jury which would support a reasonable finding by the jury of the existence of the circumstance. *See State v. Wilson*, 322 N.C. 117, 367 S.E. 2d 589 (1988); *State v. Lloyd*, 321

N.C. 301, 364 S.E. 2d 316 (1988). The term "substantial evidence" means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). The statutory mitigating circumstance of "no significant history of prior criminal activity" is not supported by the mere absence of any substantial evidence concerning the defendant's prior criminal history. *State v. Hutchins*, 303 N.C. 321, 355-56, 279 S.E. 2d 788, 809 (1981), *cert. denied*, 464 U.S. 1065, 79 L.Ed. 2d 207 (1984). A silent record in this regard does not require submission of the mitigating circumstance. *Id.* An affirmative showing of a complete absence of *any* history of criminal activity need not be made, but some substantial evidence concerning the defendant's history of prior criminal activity—or lack of it—must be presented to the jury before the trial court may determine as a matter of law that the jury could reasonably find this mitigating circumstance from the evidence. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316 (1988).

We conclude that the jury could have made no such reasonable finding from evidence introduced in this case. Hedrick's cursory and unsubstantiated references to past marijuana use by the defendant were not, standing alone, substantial evidence as to whether the defendant had a significant history of criminal activity. A jury finding of no significant history of criminal activity, solely upon Hedrick's remarks about marijuana use, would have been based purely upon speculation and conjecture, not upon substantial evidence, and unreasonable as a matter of law.

We also note that at the defendant's request, the trial court gave the jury a peremptory instruction to find as a non-statutory mitigating circumstance that the defendant had not been previously convicted of a felony involving violence to the person. The trial court instructed the jury that, because no evidence had been introduced tending to show that the defendant had been convicted of such a felony, the jury must find that the defendant had no such record. Even if it is assumed *arguendo* that this non-statutory mitigating circumstance—reflecting mere absence of the statutory *aggravating* circumstance set out in N.C.G.S. § 15A-2000(e)(3)—may ever properly be submitted in a capital case, its submission to the jury here was, nevertheless, error favorable to the defendant. There was no evidence before the jury concerning the defendant's record of criminal convictions, and the mere absence of substantial evidence with regard to a mitigating circumstance will not support

a finding that the circumstance exists. *See State v. Hutchins*, 303 N.C. at 355-56, 279 S.E. 2d at 809. The defendant bears the burden of producing substantial evidence tending to show the existence of a mitigating circumstance before the circumstance will be submitted to the jury. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642 (1982); *State v. Hutchins*, 303 N.C. at 355-56, 279 S.E. 2d at 809. In meeting this burden, however, the defendant is entitled to rely upon any substantial evidence which is before the jury in his case and tends to show the existence of the circumstance. *State v. Lloyd*, 321 N.C. at 311-12, 364 S.E. 2d at 323-24.

In the present case, counsel for the defendant and the prosecutor had informed the trial court, during a conference with the jury out of the courtroom, that the defendant had at least one prior misdemeanor conviction involving violence against the person but no record of violent felonies. However, no stipulation was entered to that effect nor was any *evidence* concerning the defendant's prior convictions—or lack of convictions—ever introduced for the jury's consideration. As a result, the evidence before the jury was totally silent on the question of whether the defendant had ever been convicted of a felony involving violence to the person and did not support the submission of this non-statutory "mitigating" circumstance for the jury's consideration. Therefore, the trial court's peremptory instruction requiring the jury to find and weigh as a non-statutory mitigating circumstance that the defendant had not previously been convicted of a felony involving violence to the person was error favorable to the defendant.

Assuming *arguendo* that the trial court's failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity was error—although we have concluded it was not—the error was harmless beyond a reasonable doubt and, thus, does not require a new sentencing proceeding under the test for harmless error we apply in cases involving violations of rights guaranteed by the Constitution of the United States. *State v. Wilson*, 322 N.C. at 144, 367 S.E. 2d at 605; N.C.G.S. § 15A-1443(b) (1988). Given the lack of any substantial evidence on the matter of prior criminality of the defendant and the trial court's erroneous peremptory instruction—favorable to the defendant—that the jury must find the non-statutory mitigating circumstance of no prior convictions for violent felonies, the defendant received virtually the same benefit he would have received if the jury had found the statutory

mitigating circumstance of no significant history of prior criminal activity. Moreover, he received that benefit without the State being allowed to introduce his criminal record and other evidence of his prior criminal activity—apparently including at least one misdemeanor involving violence against a person—as the State could have done if the statutory mitigating circumstance had been submitted to the jury. Given this situation, we conclude that any error in failing to submit the statutory mitigating circumstance of no significant history of prior criminal activity was harmless beyond a reasonable doubt, at worst, and more probably was favorable to the defendant. This assignment is without merit.

[22] By his next assignment of error, the defendant contends he is entitled to a new sentencing proceeding because the trial court failed to submit to the jury the statutory mitigating circumstance of his age at the time of the crimes. N.C.G.S. § 15A-2000(f)(7) (1988). No evidence concerning the defendant's age was before the jury. Furthermore, although the defendant contends that he was twenty-three years old at the time of these crimes, chronological age is not the determinative factor with regard to this mitigating circumstance. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983). The defendant, whose only witness was Hedrick, introduced no substantial evidence of his immaturity, youthfulness or lack of emotional or intellectual development at the time of these crimes. On the contrary, Hedrick testified that the defendant had been a trustworthy, responsible and dependable employee who was soon to become an unsupervised construction foreman with a crew of his own. There being no substantial evidence before the jury concerning this statutory mitigating circumstance, the trial court correctly declined to submit it for the jury's consideration. *State v. Hutchins*, 303 N.C. at 355-56, 279 S.E. 2d at 809. *Cf. State v. Johnson*, 317 N.C. 343, 346 S.E. 2d 596 (1986) (twenty-three-year-old defendant not entitled to submission of age as a mitigating circumstance, notwithstanding family members' testimony that he was emotionally immature for his age).

[23] By his next assignment of error, the defendant contends that these murders were, as a matter of law, not "especially heinous, atrocious or cruel" and that submission of that statutory aggravating circumstance to the jury was error requiring a new sentencing proceeding. The defendant's argument is meritless.

Although every murder is to some degree heinous, atrocious or cruel, submission of this aggravating circumstance to the jury in a capital sentencing proceeding is appropriate only where there is evidence that the murder was especially heinous, or especially atrocious, or especially cruel. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316; N.C.G.S. § 15A-2000(e)(9) (1988). We have held that the submission of this aggravating circumstance is appropriate where a first-degree murder involves a prolonged brutal attack inflicting injuries beyond what would be necessary to kill the victim. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316. It is not necessary for the evidence to establish at what point death actually occurred during such an attack. *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984).

In determining whether there is sufficient evidence to support a finding that a first-degree murder was especially heinous, atrocious or cruel, 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 therefrom. *State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984). The evidence in this case would support a finding that both victims were unable to defend themselves due to extreme intoxication when the defendant began beating them severely with his fists. They remained helpless as he took a claw hammer from the car and proceeded to beat each helpless victim mercilessly about the head and torso with the hammer, causing numerous lacerations, bruises, skull fractures and areas of hemorrhaging. The victims were found in pools of blood, with pieces of flesh, skull and brain matter scattered about the bodies. Waddell had six broken ribs, many lacerations about the head and multiple skull fractures—including two "punched out" holes in his skull and areas where the skull had been pushed into the brain. He also had injuries to his face, neck and back. Kepley's skull had been literally "cracked open," and his wounds included a fracture extending across the base of the skull and "punched out" holes in the skull. One side of the skull was so mutilated that medical examiners could not determine how many blows had been inflicted. Like Waddell's, parts of Kepley's skull had been driven down into his brain. The clothing of the defendant and Watts was covered with blood, hair, brain matter and "meat."

Our decision in *Huffstetler* is dispositive of this assignment. In *Huffstetler*, the victim was beaten to death with a cast iron skillet which caused numerous severe injuries to her skull, neck

and upper torso. We held that the severity and brutality of the numerous wounds amply justified submission of the especially heinous, atrocious or cruel aggravating circumstance. 312 N.C. at 116, 322 S.E. 2d at 125. Its submission to the jury in this case was equally justified by the prolonged brutal attacks which were required to inflict Waddell's and Kepley's gruesome injuries and to produce the other gruesome evidence in this case.

[24] By his next assignment of error, the defendant contends he is entitled to a new sentencing proceeding because the prosecutor improperly referred to the decision of this Court in *Huffstetler* to bolster his argument that the jury should find that these first-degree murders were especially heinous, atrocious or cruel. After explaining this aggravating circumstance and arguing that the facts of this case warranted such a finding, the prosecutor made the following statement to the jury:

> There's a case of State of North Carolina versus Huffstetler, a similar situation, a beating death. This very aggravating circumstance, especially cruel, heinous and [sic] atrocious, was submitted to the jury. This woman died as a result of being battered to death with a cast iron skillet so as to cause her skull to be pushed into her brain, the very same thing as this case. And you remember the testimony of the doctor that the skull was knocked down into the brain with the force of the hammer. "The severity and the brutality of the numerous wounds inflicted amply justified submission of this aggravating circumstance to the jury." That's what our Supreme Court said. It's properly before you, that aggravating circumstance, and you should answer it yes, because the State's satisfied you beyond a reasonable doubt that this particular beating death, the type you see here in these pictures [of the victims], is especially cruel, heinous and [sic] atrocious.

The defendant argues that this statement, which was not objected to at trial, violated the prohibition of *Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967), in which we held that it was improper for counsel in arguing to the jury to set forth the facts and decision of another case and then argue that the jury's decision should be the same as that in the other case because the facts before the jury were the same as those in the other case. We also said in *Wilcox*, however, that it was permissible for counsel in argument to state his view of the law applicable

to the case on trial, to read published decisions of this Court in support thereof, and to recount some of the facts on which those other decisions were based. 269 N.C. at 479, 153 S.E. 2d at 81.

Assuming *arguendo* that the prosecutor's unobjected-to reading from *Huffstetler* and argument in this regard were so grossly improper as to require the trial court to intervene *ex mero motu*, we nevertheless conclude that the defendant has failed to show any resulting prejudice in light of the overwhelming evidence of this aggravating factor introduced at trial. *See generally State v. Austin*, 320 N.C. 276, 357 S.E. 2d 641, *cert. denied*, --- U.S. ---, 98 L.Ed. 2d 224 (1987). Furthermore, the trial court subsequently instructed the jury that it was the jury's responsibility to determine from the evidence before it whether the murders were especially heinous, atrocious or cruel. This assignment of error is without merit.

[25] By his next assignment of error, the defendant contends that the prosecutor misused this Court's decisional law in arguing for a finding of the aggravating circumstance that each murder was committed as part of a course of conduct that included a crime of violence against another person. After explaining to the jury that it could consider the defendant's attack on each victim in aggravation of the murder of the other, the prosecutor added:

> The Supreme Court of this State as to that aggravating circumstance has said this: "It is the very fact that the defendant killed two people, and not just one, that aggravates the nature of his crimes, and it [is] entirely proper for the jury to consider this fact in determining whether the defendant should pay the ultimate price for *each* life he took," the ultimate price meaning death.

Considering the prosecutor's statement, including his use of the quotation taken from *State v. Pinch*, 306 N.C. 1, 32, 292 S.E. 2d 203, 226 (1982), in the context in which that statement was made, we detect no error. The prosecutor had just recited to the jury, practically verbatim, the statutory language of this aggravating circumstance and had explained to the jury that in finding and weighing aggravating circumstances with regard to the murder of either victim, it could consider the defendant's violent course of conduct against the other victim. In that context, a fair interpretation of the prosecutor's reference to the decisional law of this Court would be that this Court had said that this aggravating

circumstance exists when the defendant engages in a course of violent criminal conduct against two persons and thereby kills them. That is a fair statement of the law.

[26] The defendant also argues that a proper reading of our holding in *Pinch* is that a jury may treat this statutory circumstance as aggravating the crime of first-degree murder, but is not required to do so, after it has found the requisite course of conduct establishing the existence of the circumstance. We disagree.

We have held that our legislature, by listing specific mitigating circumstances to be considered in capital sentencing under N.C.G.S. § 15A-2000(f), has determined that such circumstances, if supported by substantial evidence and found by the jury, *shall* be considered mitigating during capital sentencing. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). We now hold for the same reasons that by enacting specific aggravating circumstances to be considered in capital sentencing, the legislature intended that a jury having found one of those statutory aggravating circumstances to exist must give it some weight in aggravation when determining the appropriate sentence to recommend. N.C.G.S. § 15A-2000(b) (1988). The amount of weight to be given such statutory aggravating circumstances is, however, left to the determination of the jury. N.C.G.S. § 15A-2000(c) (1988). Allowing the jury the discretionary power to completely disregard those circumstances specifically enumerated by our legislature and found from the evidence to exist—whether aggravating or mitigating circumstances—would return the sentencing proceedings in capital cases to the realm of unguided jury discretion, rendering any resulting death sentences constitutionally suspect. *See State v. Kirkley*, 308 N.C. at 220, 302 S.E. 2d at 158. This assignment is without merit.

[27] By his next assignments of error, the defendant contends that the prosecutor's closing argument in the sentencing proceeding included several transgressions which were so grossly improper that this Court should grant a new sentencing proceeding, notwithstanding his defense counsel's failure to object. The defendant first argues that statements by the prosecutor to the effect that the victims were entitled to the protection of the law, even though they were just average people suffering sickness and weakness, violated the prohibitions of *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed. 2d 400 (1987). The prosecutor's brief references to the victims and their families in his closing argument during the sentencing

proceeding in this case did not inject highly prejudicial, irrelevant and improper matters such as those contained in the victim impact statements prohibited by *Booth*, and the potential impact of these references was *de minimis*. *See State v. McNeil*, 324 N.C. 33, 375 S.E. 2d 909 (1989) (prosecutor's statement that he represented the victim, and reference to certain characteristics of the victim and what was probably going through her mind as she was being killed, were not so grossly improper as to require *ex mero motu* intervention); *State v. Brown*, 320 N.C. 179, 358 S.E. 2d 1 (1987) (effect of reference during sentencing argument to the victim's family's rights, even if erroneous, was *de minimis*, and the trial court did not abuse its discretion in failing to act *ex mero motu*). To the contrary, the argument correctly emphasized to the jury that it should not consider the victims' social status—either high or low status—in deciding whether to recommend a sentence of death. *See generally South Carolina v. Gathers*, No. 88-305, --- U.S. ---, --- L.Ed. 2d --- (12 June 1989), 49 CCH S.Ct. Bull., p. B2964. Therefore, any possible transgression by the prosecutor here was not so grossly improper as to require the trial court to intervene *ex mero motu*. *Id.*

[28] The defendant next complains of the prosecutor's criticism of our capital sentencing laws when he declared that it was "pathetic" that consideration of the "especially heinous, atrocious or cruel" statutory aggravating circumstance requires the jury "to decide that some murders—can you believe this?—are worse than others." The prosecutor immediately added, however, that the law required such distinctions, that the jury had to follow the law, and that the jury must find that the murders were "*especially* heinous, atrocious and [sic] cruel" before it could find this aggravating circumstance. At no time during the prosecutor's argument or the trial court's charge was it suggested that the jury could find or weigh this aggravating circumstance without first finding from the evidence that the murders were in fact *especially* heinous, atrocious or cruel. Both the prosecutor and trial court admonished the jury to apply the law as it was and not as they might like the law to be or think it should be. The prosecutor's unobjected-to commentary, while inappropriate, was not so grossly improper as to require the trial court to intervene *ex mero motu*. Any resulting effect of such comments was *de minimis* in light of the fact that the jury was told at all times it must follow the law and that the law required that the first-degree murders be *especially* heinous, atrocious or cruel for this circumstance to exist.

[29] The defendant next argues that the prosecutor misstated the law governing the statutory mitigating circumstance of "impaired capacity," N.C.G.S. § 15A-2000(f)(6), in a way as to encourage jurors to give little weight to that circumstance. After quoting the language of the statutory mitigating circumstance, the prosecutor explained it as follows:

> Now that is some catchall. What that means is this: There's something so bad with my head up here that I just don't know why I did that, and if I hadn't have been that way, well, I surely wouldn't have done that. That's almost like I heard one time, "Well, I'm sorry I did it. I didn't mean to do it. I'm sorry I did it."

We note that despite the prosecutor's comments, the jury found this statutory circumstance in mitigation of the crimes. The only evidence in support of this mitigating circumstance was that the defendant and Watts had been drinking an unspecified quantity of beer for several hours and that the defendant had told officers that he could not remember anything that happened after picking up the victims. This was contradicted by Watts' testimony that the next day the defendant threatened to kill him if he told anybody about the killings. Thus, while some of the prosecutor's language may have oversimplified the law concerning this circumstance and might have been construed as additional improper commentary on our sentencing law, his argument did not rise to the level of gross impropriety requiring the trial court to intervene *ex mero motu*, as any potential impact of the statements was *de minimis*.

[30] The defendant next argues that the prosecutor improperly limited the scope of the matters in mitigation, which the jury could have found and weighed under the "any other circumstance" provision of N.C.G.S. § 15A-2000(f)(9), when he explained this circumstance as follows:

> And, number five, any other circumstance arising from the evidence which you the jury deem to have mitigating value. And that's just what I said it was. That's anything else that you can derive from any of this why you think he's entitled to some help. That's the bottom line. And, as I told you, this case is not a question of sympathy for anybody or prejudice against anybody.

The prosecutor's statement essentially told the jurors that they could find any circumstance supported by the evidence to be mitigating. Taken in its entirety, it would have been reasonably interpreted by jurors only as an admonition to base their finding and weighing of "any other circumstance" in mitigation upon the evidence and not upon their emotions. Further, any possible confusion was corrected by the trial court's correct instructions on mitigating circumstances in its sentencing proceeding charge.

[31] The defendant next argues that the prosecutor improperly alluded to the possibility of parole by arguing that the death penalty was "the only way, the only way, we're ever going to be sure that this man over here will never do what he's done again." The defendant acknowledges that such arguments invoking deterrence have been upheld. *E.g., State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987). This assignment of error is without merit.

[32] The defendant also argues that certain Biblical references by the prosecutor in his sentencing argument were so grossly improper that, despite the absence of an objection, the trial court was required to intervene *ex mero motu*. These references included the following:

> We are imperfect people and the law is imperfect. The Bible, in Genesis 9, says: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man." That's the Old Testament, and I'm old-fashion and I believe that way. You've got the New Testament. The New Testament says "Vengeance is mine, sayeth the Lord."
>
> And as Jesus said, "Render unto Caesar that which is Caesar's and unto the Lord that which is the Lord's." There are two kinds of law: there's God's law and there's man's law. We're trying to sit here and do what's right by man's law, and yet man's law is based on God's law, one of the commandments being, "Thou shalt not kill." This man has killed his fellow man.

The defendant cites cases in which Biblical arguments have been disapproved. *E.g., State v. Moose*, 310 N.C. 482, 313 S.E. 2d 507 (1984). In such cases, however, the arguments were to the effect that the law enforcement powers of the State came from God, and to resist those powers was to resist God. The prosecutor's Biblical references in this case, while they offered virtually nothing to help the jury in its deliberations concerning the law and the

evidence, did not amount to his claiming that his authority came from God or that to resist his authority was to resist God. On the contrary, the prosecutor pointed out that the jury's task was to do what was right by man's law. The potential impact of the prosecutor's Biblical references in this case was slight, and they did not amount to gross impropriety requiring the trial court's intervention *ex mero motu*. *See State v. Zuniga*, 320 N.C. 233, 357 S.E. 2d 898 (1987) (similar Biblical references held to be of minimal prejudicial effect and not so improper as to require trial court's intervention).

The defendant also has brought forward eleven additional issues and supporting assignments and arguments. His appellate counsel, who did not represent him at trial, has exhibited commendable candor and accuracy in noting that these issues, some of which are currently scheduled for consideration in cases pending before the Supreme Court of the United States, have been or by logical extension of our prior cases would be resolved adversely to the defendant's position by this Court. Although we acknowledge that the defendant has preserved these issues for possible further review by the Supreme Court of the United States, we conclude that these assignments of error are without merit.

[33] Having found no prejudicial error either in the defendant's trial or sentencing proceeding, we undertake the duties reserved by statute for this Court in reviewing the judgment and sentence of death. N.C.G.S. § 15A-2000(d)(2) (1988). In fulfilling those duties, we must ascertain whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based; whether the sentence of death was imposed under the influence of passion, prejudice, or any arbitrary circumstance; and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

Having thoroughly examined the record, transcripts and briefs in this case, we conclude that the trial court properly submitted the aggravating circumstances which were considered and found by the jury. Additionally, we find no indication that the sentence of death was recommended or entered under the influence of passion, prejudice, or any arbitrary circumstance.

We turn, then, to our final statutory duty of proportionality review. That duty requires this Court to determine whether the

death sentences in this case are excessive or disproportionate when compared to the penalty imposed in similar cases. Our task in proportionality review is to compare this case with other first-degree murder cases in the proportionality pool which are roughly similar to this case with regard to the crime and the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316. Although the proportionality pool of cases is used for comparison purposes, proportionality review requires that each case be evaluated by independent consideration of the particular circumstances and characteristics of the defendant and the crime or crimes he has committed. *Id.* We have rejected, for constitutional reasons, any approach that would evaluate an individual defendant's sentence by mathematical or statistical comparisons with other cases and deny him individualized sentence review. *Id.* While we review all the cases in the pool each time proportionality review is undertaken, we do not cite or discuss all of the cases in the pool with each decision. *Id.*

In the present case, the defendant was convicted of two counts of premeditated and deliberate first-degree murder. He brutally and literally beat the brains out of two heavily intoxicated victims for no apparent reason. He mutilated portions of their skulls while beating them to death with a claw hammer and left them lying on a rural dirt road in pools of blood, hair, flesh, brain matter and pieces of skull. Each had been beaten about the head, neck and torso with the hammer and suffered injuries far beyond those required to incapacitate or even kill them. One victim also had six broken ribs. At least one of the victims was already incapacitated and lying motionless on the ground when the savage attacks with the hammer began. The defendant had met the victims only a few hours before and apparently had no quarrel with them as they traveled to the isolated area where the brutal killings took place.

The jury found two aggravating circumstances: that each murder was especially heinous, atrocious or cruel, and that each murder was committed during a course of conduct which involved crimes of violence against another person. The jury found four mitigating circumstances: the defendant had no prior felonies involving violence against persons, the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired, the defendant had been a good and responsible employee, and the defendant had financially assisted his family.

Comparing this defendant and his crimes to the other cases in the proportionality pool, we do not find that this case is even remotely similar to those cases in the pool in which we have overturned death sentences as disproportionate. None of those cases involved the savage, prolonged killing process evident in this case. Further, "[i]n none of these cases was the defendant convicted of more than one murder." *State v. McNeil*, 324 N.C. at 60, 375 S.E. 2d at 925. A heavy factor to be weighed against the defendant " 'is that he is a multiple killer.' " *Id.* (quoting *State v. Robbins*, 319 N.C. 465, 529, 356 S.E. 2d 279, 316 (1987)). In only one of those cases, *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), did the jury find the aggravating circumstances found in this case. In *Bondurant*, the defendant and a group of friends, all highly intoxicated, were riding around in a car when the defendant began taunting the victim and asking him if he thought the defendant would shoot him. The defendant shot the victim, but then immediately had the driver take the victim to the local hospital. This case is not closely similar to *Bondurant*.

Comparing this case to those in the proportionality pool in which we have upheld death penalties, we conclude that it is closely similar to several of those cases in the brutal and senseless nature of the killing, the helplessness of the victims, and the killing of more than one victim in savage fashion. We note in particular *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), where the defendant beat his mother-in-law to death in her home with a cast iron skillet in much the same fashion as the defendant in this case bludgeoned *two* helpless victims to death. In upholding the death sentence in *Huffstetler*, we concluded that the record before us revealed a "senseless, unprovoked, exceptionally brutal, prolonged and murderous assault." 312 N.C. at 118, 322 S.E. 2d at 126. The gruesome record before us in this case reveals *two* murders, each equally as brutal and senseless as the one in *Huffstetler*.

The defendant suggests that particular weight should be given to the mitigating circumstance of his impaired mental capacity, and notes that this factor has been present in many cases where life sentences were recommended by a jury. As noted elsewhere in this opinion, however, the defendant's evidence of this circumstance was weak, only that he had been drinking for several hours and that he told police he could not remember the killings. The defendant's claimed lack of memory was contradicted by Watts' testimony.

Further, death sentences have been recommended by juries and upheld by this Court where the evidence of impaired mental capacity resulting from the defendant's intoxication was more substantial than in the present case. *E.g.*, *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984).

Having compared this defendant and his crimes with those in all of the cases in the proportionality pool, we conclude that his death sentences are not disproportionate. Accordingly, we hold that this is not a proper case in which to exercise our statutory authority to set aside a sentence of death as disproportionate. We leave the judgments and sentences of death entered against the defendant undisturbed.

No error.

Justice FRYE concurring in result.

One of the preservation issues raised by defendant relates to the applicability of the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L. Ed. 2d 384 (1988), to the unanimity requirement for mitigating circumstances in determining whether death is the appropriate punishment in a given case. This issue is now pending before the Supreme Court of the United States. *See State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L. Ed. 2d 180 (1989). While I believe that *Mills* is applicable to North Carolina, *see State v. Lloyd*, 321 N.C. 301, 364 S.E. 2d 316, *vacated and remanded on other grounds*, --- U.S. ---, 102 L. Ed. 2d 18, *reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988), Exum, C.J., and Frye, J., dissenting, assuming error arguendo, I would find the error nonprejudicial under the peculiar circumstances of this case.

STATE OF NORTH CAROLINA v. MICHAEL RAY QUESINBERRY

No. 95A88

(Filed 26 July 1989)

1. Criminal Law § 126.3— murder—jury deliberations—consideration of parole—impeachment not allowed

The trial court in a first degree murder prosecution properly denied defendant's motion for appropriate relief, which was based on allegations that the jurors considered defendant's possibility of parole in their sentencing deliberations, because allowing jurors to impeach their verdict by revealing the "ideas" and "beliefs" influencing their verdict is not supported by case law, nor is it sound public policy. The denial of defendant's motion did not preclude defendant from introducing evidence to support his claim because the record shows that the court asked defense counsel if he wanted to argue the motion and defense counsel chose not to do so, believing there was a question as to jurisdiction of the trial court due to the pendency of an appeal. Moreover, neither the documents defendant attached to his motion nor testimony by jurors impeaching the verdict would have been admissible because they attacked the internal processes of the jury. N.C.G.S. § 8C-1, Rule 606(b).

Am Jur 2d, Trial §§ 1219 et seq.

2. Jury § 7.12— murder—jury selection—opposition to death penalty—excused for cause

The trial court did not err during jury selection in a murder prosecution by excusing three jurors for cause where all three jurors said they could not vote for the death penalty under any circumstances and each juror responded affirmatively when asked by the court whether his or her beliefs about the death penalty would substantially impair his or her ability to sit as a juror. Defendant did not request to be allowed to examine the jurors after the State made its challenges for cause and defendant has not shown that further questioning likely would have resulted in different answers.

Am Jur 2d, Jury § 121.

3. Criminal Law § 102.6— murder—prosecutor's closing argument

The trial court did not err by not intervening *ex mero motu* during the prosecutor's closing argument where the assertion that defendant robbed and murdered the victim because he wanted money to buy drugs was an inference which could be drawn from the evidence.

Am Jur 2d, Homicide § 463.

4. Criminal Law § 102.6— murder—prosecutor's closing argument—sending message to community

The trial court did not err during closing arguments in a murder prosecution by not intervening *ex mero motu* where the prosecutor argued that the jury could send a message to the community.

Am Jur 2d, Homicide § 463.

5. Criminal Law § 102.13— murder—prosecutor's closing argument—parole

The prosecutor's closing argument in a murder prosecution 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.

Am Jur 2d, Homicide § 463.

6. Jury § 7.14— murder—jury selection—use of peremptory challenges—reservations about death penalty

The trial court did not err in a first degree murder prosecution by allowing the State to use peremptory challenges to exclude prospective jurors who expressed reservations about the death penalty.

Am Jur 2d, Jury §§ 289, 290.

7. Criminal Law § 135.7— murder—sentencing—mitigating circumstance—requirement of unanimity

The trial court did not err during the sentencing portion of a murder prosecution by instructing the jurors that they must be unanimous before they could find the existence of a mitigating circumstance.

Am Jur 2d, Trial § 1054.

8. **Jury § 6— murder—jury selection—motion for individual voir dire and sequestration of prospective jurors denied—no abuse of discretion**

Defendant in a murder prosecution did not show prejudice or abuse of discretion from the trial court's denial of his motion for individual voir dire and sequestration of individual jurors.

Am Jur 2d, Trial §§ 1122 et seq.

9. **Constitutional Law § 80— death penalty—constitutional**

N.C.G.S. § 15A-2000 is not unconstitutional.

Am Jur 2d, Homicide § 556.

10. **Criminal Law § 135.7— murder—sentencing—instruction on duty to return recommendation of death**

The North Carolina Pattern Jury Instruction on the jury's "duty" to return a recommendation of death is not unconstitutional.

Am Jur 2d, Homicide § 513.0.

11. **Criminal Law § 135.10— murder—armed robbery—death sentence disproportionate**

A death sentence in a first degree murder prosecution was not disproportionate, even though the victim was killed during an armed robbery, where defendant put a hammer in his pocket, went into a country store, and attacked a seventy-one-year-old man who had let him buy groceries and gas on credit; the attack commenced while the victim's back was turned; defendant beat the victim on his head, knocking him to the floor; defendant continued to beat the victim after the victim looked at him, hitting him on the head at least ten times; defendant then stepped over the victim to get two packs of cigarettes, then left him for dead; the victim suffered for several hours before dying, knowing that defendant, a man he had trusted and helped, had brutally beaten him; defendant disposed of the murder weapon, money, and purse, then returned to work acting no differently than when he had left; when informed that the victim had died, defendant made a remark which failed to indicate regret or remorse; and defendant denied the murder when first questioned about it.

Am Jur 2d, Homicide §§ 552, 554, 556.

Chief Justice EXUM concurring.

Justice FRYE dissenting as to sentence.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by *Freeman, J.*, at the 25 January 1988 Criminal Session of Superior Court, RANDOLPH County. Heard in the Supreme Court 14 March 1989.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was first tried at the 12 June 1985 Criminal Session of Superior Court, Randolph County. The jury found defendant guilty of first degree murder based on premeditation and deliberation and on the felony murder theory, and of robbery with a dangerous weapon. In the sentencing hearing for the murder conviction, the jury recommended the death sentence. On appeal, this Court found no error in the guilt phase of the trial but vacated the death sentence and remanded for a new sentencing hearing. *State v. Quesinberry*, 319 N.C. 228, 354 S.E. 2d 446 (1987). The evidence presented in the second sentencing hearing tended to show the following:

On 20 July 1984, Van Buren Luther, seventy-one years old, was working at a country store owned by his son Gary. Defendant lived near the store. Mr. Luther had allowed defendant to buy groceries and gas there several times on credit. Defendant owed $33.50. On the morning of 20 July, before the murder, defendant bought a drink on credit at the store. Around 1:37 p.m., Lisa Cox stopped at the store and went inside to speak to Mr. Luther. No one else was around. The front door was swinging open. She found Mr. Luther lying unconscious on the floor behind the counter. She went to a neighbor's house and called the rescue squad.

Herman Hogan, a volunteer fireman, received a call around 1:40 p.m. to go to the Luthers' store. He arrived at the store less than a minute later. As he drove up he saw Mr. Luther standing in the doorway, holding onto the door casing with one hand, waving for help. Mr. Luther was covered with blood from the top of his head to his waist. Blood was caked thickly on his chest and was spattered on the rest of his clothes. When Mr. Hogan asked who had done that to him, Mr. Luther replied, "It was Michael

Quesinberry." While Mr. Hogan was treating him, Mr. Luther passed out again, vomited, then regained consciousness. He said that his head hurt so badly he could hardly stand it.

The ambulance arrived at 2:09 p.m. Gary Luther drove up around 2:20 p.m. Mr. Luther told Gary that defendant pulled up to the store in his truck, came in and asked for a pack of Marlboros, and when he turned to get the cigarettes for defendant, defendant started beating him with a hammer. Mr. Luther told Gary that he had a terrible headache. During the trip to High Point Hospital, Mr. Luther vomited four times. He remained conscious. The ambulance arrived at the hospital around 3:20 p.m. Dr. Samuel Rakestraw treated Mr. Luther in the emergency room. Mr. Luther told Dr. Rakestraw that a Mr. Quesinberry assaulted him in the store.

While he was in the hospital, Mr. Luther told his wife that defendant had driven his truck up to the store, come in, picked up a Pepsi, set it on the counter, then walked around to where he was. Defendant said he wanted two packs of Marlboros. When Mr. Luther turned to get them, defendant struck him on the head. He did not know how many times defendant hit him. Mr. Luther told his wife that his head and hand were hurting.

Around 5:15 p.m., Mr. Luther's blood pressure and heart rate dropped, and his heartbeat became irregular. Attempts to stabilize his heartbeat and blood pressure failed. At 5:53 p.m. he was pronounced dead.

Dr. Robert Thompson, a forensic pathologist, conducted an autopsy. He found a contusion on the back of Mr. Luther's left hand and more than ten lacerations on his head. There was a skull fracture in the right rear of his head and subarachnoid hemorrhaging. Dr. Thompson testified that the injuries would have been painful. He testified that the cause of death was "blunt-force injuries to the head," which were consistent with blows by a hammer.

An officer in the Randolph County Sheriff's Department arrived at the Luthers' store around 4:20 p.m. to photograph the crime scene. There was a big pool of blood on the floor behind the counter, as well as blood on the walls, the counter, the door, and the door facings. An open Pepsi bottle was on the counter, and two packs of Marlboro cigarettes were on the floor behind the counter.

Around 4:00 p.m., a North Carolina Highway Patrol officer stopped defendant in his truck about two miles from the store,

told defendant to drive to the store, and followed him there. At the store, law enforcement officers advised defendant of his constitutional rights. Defendant denied that he had done anything. Around 6:00 or 7:00 p.m., defendant was told that Mr. Luther had died. Defendant responded, "What can I say?"

Defendant gave a statement to an SBI agent around 7:00 p.m. Defendant said that he smoked a marijuana cigarette during his lunch break at work that day, then at 1:00 p.m. he told a co-worker that he was going to leave for about an hour. He went to his truck, smoked another marijuana cigarette, and drove towards his home. He went to the Luthers' store to get a drink and saw that no one was around. He thought about how broke he was and about how his baby needed diapers and other things. He saw a hammer on the floor of his truck, put it in his back pocket, then went inside the store. He got a Pepsi and asked for cigarettes. When Mr. Luther turned to get the cigarettes, he hit him on the back of his head with the hammer. Mr. Luther fell on the floor, and he hit him on the head again. He took a purse with money in it, ran to his truck, and drove off. He threw the hammer and purse out the window, stopped and hid the money under a rock, then returned to work.

After making this statement, defendant went with the officers to look for the discarded items. They were able to locate the money, $545 in cash, but did not find the bag or the hammer. Defendant said the hammer was a "ball-and-ping-type hammer" with a metal head.

Three days after the murder, defendant told the SBI Agent that after he hit Mr. Luther the first time, Mr. Luther fell and looked at him; then he hit him again. Defendant said he had planned to get his family and go to West Virginia after he robbed Mr. Luther.

On the day of the murder, defendant was employed at a furniture company. He told Jason Coggins, a co-worker, that he had something he wanted to do and asked Mr. Coggins to cover for him. Defendant left around 1:00 to 1:30 p.m. Mr. Coggins testified that defendant came back around 2:00 or 2:30 p.m., appearing no different from when he had left, and resumed his work. Defendant left work at 3:25 p.m.

Another co-worker, Jeff Williams, testified that one day in June 1984 he and defendant were sitting in front of the Luthers'

store. Defendant said it was a wonder someone had not robbed Mr. Luther because he would be an "easy old man to rob."

Defendant testified that on the day of the murder he smoked five marijuana cigarettes and drank two beers. He felt nauseated and left work to go home. He saw the store and decided to stop for some groceries. He saw the hammer in the truck and started thinking about being broke and about taking his wife to the doctor. He put the hammer in his back pocket, went inside, asked for cigarettes, then hit Mr. Luther twice on the back of his head with the hammer. Defendant denied getting a Pepsi. He testified that he considered calling for help for Mr. Luther. He got the bag of money, stepped over Mr. Luther to get the cigarettes, and ran. After leaving the store and disposing of the bag, money, and hammer, defendant returned to work. He told Jason Coggins that he had taken a nap and felt better. He thought he had killed Mr. Luther and did not think Mr. Luther had recognized him.

Defendant grew up in a coal-mining town in West Virginia. He started using drugs when he was fourteen. When his grandfather died he moved in with his grandmother to help her. He dropped out of school when he was sixteen and joined the Army at seventeen. He continued to use drugs. The Army sent him to a drug and alcohol rehabilitation center. He used drugs while in the program, so the Army discharged him. He returned home and got married. He spent one-third to one-half of his income on drugs. He was "smoking pot, doing acid, speed, and smoking hash, and cocaine every now and then." He borrowed money which he did not repay and filed for bankruptcy, then he and his wife and baby moved to Asheboro. They lived in a house rent free in exchange for repairs to the house. On the weekend before the murder, defendant asked some of his relatives for $110.

Defendant presented testimony that when he was growing up in West Virginia he worked hard and had a good reputation in his community. There was also evidence that he had no prior criminal convictions.

Dr. Brad Fisher, a clinical forensic psychologist, testified that he diagnosed defendant as being clinically depressed. He believed that defendant would not be violent to others if incarcerated, but that he might attempt to hurt himself. Dr. Fisher testified that defendant had no record of violent behavior prior to the murder and that the murder was "totally out of character." He testified

that defendant had no serious mental illness or memory problem. He believed that long-term treatment could help keep defendant from using drugs again.

In the second sentencing hearing, the jury found the only aggravating circumstance submitted: the murder was committed for pecuniary gain. The jury found seven mitigating circumstances: defendant has no significant history of prior criminal activity; prior to the murder, defendant had no history of assaultive behavior; since defendant's arrest he has adapted well to life in custody and has shown no tendencies for violence against others; defendant voluntarily confessed to the crime after being warned of his right to remain silent and without asking for or without assistance of counsel; upon his arrest, defendant cooperated with law enforcement officers; the crime was out of character for defendant; and defendant is remorseful for the crime. Upon the jury's recommendation, the trial court sentenced defendant to death. We find no error.

SENTENCING PHASE

[1] On 12 February 1988 defendant filed a motion for appropriate relief pursuant to N.C.G.S. § 15A-1415, requesting an evidentiary hearing and a new sentencing hearing based on allegations that the jurors considered defendant's possibility of parole in their sentencing deliberations. On 25 May 1988 there was a hearing on the motion. The State moved to strike affidavits and a newspaper article which defendant had attached to the motion and to prohibit testimony by jurors. The court granted the State's motion to strike. Defendant did not present evidence. The court denied defendant's motion for appropriate relief. Defendant appeals from the denial of that motion.

The affidavits and newspaper article, submitted with defendant's motion and sealed by the trial court for review by this Court, contain statements by jurors that during deliberations they discussed that defendant might be paroled in ten years if given a life sentence. The affidavits include two affidavits of jurors and two affidavits of members of the Appellate Defender's office and the North Carolina Death Penalty Resource Center. Defendant claims that the affidavits and newspaper article show that the jurors had misconceptions about the length of time defendant would have to serve before he would be eligible for parole, and that the jurors' misconceptions were "the determining factor" in the jury's decision to recommend a death sentence rather than a life sentence. De-

fendant argues that the court erred in quashing the affidavits and newspaper article and in prohibiting testimony by jurors that during deliberations they were influenced by considerations of the possibility that defendant would be paroled if given a life sentence. He complains that his federal and state constitutional rights to confrontation, due process of law, and freedom from cruel and unusual punishment were violated.

Federal Rule of Evidence 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or any evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b). Federal Rule 606(b) is based on the common law rule prohibiting juror testimony which would impeach a verdict, except for testimony concerning extraneous influences on the jury. *Tanner v. United States*, 483 U.S. 107, 121, 97 L.Ed. 2d 90, 106 (1987). Under the common law, federal courts used an "external/internal distinction to identify those instances in which juror testimony impeaching a verdict would be admissible." *Id.* at 117, 97 L.Ed. 2d at 104.

Federal cases[1] where courts have found "external" influences on jurors include: *Parker v. Gladden*, 385 U.S. 363, 17 L.Ed. 2d 420 (1966) (bailiff told jurors defendant was guilty and Supreme Court would correct "anything wrong" on appeal); *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 2d 424 (1965) (two deputy sheriffs who were key witnesses for state could not be in "continuous and intimate" association with jury); *United States v. Barnes*, 747 F. 2d

1. Federal cases, while not binding on the courts of this state in construing our rules of evidence, "should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly . . . ." N.C.G.S. § 8C-1, Rule 102, Commentary.

246 (4th Cir. 1984) (three unauthorized exhibits sent to jury room); *United States v. Howard*, 506 F. 2d 865 (5th Cir. 1975) (one juror told other jurors defendant had been in trouble before); *Downey v. Peyton*, 451 F. 2d 236 (4th Cir. 1971) (juror was son of jailer beaten when defendant attempted an escape). These are cases in which "extraneous prejudicial information was improperly brought to the jury's attention or . . . outside influence was improperly brought to bear upon [a] juror." Fed. R. Evid. 606(b).

"Internal" influences, however, involve information coming from the jurors themselves—"the effect of anything upon [a] juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith." Fed. R. Evid. 606(b). Federal cases finding internal influences upon the jury include: *Shillcutt v. Gagnon*, 827 F. 2d 1155 (7th Cir. 1987) (juror alleged to have made racial slur which prejudiced defendant); *United States v. Barber*, 668 F. 2d 778 (4th Cir.), *cert. denied*, 459 U.S. 829, 74 L.Ed. 2d 67 (1982) (juror allegedly threatened by foreman and coerced into verdict); *Smith v. Brewer*, 444 F. Supp. 482 (S.D. Iowa), *aff'd*, 577 F. 2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967, 58 L.Ed. 2d 426 (1978) (juror alleged that other jurors told her she would be responsible if defendant was not convicted and killed someone else and that there were racial considerations during deliberations). *See also State v. Froneberger*, 55 N.C. App. 148, 285 S.E. 2d 119 (1981), *cert. denied and appeal dismissed*, 305 N.C. 397, 290 S.E. 2d 367 (1982) (three jurors allegedly "coerced" into voting for guilty verdict).

In *Tanner v. United States*, 483 U.S. 107, 97 L.Ed. 2d 90 (1987), the United States Supreme Court held that the district court did not err in denying the defendant's motion for a post-verdict evidentiary hearing based on allegations that jurors were intoxicated by drugs and alcohol during defendant's trial. The Supreme Court held that testimony by jurors that they and/or other jurors had used drugs and alcohol throughout the trial was inadmissible under Federal Rule 606(b) because the voluntary ingestion of drugs or alcohol by a juror was not an "outside" or "external" influence. *Id.* at 122, 97 L.Ed. 2d at 107. The Court stressed the importance of protecting the "internal processes of the jury" from post-verdict inquiry. *Id.* at 120, 97 L.Ed. 2d at 106. "[F]ull and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by

a barrage of post verdict scrutiny of juror conduct." *Id.* at 120-21, 97 L.Ed. 2d at 106.

This Court also has distinguished between "external" and "internal" influences on jurors. In *State v. Rosier*, 322 N.C. 826, 370 S.E. 2d 359 (1988), a first degree sexual offense case with a child victim, the defendant made a motion for appropriate relief based on affidavits from four jurors. The affidavits stated that the foreman of the jury had watched a television program on child abuse which the court had specifically instructed the jurors not to watch and that some jurors did not think the defendant was guilty, but "just wanted to get him off the streets." *Id.* at 830, 370 S.E. 2d at 361-62. We examined North Carolina Rule of Evidence 606(b), which is identical to the federal rule, and stated:

> [Rule 606(b)] mean[s] that extraneous information is information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried.

Id. at 832, 370 S.E. 2d at 363. We concluded that the jurors' affidavits were "not extraneous information within the meaning of Rule 606," and held that the trial court did not err in denying defendant's motion for appropriate relief. *Id.* at 832, 370 S.E. 2d at 363.

Under North Carolina Rule 606(b), as interpreted in *Rosier*, allegations that jurors considered defendant's possibility of parole during their deliberations are allegations of "internal" influences on the jury. First, the "information" that defendant would be eligible for parole in about ten years was not information dealing with this particular defendant, but general information concerning the possibility of parole for a person sentenced to life imprisonment for first degree murder. Second, there is no allegation that the jurors received information about parole eligibility from an outside source. The juror affidavits state that it was the jurors' "idea," "belief," or "impression" that defendant would be released in ten years. We have said that "[i]t would be naive to believe jurors during jury deliberations do not relate the experiences they have had," *id.*, and that "the possibility of parole or executive clemency is a matter of common knowledge among most adult persons." *State v. Cherry*, 298 N.C. 86, 101, 257 S.E. 2d 551, 561 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796 (1980). Most jurors,

through their own experience and common knowledge, know that a life sentence does not necessarily mean that the defendant will remain in prison for the rest of his life. Therefore, the jurors' "belief" about defendant's possibility of parole was an "internal" influence on the jury. *See Cherry*, 298 N.C. at 101, 257 S.E. 2d at 561 ("a possibility that . . . knowledge [of a defendant's eligibility for parole] might have been possessed by jurors will not permit a juror to attack and impeach his own verdict after it has been received by the court"); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979) (trial court properly excluded from record on appeal documents indicating that jury had considered possibility of parole).

Allowing jurors to impeach their verdict by revealing their "ideas" and "beliefs" influencing their verdict is not supported by case law, nor is it sound public policy.

> [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

Tanner v. United States, 483 U.S. 107, 119-20, 97 L.Ed. 2d 90, 105-06 (1987) (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68, 59 L.Ed. 1300, 1302 (1915)); *State v. Cherry*, 298 N.C. at 101, 257 S.E. 2d at 561.

Defendant further argues that the court's denial of his motion for appropriate relief improperly precluded him from introducing evidence to support his claim. The record shows, however, that the court asked defense counsel if he wanted to argue the motion for appropriate relief, but that he chose not to do so, believing there was a question as to the jurisdiction of the trial court to hear the motion due to the pendency of an appeal. Moreover, neither the documents defendant attached to his motion nor testimony by the jurors impeaching the verdict would have been admissible,

because they would have attacked the "internal processes of the jury." *Tanner v. United States*, 483 U.S. at 120, 97 L.Ed. 2d at 106.

We conclude that the trial court properly denied defendant's motion for appropriate relief.

[2] Defendant next contends that the trial court erred by excusing three prospective jurors for cause, due to their feelings about the death penalty, without proper inquiry as to their ability to follow the law, and by not allowing defendant to question the prospective jurors.

During jury selection, the State challenged three prospective jurors for cause due to their opposition to the death penalty. The first prospective juror said that she "couldn't render the death penalty."

MR. YATES [prosecutor]: So, you would automatically vote against the imposition of the death penalty without regard to any of the evidence in the case?

MS. CAGLE: Yes.

MR. YATES: And you would not vote in favor of the death penalty under any facts or circumstances?

MS. CAGLE: Now, I don't know that. I'm just not in favor of the death penalty.

MR. YATES: Would you say you would not vote for the death penalty under any circumstances?

MS. CAGLE: Yes.

MR. YATES: Because of your religion?

MS. CAGLE: Yes.

MR. YATES: State would challenge for cause.

COURT: Ma'am, is what you're saying because of your religious beliefs that under no set of circumstances, it doesn't matter what the facts might be, that you could not fairly even consider the death penalty?

MS. CAGLE: (No response.)

COURT: Is that what you're saying?

MS. CAGLE: Right.

COURT: And because of your beliefs, your religious beliefs, I believe you feel like that would substantially impair your ability to sit on this case as a juror and be fair and impartial to both sides?

MS. CAGLE: Yes.

COURT: Is that what you're saying?

MS. CAGLE: Right.

The prosecutor asked the second prospective juror whether he would be unable to vote for the death penalty under any circumstances. He responded that he felt that he would be unable to do so. The court questioned him:

COURT: Mr. Wilmouth, no matter what your beliefs are, if the—Are you saying that because of those beliefs and it really doesn't matter what they are, but because of those beliefs you couldn't even consider the death penalty?

MR. WILMOUTH: Well, really, I don't feel like I would really—I feel like it would bother me later, regardless of which way it went.

COURT: Are you saying that just because of that, you don't think that you could fairly and impartially sit on this jury and come to a fair and impartial decision because of your feelings?

MR. WILMOUTH: I don't think I could consider the death penalty, no.

COURT: You're saying you could or could not?

MR. WILMOUTH: I don't think I could and feel like—feel right.

COURT: Because of your feelings about the death penalty, do you feel that that would substantially impair and hamper your ability to sit as a juror; is that what you are saying?

MR. WILMOUTH: Yes, I do in this case.

The third prospective juror said she was against the death penalty.

MR. YATES: So you would not impose the death penalty under any circumstances?

MS. GILLETTE: I don't believe so.

MR. YATES: You would automatically vote for life imprisonment in this case no matter what the facts or circumstances?

MS. GILLETTE: Yes, sir.

MR. YATES: State will challenge for cause.

COURT: Ma'am, is what you're saying because of your feelings about the death penalty, and even regardless of your feelings about the death penalty, that no matter the facts and circumstances of any case, that you would not even consider the death penalty; is that what you're saying?

MS. GILLETTE: Yeah, it would be very difficult for me to.

COURT: It's going to be difficult for everybody, but you're saying you would not even consider it. You need to say yes, or no, she can't hear you.

MS. GILLETTE: No.

COURT: She can't take a shake of the head in the record. And you feel like those feelings that you have and beliefs would substantially impair your ability to sit on this jury and be fair and impartial, don't you?

MS. GILLETTE: Yes, sir.

In *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed. 2d 841 (1985), the United States Supreme Court held that a prospective juror may be removed for cause due to his or her views about the death penalty if those views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Id.* at 424, 83 L.Ed. 2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L.Ed. 2d 581, 589 (1980)). Here, all three of the prospective jurors said they could not vote for the death penalty under any circumstances. Each juror responded affirmatively when asked by the court whether his or her beliefs about the death penalty would substantially impair his or her ability to sit as a juror. Therefore, the trial court did not err in excusing them for cause.

Defendant argues that the trial court erred by not allowing him to examine each prospective juror before he or she was excused. However, the record shows that defendant did not request

to be allowed to examine the jurors after the State made its challenges for cause. Additionally, defendant has not shown that he could have rehabilitated any of the prospective jurors. We stated in *State v. Reese*, 319 N.C. 110, 353 S.E. 2d 352 (1987):

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

Id. at 120-21, 353 S.E. 2d at 358 (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E. 2d 183, 191 (1981)). Defendant has not shown that further questioning likely would have resulted in different answers by the prospective jurors concerning their feelings about the death penalty. Their answers to questions from the prosecutor and the court showed that they could not fulfill their duty as jurors. We therefore hold that the trial court did not abuse its discretion.

[3] Defendant next contends that the court erred in not intervening in portions of the prosecutor's closing argument. Defendant did not object to the portions of the argument to which he now assigns error. Therefore, "review is limited to an examination of whether the argument was so grossly improper that the trial [court] abused [its] discretion in failing to intervene *ex mero motu*." *State v. Gladden*, 315 N.C. 398, 417, 340 S.E. 2d 673, 685, *cert. denied*, 479 U.S. 871, 93 L.Ed. 2d 166 (1986).

First, defendant argues that the prosecutor made assertions that were not supported by the evidence. The prosecutor argued that the reason defendant robbed and murdered Mr. Luther was because he wanted money to buy drugs. The prosecutor also argued that defendant gave as his reason for killing the victim that he wanted money to buy drugs. Defendant claims that there is no evidence supporting either argument.

We have stated that "[a] prosecutor in a criminal case is entitled to argue vigorously all of the facts in evidence, any reasonable inference that can be drawn from those facts and the law that is relevant to the issues raised by the testimony." *State v. Maynard*, 311 N.C. 1, 14-15, 316 S.E. 2d 197, 205, *cert. denied*, 469 U.S. 963, 83 L.Ed. 2d 299 (1984). Defendant claimed that he needed money to buy diapers and other things for his baby. However, the

evidence showed that Mr. Luther had let defendant buy grocery items at the store on credit. Defendant admitted that he was addicted to drugs and that before the murder he was spending a large portion of his salary on drugs. An inference can be drawn from this evidence that defendant beat and robbed Mr. Luther to get money for drugs. We thus conclude that the prosecutor's argument was not so grossly improper that the court abused its discretion in failing to intervene *ex mero motu.*

[4] Second, defendant argues that the prosecutor improperly appealed to community sentiment by suggesting that only a death sentence would prevent this type of crime. The prosecutor said, "Send a message that, yes, anybody out there like Mr. Quesinberry that can show that he doesn't have a prior record, and if he gets on drugs, he's not responsible. He's not responsible." The prosecutor went on to tell the jurors, "[W]hen you think about [the circumstances of the killing], then you will do your duty, and you will find that this type of murder is not allowed in Randolph County. Not allowed in this State." Defendant argues that this type of argument is prejudicial under *State v. Scott*, 314 N.C. 309, 333 S.E. 2d 296 (1985). There, we held that the prosecutor's argument to the jury was improper because it " 'ask[ed] the jury to lend an ear to the community rather than a voice.' " *Id.* at 312, 333 S.E. 2d at 298 (quoting *Prado v. State*, 626 S.W. 2d 775, 776 (Tex. Crim. 1982)). Here, instead, the prosecutor asked the jury to send a message to the community, not to "lend an ear to the community." Therefore, the trial court properly did not intervene *ex mero motu* in the prosecutor's argument. *See State v. McNeil*, 324 N.C. 33, 52-53, 375 S.E. 2d 909, 920-21 (1989) (prosecutor's argument to the jurors during the sentencing hearing asking what message they would send to the community did not require *ex mero motu* intervention).

Third, defendant claims that the following argument by the prosecutor was improper:

> The law says if it's a brutal, vicious killing for money, then the punishment is the death penalty. When you think about mercy, you think about the mercy—the mercy this person right here, this killer, this murderer showed Mr. Luther when Mr. Luther turned and looked at him. And you think about the mercy he showed. Think about the extra blows he delivered. I think when you think about that, then you will do your

> duty, and you will find that this type of murder is not allowed in Randolph County. Not allowed in this State. And certainly not allowed for the reason that the defendant gives for killing Mr. Luther, money to buy drugs.

Even assuming that the prosecutor's statements here were improper, the impropriety was not so gross that the trial court abused its discretion by not intervening *ex mero motu.*

[5] Finally, defendant argues that the prosecutor improperly suggested to the jury that defendant could be released from prison if given a life sentence. The prosecutor argued, "When you go back and you try to decide, I'm not going to give any mercy; I'm not going to let him, as his wife says, go back to his little kids, they depend on him." His argument referred to defendant's wife's statement, "I hope [defendant's] appeal does go through, 'cause he's got two . . . little boys that needs him," and her testimony that she took the boys to see their father.

We have found that a prosecutor's arguments to the jury during a capital sentencing proceeding that "you are the only thing standing between [the defendant] and freedom to walk around again" and "the only way you can ever be sure this man will never walk out again is to give him the death penalty" were not improper because he "never used the word parole nor did he tell the jury that if defendant received a life sentence he could be out in twenty years." *State v. Johnson*, 298 N.C. 355, 366-67, 259 S.E. 2d 752, 760 (1979); *see also State v. Hunt*, 323 N.C. 407, 427-28, 373 S.E. 2d 400, 414 (1988); *State v. Brown*, 320 N.C. 179, 201, 358 S.E. 2d 1, 13-14 (1987). Likewise, the prosecutor's argument here 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." *State v. Hunt*, 323 N.C. at 428, 373 S.E. 2d at 414.

[6] Defendant next contends that the trial court erred in allowing the State to use peremptory challenges to exclude prospective jurors who expressed reservations about imposing the death penalty. He argues that such a use of peremptories denied him his Sixth Amendment right to trial by an impartial jury composed of a fair cross-section of the community. We have rejected this argument. *State v. Parks*, 324 N.C. 94, 99, 376 S.E. 2d 4, 8 (1989); *State v. Fullwood*, 323 N.C. 371, 381-83, 373 S.E. 2d 518, 525-26 (1988). Defendant argues that we should reconsider this position in light of *Brown v.*

Rice, 693 F. Supp. 381 (W.D.N.C. 1988). When *Parks* was before this Court for consideration, defense counsel there filed a memorandum of additional authority citing *Brown*. We thus were cognizant of *Brown* when we rendered our decision in *Parks*. We continue to find defendant's argument unpersuasive and adhere to our prior decisions.

Defendant raises the following "preservation" issues:

[7] (1) He 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 384 (1988). For the reasons expressed in *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L.Ed. 2d 180 (1989), we reject this argument.

[8] (2) He contends that the trial court erred in denying his motion for individual voir dire and sequestration of prospective jurors. It is in the trial court's sound discretion whether to allow individual voir dire and sequestration. *State v. Murphy*, 321 N.C. 738, 365 S.E. 2d 615 (1988). Defendant has not shown any prejudice or abuse of discretion. Therefore, this assignment of error has no merit.

[9] (3) He contends that N.C.G.S. § 15A-2000 is unconstitutional. This argument is without merit. *State v. Fullwood*, 323 N.C. 371, 400, 373 S.E. 2d 518, 535 (1988).

[10] (4) He 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, *cert. denied*, 484 U.S. 918, 98 L.Ed. 2d 226 (1987).

PROPORTIONALITY REVIEW

[11] Because we have found no error in the sentencing phase, and on the prior appeal found no error in the guilt phase, 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. Fullwood*, 323 N.C. 371, 401, 373 S.E. 2d 518, 536 (1988).

The jury found, as an aggravating circumstance, that the murder was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6) (1988). 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.

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), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988). 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.* 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. 465, 529, 356 S.E. 2d 279, 316, *cert. denied*, 484 U.S. 918, 98 L.Ed. 2d 226 (1987) (emphasis in original).

The jury found one aggravating circumstance—the murder was committed for pecuniary gain. The jury found seven mitigating circumstances: defendant has no significant history of prior criminal activity; prior to the murder, defendant had no history of assaultive behavior; since defendant's arrest he has adapted well to life in custody and has shown no tendencies for violence against others; defendant voluntarily confessed to the crime after being warned of his right to remain silent and without asking for or without assistance of counsel; upon his arrest, defendant cooperated with law enforcement officers; the crime was out of character for defendant; and defendant is remorseful for the crime.[2]

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2. Defendant also submitted the following mitigating circumstances, which the jury refused to find:

Defendant argues that in the cases in the pool in which the defendants killed their victims during armed robberies, most of the juries imposed life sentences rather than death sentences. Moreover, defendant argues that in almost all the robbery-murder cases in which we have affirmed the death sentence, the jury found as an aggravating circumstance that the defendant engaged in a course of conduct which included the commission by the defendant of other crimes of violence against another person or persons, and/or that the murder was especially heinous, atrocious, or cruel. Defendant points out that neither of those aggravating circumstances is present here.

Although we compare this case to similar cases in the proportionality "pool," our responsibility in proportionality review is to evaluate each case independently, considering " 'the individual defendant and the nature of the crime or crimes which he has committed.' " *State v. Lloyd*, 321 N.C. 301, 322, 364 S.E. 2d 316, 329-30, *judgment vacated and remanded*, --- U.S. ---, 102 L.Ed. 2d 18, *judgment reinstated*, 323 N.C. 622, 374 S.E. 2d 277 (1988) (quoting *State v. Pinch*, 306 N.C. 1, 36, 292 S.E. 2d 203, 229, *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 refused to evaluate a defendant's sentence by mathematical or statistical comparisons. *Id.* at 322, 364 S.E. 2d at 330. "[Although] certain aggravating circumstances usually are present in death-affirmed cases, . . . we do not consider their presence crucial to affirmation of a jury's recommendation of a death sentence." *State v. Greene*, 324 N.C. 1, 29, 376 S.E. 2d 430, 447 (1989). Further, we give the decision of the jury great deference in determining whether a death sentence is disproportionate. *Id.* at 32, 376 S.E. 2d at 449. Therefore, we cannot conclude that simply because this case involves a robbery-murder, and many juries have returned life sentences in such cases, the death sentence here is disproportionate.

Defendant compares this case to several "robbery-murder" cases in which the juries recommended life sentences. In *State v. Atkinson*,

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The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired because he was under the influence of drugs;

The age of the defendant at the time of the murder; and

Any other circumstances arising from the evidence.

298 N.C. 673, 259 S.E. 2d 858 (1979), *overruled on other grounds, State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981), an owner of a grocery store was found beaten and robbed. He was bleeding from his head. There was blood inside and outside the store. After being taken to the hospital, the victim died. In *State v. Massey*, 316 N.C. 558, 342 S.E. 2d 811 (1986), the defendant and his brother robbed a country store. The owner of the store was found shot to death. In *State v. Miller*, 315 N.C. 773, 340 S.E. 2d 290 (1986), the defendant and two other men robbed a convenience store, shot and wounded the clerk, ran from the store, robbed some people who had driven into the parking lot, then shot one of them. In *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985), the defendant and another man robbed and stabbed to death the manager of a motel.

The cases defendant cites are all distinguishable from the case at bar. First, the guilty verdicts in all four cases were based only on the felony murder theory, not on premeditation and deliberation as well, as in the present case. Moreover, there are other important distinctions. In *Atkinson* there was no evidence that the defendant himself actually beat the victim; rather, he was found guilty of murder on an acting in concert theory. In *Massey* the defendant was eighteen years old and was mildly mentally retarded, with a mental age of ten or eleven. In *Miller* there was no evidence that the defendant fired the fatal shot; he was convicted on an acting in concert theory. Although the evidence showed that he asked two other men to help him rob the store, he also warned them not to shoot anyone. In *Wilson* there was no evidence that the defendant himself stabbed the victim; he was convicted on an acting in concert theory.

This case is also distinguishable from the seven cases in which this Court has found the death sentence disproportionate. In *State v. Benson*, 323 N.C. 318, 372 S.E. 2d 517 (1988), the jury found the same aggravating circumstance found here—pecuniary gain. The jury found several mitigating circumstances: the defendant had no significant history of prior criminal activity; the defendant was under the influence of mental or emotional disturbance; the defendant confessed and cooperated upon arrest; the defendant voluntarily consented to searches of his home, car and motel room; and the defendant was abandoned by his natural mother at an early age. Although the aggravating and mitigating circumstances in *Benson* are almost the same as the aggravating and mitigating circumstances here, the murder in *Benson* was far less brutal than

this murder. The evidence in *Benson* was that the defendant shot his victim in his legs "rather than a more vital part of his body," tending to show that he "intended only to rob," not to kill. *Id.* at 329, 372 S.E. 2d at 523. Here, however, defendant beat his victim on the head with a metal hammer and left thinking he had killed him. Further, in *Benson* the defendant was convicted only on a felony murder theory, and there was little or no evidence that he premeditated and deliberated the killing. Here, defendant was convicted on a premeditation and deliberation theory, as well as on a felony murder theory, and the evidence supports the finding of premeditation and deliberation.

State v. Stokes, 319 N.C. 1, 352 S.E. 2d 653 (1987), is also distinguishable from this case. First, the defendant there was only seventeen years old. Second, 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 was convicted only on a felony murder theory.

State v. Rogers, 316 N.C. 203, 341 S.E. 2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E. 2d 373 (1988), is distinguishable because the defendant there apparently shot the victim while attempting to shoot another person with whom he had argued on several occasions. In contrast, defendant here entered the store with a weapon and attacked his intended victim without provocation.

In *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985), the defendant and two other men went to the victim's home, where they robbed and murdered him. Defendant and one of the men stabbed the victim. The jury found as aggravating circumstances that the murder was committed (1) for pecuniary gain and (2) during the course of a robbery or burglary.[3] The jury found one or more of the submitted mitigating circumstances. This case is distinguishable from *Young*. First, the defendant in *Young* was only nineteen years old at the time of the crime; defendant here was twenty-two. Second, there was medical testimony that the victim in

3. We held in *State v. Quesinberry*, 319 N.C. 228, 354 S.E. 2d 446 (1987), that the court erred in submitting both of these aggravating circumstances to the jury because "in the particular context of a premeditated and deliberate robbery-murder where evidence is presented that the robbery was attempted or effectuated for pecuniary gain," the submission of both circumstances is redundant. *Id.* at 239, 354 S.E. 2d at 453. That issue was not raised in *Young*.

Young probably died shortly after being stabbed. Here, the victim suffered for several hours before he died. Third, there was no evidence that the victim and the defendant in *Young* had an ongoing relationship such that the victim should not have been on guard when the defendant and his accomplices came to his home. Here, however, the victim was particularly vulnerable to defendant's attack. He had extended credit to defendant, which indicates that he trusted defendant. Thus, when defendant entered the store to murder him, the victim had no reason to be particularly cautious.

In *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984), the defendant shot and killed a police officer. That case is distinguishable because there was no clear evidence of how the crime took place and what the defendant was doing before he encountered the officer. Further, the shooting occurred quickly. There was no long, brutal assault on the victim as there was here.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), the defendant shot the victim while they were riding in a car. After the shooting, he directed the driver to go to the hospital, then went inside to get medical treatment for the victim. Here, defendant showed no such concern for his victim's life. He testified that he thought about calling for help for his victim; instead, he stepped over his victim to get the cigarettes he had asked for. When law enforcement officers informed him that the victim had died, defendant answered, "What can I say?" His later expressions of remorse at trial are not comparable to the actions of the defendant in *Bondurant*.

In *State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983), the defendant climbed in the victim's truck and rode off with him after the victim offered to help the defendant with his car. The victim's body was found with two gunshot wounds to the head. *Jackson* is distinguishable from this case because in that case there was no evidence that the defendant had brutally attacked the victim. Here, the evidence showed a brutal, relentless attack.

While dissimilar to the facts of the above cases, the facts of this case are similar to those of two other cases in the pool in which the defendants beat their victims to death—*State v. Greene*, 324 N.C. 1, 376 S.E. 2d 430 (1989), and *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 both cases we held that the death sentence was not disproportionate.

In *Greene* the defendant beat his father to death with a gun to secure an inheritance. The defendant inflicted numerous wounds to his father's face, chest, mid-back, and shoulders. After the killing defendant threw his own bloody clothes and the gun into a river. The jury found the defendant guilty on the theory of premeditation and deliberation as well as on the felony murder theory. The only aggravating circumstance the jury found was that the murder was committed during a robbery with a dangerous weapon. The jury found four mitigating circumstances: the defendant's I.Q. of eighty-one placed him in the lowest ten percent of the population; the defendant was a model prisoner in jail while awaiting trial; the defendant was a person of good behavior except when he was drinking alcohol; and the catch-all circumstance of "any other circumstance or circumstances which you the jury deem to have mitigating value." *Greene*, 324 N.C. at 23-24, 376 S.E. 2d at 444.

In our proportionality analysis, we distinguished *Greene* from other robbery-murder cases on the basis that the defendant killed his father.

> The victim was in a position of enhanced vulnerability because the victim and defendant were closely related, defendant lived nearby, the two frequently spent time together, and the victim thus had no reason to be on guard against harm at defendant's hand. . . . The pathologist testified that the blow to the head was the cause of death. Thus, defendant killed his father for a pecuniary motive while his father had his back turned. The evidence showed that defendant inflicted further blows on the victim, then dragged the body to the stairs, attempting to make the murder look like an accident. These actions show a meanness on the part of a mature, calculating adult without remorse for his crime or mercy towards his victim.

Id. at 26, 376 S.E. 2d at 445. We disagreed with the defendant's portrayal of his case as a typical robbery-murder, stating that "the crime is more accurately described as a premeditated and deliberated robbery-murder of a parent by a child, executed by a brutal beating until death resulted." *Id.*

This case is similar to *Greene*. Defendant hit the victim on the head with a metal hammer when the victim turned his back. Defendant continued to hit the victim on his head even after he had knocked him to the floor. He then took money from the cash register, left, disposed of the murder weapon and the purse, and hid

the money. Although defendant did not kill his father, as the defendant in *Greene* did, the victim here was also "in a position of enhanced vulnerability" because of his prior dealings with defendant. As recently as the morning of the murder, the victim had allowed defendant to purchase a drink on credit. He thus had less reason to be on guard when defendant entered the store than when dealing with customers with whom he had no ongoing credit relationship.

In *Huffstetler* the defendant beat his sixty-five-year-old mother-in-law to death with a frying pan. There, the jury found one aggravating circumstance—that the murder was especially heinous, atrocious, or cruel. The jury found three mitigating circumstances: the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired; the killing occurred contemporaneously with an argument and by means of an instrument acquired at the scene and not taken there; and defendant did not have a history of violent conduct.

There are several similarities between the murder in *Huffstetler* and the murder here. There, the defendant hit his victim on her head and shoulders with a frying pan fourteen times, and left her lying in a pool of blood. The victim had multiple wounds and lacerations on her head and body, as well as a skull fracture and a hemorrhage in her brain. The defendant disposed of the murder weapon and other evidence of the crime—his bloody clothes—as defendant did here. One difference between *Huffstetler* and this case is that the defendant there did not take a weapon with him to the scene, but picked up a frying pan and beat the victim after an argument. Defendant here, however, with no provocation, calculated the murder and carried the murder weapon with him into the store. In *Huffstetler*, we said that the crime was "a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault by an adult male upon a sixty-five year old female in her home." *Huffstetler*, 312 N.C. at 118, 322 S.E. 2d at 126. Here, the crime was "a senseless, unprovoked, exceptionally brutal, prolonged and murderous assault" on a seventy-one-year-old man in his place of business where he had maintained an ongoing creditor-debtor relationship with defendant.

In summary, the facts here show a particularly brutal and senseless crime. Defendant put a hammer in his pocket, went into a country store, and attacked a seventy-one-year-old man who had

let him buy groceries and gas on credit. The attack commenced while the victim's back was turned. Defendant beat the victim on his head, knocking him to the floor. After the victim looked at him, defendant continued to beat him, hitting him on the head at least ten times. After thus beating his victim, defendant stepped over him to get two packs of cigarettes, then left him for dead. The victim suffered for several hours before dying, knowing that defendant, a man he had trusted and helped, had brutally beaten him. Defendant disposed of the murder weapon, money, and purse, then returned to work, acting no differently than when he had left. When the authorities informed defendant that the victim had died, defendant made a remark which failed to indicate regret or remorse. When the authorities first questioned defendant about the murder, he denied it. Under these circumstances, considering both the crime and the defendant, we cannot hold as a matter of law that the death sentence was disproportionate or excessive. *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.

If the Court were addressing for the first time the mitigating circumstance unanimity instruction issue, 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), *cert. granted*, --- U.S. ---, 103 L.Ed. 2d 180 (1989), 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.

In upholding the death sentence in this case, the majority relies on *State v. McKoy*, 323 N.C. 1, 372 S.E. 2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L. Ed. 2d 180 (1989), in which this Court rejected defendant's contention that the trial court erred in in-

structing the jurors that they must be unanimous before they could find the existence of a mitigating circumstance. A significant question involved in this case is whether the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L. Ed. 2d 384 (1988), applies to the North Carolina death sentencing scheme. Accordingly, for the reasons stated 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 continue to believe that the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. ---, 100 L. Ed. 2d 384, is applicable to the North Carolina death sentencing procedure. I therefore dissent from that portion of the Court's opinion which rejects defendant's request for a new sentencing hearing.

RICHARD D. TURNER, ADMINISTRATOR OF THE ESTATE OF JANE L. TURNER v. DUKE UNIVERSITY, PRIVATE DIAGNOSTIC CLINIC AND ALLAN H. FRIEDMAN, M.D.

No. 526A88

(Filed 26 July 1989)

1. **Physicians, Surgeons, and Allied Professions § 19— physician's negligent failure to attend, diagnose and treat—sufficiency of evidence**

Plaintiff's evidence raised a question of fact for the jury as to whether a hospital patient's death from a perforated colon was proximately caused by defendant attending physician's negligent failure to attend, diagnose and treat the patient's dangerous state of constipation after the patient had been admitted to a medical center for evaluation for a neurosurgical procedure.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 228.

2. **Rules of Civil Procedure § 11— Rule 11(a) sanctions—objective reasonableness standard**

A subjective showing of bad faith is unnecessary for the imposition of sanctions under N.C.G.S. § 1A-1, Rule 11(a). Rather, the standard under Rule 11(a) is one of objective reasonableness under the circumstances.

Am Jur 2d, Depositions and Discovery § 376.

3. Rules of Civil Procedure § 11— Rule 11(a) sanctions—standard for appellate review

The trial court's decision to impose or not to impose mandatory sanctions under Rule 11(a) is reviewable de novo as a legal issue. In the de novo review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under Rule 11(a).

Am Jur 2d, Appeal and Error §§ 79, 703.

4. Rules of Civil Procedure § 11— Rule 11(a) sanctions—appropriateness of particular sanction—abuse of discretion standard

An "abuse of discretion" standard will be used in reviewing the appropriateness of a particular sanction imposed under Rule 11(a).

Am Jur 2d, Appeal and Error § 18.

5. Rules of Civil Procedure § 26— physician not expert witness—deposition after certain date—court order not violated

A physician deposed by defendant medical center in Florida was not an expert witness, and the trial court's order requiring the identification and deposition of expert witnesses prior to a certain date was not violated by defendant's deposition of the physician after that date, where the focus of the deposition was the physician's previous treatment of the patient for lung cancer, the physician was not questioned about the standard of the patient's care at defendant medical center, and the physician was not retained by defendant for the purpose of litigation.

Am Jur 2d, Depositions and Discovery §§ 131, 140.

6. Attorneys at Law § 7.7; Rules of Civil Procedure § 11— noticing and taking of depositions close to trial—increasing litigation costs and unnecessary delay—harassment of counsel—Rule 11(a) sanctions

In an action to recover for the wrongful death of a hospital patient based on medical malpractice, defendant medical center's noticing and taking of the depositions of two physicians, one in California six days before trial and one in Florida four days before trial, subsequent to its failure to reveal the existence of the California physician in response to discovery requests, as well as the duplicative and cumulative nature of the Florida physician's testimony, threatened to increase plaintiff's litigation costs and cause unnecessary delay in the trial in violation of Rule 11(a). Also, the noticing and taking of the depositions so close to trial represented an attempt to harass plaintiff's counsel in violation of Rule 11(a). Therefore, the trial court should have imposed sanctions on defendant medical center and/or its counsel pursuant to Rule 11(a).

Am Jur 2d, Depositions and Discovery §§ 131, 140.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, reported at 91 N.C. App. 446, 372 S.E. 2d 320 (1988), affirming a judgment entered by *Stephens, J.*, at the 4 August 1987 session of Superior Court, DURHAM County, and on discretionary review of that same decision of the Court of Appeals unanimously affirming an order entered by *Barnette, J.*, at the 20 July 1987 session of Superior Court, DURHAM County. Heard in the Supreme Court 14 March 1989.

Leonard T. Jernigan, Jr., P.A., for plaintiff-appellant.

Yates, Fleishman, McLamb & Weyher, by Beth R. Fleishman and Barbara B. Weyher, for defendant-appellee Duke University; Newsom, Graham, Hedrick, Bryson & Kennon, by E. C. Bryson, Jr., Joel M. Craig, and Mark E. Anderson, for defendant-appellees Private Diagnostic Clinic and Allan Friedman, M.D.

MEYER, Justice.

This is a wrongful death action based on alleged medical malpractice. The evidence presented at trial tended to show the following facts and circumstances. In 1982, plaintiff's wife, Jane L. Turner,

was diagnosed as having lung cancer, for which she received chemotherapy and radiation treatment. She subsequently developed herpes zoster, or shingles. In time, the shingles disappeared, but Mrs. Turner was left with constant post-herpetic pain in her upper right back. In attempting to find relief for this residual pain, Mrs. Turner saw numerous physicians, but to no avail. She was eventually referred to Dr. Blaine Nashold, a neurosurgeon at defendant Duke University Medical Center ("Duke"), for evaluation as a candidate for a DREZ procedure. This is a neurosurgical procedure in which the appropriate nerves are severed by burning in order to relieve pain. Dr. Nashold in turn referred Mrs. Turner to defendant Dr. Allan H. Friedman, one of Dr. Nashold's partners in the defendant Private Diagnostic Clinic. Dr. Friedman became Mrs. Turner's attending physician.

Accompanied by her husband, Mrs. Turner was admitted to Duke in the afternoon of 25 August 1983. She was examined by Dr. Bruce Woodworth, a urology resident and employee of Duke. On the admission summary, Dr. Woodworth noted that Mrs. Turner had been experiencing constipation and that she had been taking medication to alleviate the problem. Dr. Woodworth conducted a digital rectal examination but found Mrs. Turner's rectum empty and determined that her bowel sounds were normal.

At about 5:00 p.m. the same afternoon, Mr. and Mrs. Turner met with defendant Dr. Friedman. Dr. Friedman explained that it would be necessary for a variety of tests to be performed by various physicians, after which he would consult further with Mr. and Mrs. Turner as to what type of pain relief would be best suited for her condition. Dr. Friedman then left. That evening, Mrs. Turner took two Dulcolax tablets for her constipation, but they had no effect.

On the following morning of 26 August 1983, Dr. Friedman made his morning rounds. Although he stopped at Mrs. Turner's room and looked at her medical chart, he did not enter the room to examine Mrs. Turner because she appeared to be asleep. Upon awakening and throughout the morning, Mrs. Turner complained of constipation and abdominal cramping. At about 11:00 a.m., Dr. Woodworth ordered that Mrs. Turner be given a saline enema to alleviate her constipation. He further ordered that if the enema produced no results, Mrs. Turner was to be given a half bottle of magnesium citrate. If Mrs. Turner experienced no relief, the

second half-bottle of magnesium citrate was to be administered at about 2:00 p.m. Neither the enema nor the first half-bottle of magnesium citrate produced any positive results. Mrs. Turner made numerous unsuccessful attempts to have a bowel movement and continued to complain of abdominal cramping.

The second half-bottle of magnesium citrate was administered at about 2:00 p.m. Mrs. Turner was then transferred to a different wing of the hospital, where patients with neurological complaints were concentrated. Dr. Friedman made his afternoon rounds, but because Mrs. Turner had been moved from her former room, he failed to see her. At about 3:00 p.m., Dr. Robert Havard, an oncologist called upon by Dr. Friedman to evaluate the condition of Mrs. Turner's cancer, visited Mrs. Turner and examined her. Dr. Havard's examination was repeatedly interrupted by Mrs. Turner's trips to the bathroom for unsuccessful attempts to have a bowel movement. Dr. Havard noted on Mrs. Turner's chart that she was experiencing extreme abdominal discomfort as well as nausea and vomiting.

At about 5:00 p.m., plaintiff, who had remained with his wife throughout the day, became increasingly concerned about her abdominal pain. He rang for a nurse and requested that a doctor check Mrs. Turner. Plaintiff was informed that the doctors were making rounds and that they would attend his wife when they reached her room. At 6:00 p.m., the doctors stopped at Mrs. Turner's room, but despite plaintiff's requests, they did not examine Mrs. Turner at that time. Sometime between 7:00 p.m. and 8:00 p.m., plaintiff saw Dr. Woodworth in the hospital hallway and asked him to check his wife. When Dr. Woodworth examined Mrs. Turner, her bowel was distended, she was breathing heavily, and her skin was clammy. He immediately left to order a blood work-up and x-rays and to contact the general surgeon on duty. When Dr. Woodworth returned to Mrs. Turner's room, her blood pressure had dropped. She was unresponsive and in shock. The x-ray revealed the presence of air in the abdominal cavity, which indicated a perforation in Mrs. Turner's colon.

At about 12:00 midnight, Mrs. Turner underwent exploratory surgery, which revealed that her colon was indeed perforated. Mrs. Turner's abdomen was full of stool, and there was a large impaction of fecal matter in her colon. The surgeon determined that Mrs. Turner's intestines were nonsalvageable, and he terminated the

operation. The surgeon advised plaintiff that nothing could be done to save his wife. Mrs. Turner was pronounced dead at 4:10 a.m. on 27 August 1983. The autopsy report stated that a single acute perforation of the sigmoid colon had led to bacterial peritonitis, sepsis, and death.

Plaintiff instituted this action on 25 July 1985 pursuant to N.C.G.S. § 28A-18.1, alleging that defendants' negligence in the treatment and diagnosis of his wife proximately caused her death on 27 August 1983. At the end of plaintiff's evidence, the trial court granted a directed verdict in favor of defendants Dr. Friedman and the Private Diagnostic Clinic. The jury subsequently returned a verdict in favor of defendant Duke.

Earlier, on 17 July 1987, prior to trial, plaintiff filed a motion for sanctions against Duke pursuant to N.C.G.S. § 1A-1, Rule 11(a), Rule 26(g) and Rule 37, alleging in part (1) that Duke failed to comply with an order instructing it, in answering a set of interrogatories, to provide the names and addresses of persons involved in the treatment of plaintiff's wife as to specific individuals "if requested by plaintiff's counsel at a later date"; (2) that Duke failed to comply with an order instructing Duke to identify all expert witnesses it would offer at trial *before* 17 June 1987; (3) that Duke failed to comply with an order instructing all parties to supplement outstanding interrogatories on or by 1 July 1987; and (4) that Duke noticed *post* 17 July 1987 depositions of two physicians who had treated Mrs. Turner (one located in Florida, and one located in California), whom plaintiff classified as expert witnesses, for an improper purpose and with the intent to harass plaintiff's counsel in contravention of Rule 11(a). After a hearing, plaintiff's motion for sanctions was denied.

Plaintiff appealed to the Court of Appeals both the granting of the directed verdict in favor of Dr. Friedman and the Private Diagnostic Clinic and the denial of the motion for sanctions against Duke. That court, with one judge dissenting, affirmed the directed verdict and unanimously affirmed the denial of the motion for sanctions. Plaintiff appealed to this Court on the issue of the directed verdict, and we granted discretionary review on the issue of the denial of the motion for sanctions. We now reverse the Court of Appeals as to both issues.

I.

[1] We first address plaintiff's contention that the directed verdict in favor of Dr. Friedman and the Private Diagnostic Clinic should

not have been granted. The law with regard to directed verdicts is clear. In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979). Further, this Court has stated:

> [A]fter all the evidence of plaintiff and defendant is in, the court may consider so much of defendant's evidence as is favorable to plaintiff or tends to clarify or explain evidence offered by plaintiff not inconsistent therewith, but it must ignore that which tends to establish another and different state of facts or which tends to contradict or impeach the testimony presented by plaintiff. Otherwise, consideration would not be in the light most favorable to plaintiff.

Morgan v. Tea Co., 266 N.C. 221, 222-23, 145 S.E. 2d 877, 879 (1966). Finally, where the question of granting a directed verdict is a close one, we have said that the better practice is for the trial court to reserve its decision on the motion and allow the case to be submitted to the jury. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

At trial and before the Court of Appeals, defendants Dr. Friedman and the Private Diagnostic Clinic successfully argued that plaintiff had failed to produce sufficient evidence on the element of causation to take the case to the jury. Our review of the factual issues in the case with regard to causation compels us to disagree.

First, the record reveals that, on the issue of Dr. Friedman's alleged violation of the accepted standard of care, plaintiff's expert, Dr. William Pace, testified as follows:

> Q Let me direct your attention to Dr. Friedman, if I might. After your review of the medical records in this case, have you performed [sic] an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether the care and treatment rendered by Allan H. Friedman to Jane L. Turner was in accordance with acceptable standards of practice for physicians with similar training and experience in the same or similar communities of [sic] that

of Durham, North Carolina in August of 1983. Do you have an opinion?

MR. BRYSON: Objection.

COURT: Overruled. You may answer.

A Yes, sir.

Q What is that, sir?

MR. BRYSON: Objection.

COURT: Overruled. You may answer.

A It was.

Q Can you explain that to the jury . . .

A It was in accordance . . . It was a violation, yes.

Dr. Pace testified that since Mrs. Turner was taking Tylenol #4, "the most potent codeine that you can get in Tylenol," which makes the colon stop working and gives the patient constipation, one of the questions that Dr. Friedman should have asked Mrs. Turner was, "[W]hen did your bowels move last?" The evidence shows that neither Dr. Friedman nor anyone else ever asked Mrs. Turner this question.

Dr. Pace's testimony then continued as follows:

Q Do you have some comments about [Dr. Friedman's] failure to see [Mrs. Turner] on the afternoon of the 26th?

MR. BRYSON: Objection.

COURT: Overruled.

A He's still her doctor and he's charging her for hospital care. *And a part of that ought to be at least the courtesy of coming to see the patient. Under those circumstances, he may well have been the one doctor to discover that she was in trouble.* And so it certainly was a deviation from proper standards of care of a patient not to see her on the afternoon.

Q Dr. Pace, after reviewing this medical chart, have you formed an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to whether *the violation of the*

accepted standards of care by Dr. Friedman was a proximate cause for the death of Jane L. Turner?

MR. BRYSON: Objection.

COURT: Overruled.

A I have.

Q And what is that?

MR. BRYSON: Objection.

COURT: Overruled.

A *It was.*

(Emphasis added.)

The testimony quoted above clearly describes a violation by Dr. Friedman and the Private Diagnostic Clinic of the standard of care in failing to attend, diagnose, and treat Mrs. Turner. But this was not the only evidence of causation that plaintiff presented. Dr. Pace also testified that Mrs. Turner's condition was reversible after her colon perforated. According to Dr. Pace, defendant Dr. Friedman should have seen Mrs. Turner between 2:00 p.m. and 8:00 p.m. on 26 August 1983. At that time, Dr. Friedman should have carefully examined Mrs. Turner's abdomen. Had he done so, a colostomy could subsequently have been performed which could have saved Mrs. Turner's life. Such evidence is the essence of proximate cause. As the dissenting judge in the Court of Appeals succinctly noted, plaintiff's evidence raised a question of fact as to whether Mrs. Turner's death was proximately caused by Dr. Friedman's negligent failure to diagnose and treat his patient's dangerous state of constipation, as alleged in plaintiff's complaint.

Defendants argue, and the Court of Appeals majority agreed, that even had Dr. Friedman examined Mrs. Turner on the afternoon of 26 August 1983, it would have made no difference to the diagnosis of her condition and that even Dr. Pace, plaintiff's expert, himself admitted that it probably would not have made a difference. It is true that on cross-examination of Dr. Pace, the following exchange took place:

Q All right. Now, is it not true . . . Let me ask you this. If Dr. Friedman had seen Mrs. Turner at 3:00 in the afternoon, some thirty minutes before Dr. Havard, the internist,

had seen her? It would not have made any difference to the diagnosis, of her condition, would it?

A We've got to do a hypothetical assumption that Dr. Havard did see her at 3:30 and that Dr. Friedman did try to see her at 3:00 and somewhere in that half an hour she appeared, got into bed and was available for examination. And it wouldn't have made a difference.

Q But I want you to assume . . .

A Very difficult. But all right. I'll assume. It probably wouldn't have made much difference.

Q It would not have made much difference.

A Especially not if he had not examined her.

Q I said he did examine her.

A Oh. I would hope that he would have found signs of a perforated colon.

Q And Dr. Havard, the internist, didn't some thirty minutes later or an hour later?

A I would hope that Dr. Havard would have put it in the record if he had.

Q That was not my question, Dr. Pace.

A All right, sir.

Q My question was, if Dr. Havard, the internist who specialized in internal medicine, . . . didn't pick it up, less chance of Dr. Friedman would have picked it up, is that not true?

A Probably.

However, plaintiff's evidence shows that Mrs. Turner was in distress at 3:30 p.m. when Dr. Havard attempted to examine her, a mere thirty minutes after Dr. Pace was to assume that defendant Dr. Friedman had examined her. According to the medical record, she was complaining of extreme discomfort. Plaintiff himself testified that his wife repeatedly interrupted Dr. Havard's examination as she unsuccessfully attempted a bowel movement. Furthermore, Dr. Pace's answer to the hypothetical question was not conclusive. To assume the facts in this hypothetical question to be true is to construe the evidence in the light most favorable to defendants

Dr. Friedman and the Private Diagnostic Clinic, the movants for the directed verdict in this instance, rather than in the light most favorable to plaintiff, the non-movant. This the law does not permit. *Morgan v. Tea Co.*, 266 N.C. 221, 145 S.E. 2d 877.

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether the plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care, (2) breach of the standard of care, (3) proximate causation, and (4) damages. *Lowery v. Newton*, 52 N.C. App. 234, 278 S.E. 2d 566, *disc. rev. denied*, 303 N.C. 711, --- S.E. 2d ---, *reconsideration of denial of disc. rev. denied*, 304 N.C. 195, 291 S.E. 2d 148 (1981). Causation is an inference of fact to be drawn from other facts and circumstances. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984). Proximate cause is ordinarily a jury question. *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740 (1944). We conclude from the record here that plaintiff presented sufficient evidence to take his case to the jury on the element of causation with regard to defendant Dr. Friedman's failure to diagnose and treat Mrs. Turner's condition, which led to her subsequent death. Accordingly, the Court of Appeals erred in affirming the trial court's directed verdict in favor of defendants Dr. Friedman and the Private Diagnostic Clinic. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678.

II.

We now turn to an issue of first impression in this Court—plaintiff's contention that the Court of Appeals erred in restricting its review of defendant Duke's alleged Rule 11(a) and Rule 26(g) of the North Carolina Rules of Civil Procedure violation to an "abuse of discretion" standard. Our reading of the Court of Appeals' opinion discloses that the Court of Appeals used a "clearly erroneous" standard. Plaintiff argues that the Court of Appeals should have undertaken a *de novo* review.

To resolve the issue, some historical background is necessary. Prior to the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure, the federal courts had attempted to handle litigation abuse with *discretionary* authority under Rule 37 and the former Rule 11, which provided that if a pleading was not signed or was signed with intent to defeat the purpose of the rule, it could be struck as sham and false. Fed. R. Civ. P. 11 (1983).

A willful violation of the rule could result in appropriate disciplinary sanctions. *Id.* Rule 11(a) of the North Carolina Rules of Civil Procedure contained similar provisions concerning the striking of pleadings as sham and false, but it did not authorize sanctions. *Estrada v. Burnham*, 316 N.C. 318, 325 n.5, 341 S.E. 2d 538, 543 n.5 (1986); N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988).

On the federal level, experience revealed that Rule 11 had not been effective in deterring abuses. *See* Wright & Miller, *Federal Practice and Procedure, Civil* § 1334 (1969). Federal judges were reluctant to impose sanctions, primarily because the rule only required a subjective standard of good faith compliance. *Eastway Const. Corp. v. City of New York*, 762 F. 2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S. 918, 98 L.Ed. 2d 226 (1987). Rule 11 was amended, effective 1 August 1983. The Advisory Committee Note on Rule 11 stated that the changes were intended to reduce the reluctance of the federal courts to impose sanctions by emphasizing the responsibilities of attorneys and reinforcing those obligations by the imposition of sanctions. The amended Rule 11 provides in pertinent part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11 (1983). Effective 1 January 1987, North Carolina's Rule 11(a) was also amended. N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988). With the exception of one sentence in the federal counterpart not relevant here, N.C.G.S. § 1A-1, Rule 11(a) is identical to the federal rule. Similarly, N.C.G.S. § 1A-1, Rule 26(g) pro-

vides that when an attorney or party signs a discovery document, he certifies to the best of his knowledge that it has not been served for an improper purpose and is not unreasonably burdensome or expensive. N.C.G.S. § 1A-1, Rule 26(g) (Cum. Supp. 1988). Violation of Rule 26(g) subjects the attorney or party to mandatory sanctions.

[2] The North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules. *Id.* Cases considering the amended federal Rule 11 have all held that a showing of subjective bad faith is no longer required to trigger the Rule's sanctions. *Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 789 F. 2d 1056 (4th Cir. 1986); *Zaldivar v. City of Los Angeles*, 780 F. 2d 823 (9th Cir. 1986); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F. 2d 535 (3d Cir. 1985); *Westmoreland v. CBS, Inc.*, 770 F. 2d 1168 (D.C. Cir. 1985); *Eastway Const. Corp. v. City of New York*, 762 F. 2d 243 (2d Cir.). Further, the Advisory Committee Notes contain the following comments:

> The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. *The standard is one of reasonableness under the circumstances.* This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.

Fed. R. Civ. P. 11 advisory committee's notes (citations omitted) (emphasis added). Guided by the reasoning and uniformity of the federal decisions, we conclude that a showing of subjective bad faith is unnecessary under N.C.G.S. § 1A-1, Rule 11(a). Rather, the standard under our Rule 11(a) is one of objective reasonableness under the circumstances.

In deciding upon the proper standard of appellate review, however, the federal opinions diverge. Some circuits have established a three-tier analysis: (1) the legal conclusion that specific conduct violated Rule 11 is a legal issue reviewable *de novo*, (2) any disputed factual determinations are reviewed under a "clearly erroneous" standard, and (3) the appropriateness of an imposed sanction is reviewed for abuse of discretion. *Brown v. Federation of State Medical Boards of U.S.*, 830 F. 2d 1429 (7th Cir. 1987);

Zaldivar v. City of Los Angeles, 780 F. 2d 823 (9th Cir.). Other circuits apply a variation of the three-tiered analysis, using an abuse of discretion standard when reviewing the factual reasons for imposing Rule 11 sanctions and the amount or type of sanctions, while reviewing *de novo* the legal sufficiency of a pleading or motion and the determination to impose sanctions. *Donaldson v. Clark*, 819 F. 2d 1551 (11th Cir. 1987) (en banc); *Westmoreland v. CBS, Inc.*, 770 F. 2d 1168 (D.C. Cir.); *Eastway Const. Corp. v. City of New York*, 762 F. 2d 248 (2d Cir.). Yet others use an "abuse of discretion" standard across the board. *Thomas v. Capital Sec. Services, Inc.*, 836 F. 2d 866 (5th Cir. 1988); *O'Connell v. Champion Intern. Corp.*, 812 F. 2d 393 (8th Cir. 1987); *EBI, Inc. v. Gator Industries, Inc.*, 807 F. 2d 1 (1st Cir. 1986); *Cotner v. Hopkins*, 795 F. 2d 900 (10th Cir. 1986); *Stevens v. Lawyers Mut. Liab. Ins. Co. of N.C.*, 789 F. 2d 1056 (4th Cir. 1986).

[3] After careful analysis of the rule and the federal decisions, we adopt the following standard for appellate review of the granting or denial of motions to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a). The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

[4] Finally, in reviewing the appropriateness of the particular sanction imposed, an "abuse of discretion" standard is proper because "[t]he rule's provision that the court 'shall impose' sanctions for motions abuses . . . concentrates [the court's] discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Westmoreland v. CBS, Inc.*, 770 F. 2d at 1174; *see also Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E. 2d 772 (1987).

We conclude that the Court of Appeals erred in employing a "clearly erroneous" standard in reviewing the trial court's denial of plaintiff's motion for sanctions in the case sub judice.

We now review the trial court's determination that N.C.G.S. § 1A-1, Rule 11(a) sanctions were not warranted here under the standard explained above. On 25 April 1986, plaintiff submitted his second set of interrogatories to defendant Duke. Interrogatory number 13 requested Duke to identify any person who had any knowledge about the care and treatment of Mrs. Turner while she was at Duke; to state the substance of that knowledge; and to identify the individual by name, address, telephone number and job title. On 27 May 1986, Duke submitted an answer to interrogatory number 13, in which it stated:

> To the best of defendant's knowledge and belief, all witnesses listed in medical records, a copy of which has been furnished previously to plaintiff's counsel. See medical records for substance of those individuals' knowledge. Also plaintiff.

On 23 July 1986, plaintiff filed a motion to compel Duke to answer interrogatory number 13, among others, directly rather than by reference to the medical records. On 6 August 1986, the trial court entered an order which provided in part:

> As to Interrogatory No. 13, it appearing that the names and addresses of the witnesses were not listed as requested, and although the objection is sustained, defense counsel is directed to provide this information as to specific individuals if requested at a later date by plaintiff's counsel.

On 13 May 1987, plaintiff requested in writing that Duke provide him with the names and addresses of the witnesses requested in interrogatory number 13. Plaintiff received no response to this request.

On 4 June 1987, the trial court ordered all parties to supplement all outstanding interrogatories on or before 1 July 1987. On 1 July 1987, Duke submitted a letter to plaintiff's counsel, in which it listed several witnesses, including one Dr. Havard. No addresses were given, and no information as to the knowledge of these witnesses was provided. On 25 June 1987, defendant Dr. Friedman furnished his supplemental responses to interrogatories to plaintiff's counsel, in which he identified Dr. Robert A. Havard, Visalia, California, address unknown at that time, as a witness.

On 6 July 1987, Duke hand delivered two notices of depositions to plaintiff's counsel. One notice scheduled the deposition of Dr. Robert Havard in California for 21 July 1987 (six days prior to

trial), and the other scheduled the deposition of Dr. R. P. Scheerer in Florida for 23 July 1987 (four days prior to trial). Dr. Havard was an oncology fellow who had seen Mrs. Turner at Duke, and Dr. Scheerer was an oncologist who had treated Mrs. Turner's cancer in Florida in 1982.

On 17 July 1987, plaintiff filed his motion for sanctions under N.C.G.S. § 1A-1, Rules 11(a), 26(a) and 37(b). Plaintiff sought an order (1) that the notices and depositions of Dr. Havard and Dr. Scheerer be struck as sham and the depositions not be allowed into evidence; (2) that the defensive pleadings of Duke be struck and a default judgment be entered against it; (3) that plaintiff's expenses, including attorney's fees in preparing and arguing the motion for sanctions, be taxed to Duke or its attorneys; and (4) for such other and further relief as the trial court deemed just and proper. At the hearing on 20 July 1987, plaintiff read Rule 26(g) into the record. After hearing arguments of counsel, the trial court denied plaintiff's motion in its entirety. The Court of Appeals affirmed the trial court's denial of plaintiff's motion.

In this case, we focus upon the trial court's conclusion of law that Duke's noticing and scheduling of the depositions of Dr. Scheerer and Dr. Havard did not amount to conduct sufficient to trigger the mandatory sanctions of N.C.G.S. § 1A-1, Rule 11(a).

Plaintiff posits four reasons to support his argument that Duke's conduct in this case warranted sanctions under Rule 11(a): (1) that Dr. Scheerer was an expert witness and that Duke failed to disclose his identity in a timely manner, (2) that Duke failed to identify Dr. Havard in response to other discovery requests, (3) that the doctors' depositions threatened to cause a needless increase in the cost of litigation and an unnecessary delay, and (4) that the depositions were noticed for an improper purpose, that is, to disrupt his counsel's trial preparation. We conclude that three of these assertions have merit and, in combination, suffice to trigger the mandatory sanctions clause of Rule 11(a).

[5] The Court of Appeals correctly disposed of plaintiff's first assertion that Dr. Scheerer was an expert witness. Dr. Scheerer had treated Mrs. Turner for her lung cancer in Florida. As the Court of Appeals noted, perusal of the record reveals that the purpose of Dr. Scheerer's deposition was to elicit the doctor's personal observations as to Mrs. Turner's medical condition. The focus of his deposition was his treatment of Mrs. Turner. Although, by

general definition, all doctors may be considered experts in that they possess a specialized knowledge of medicine beyond that of the layman, not every role of a doctor as a witness in a legal controversy is in the capacity of an "expert" witness. N.C.G.S. § 1A-1, Rule 26(b)(4) governs discovery of facts known and opinions held by experts. The commentary to this Rule reads as follows:

> Subsection (b)(4)—Trial Preparation; Experts.—This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert *retained* by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subsection deals with those experts whom the party expects to call as trial witnesses. It should be noted that the subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. *Such an expert should be treated as an ordinary witness.*

N.C.G.S. § 1A-1, Rule 26(b)(4) comment (1983) (emphasis added). Where a doctor is or was the plaintiff's treating physician and is called to testify not about the standard of the plaintiff's care but rather about the plaintiff's treatment and the doctor's choice of surgical procedures, he is not an expert witness. *See Sheahan v. Dexter*, 136 Ill. App. 3d 241, 483 N.E. 2d 402 (1985). Here, Dr. Scheerer was not questioned about the standard of Mrs. Turner's care at Duke. Further, Duke did not retain Dr. Scheerer for the purpose of litigation. He personally treated plaintiff's wife, and his knowledge of her case arose before her death and before this litigation. *See Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 529 N.E. 2d 525 (1988); *Krug v. United Disposal, Inc.*, 567 S.W. 2d 133 (Mo. App. 1978). Duke properly listed Dr. Scheerer as "an ordinary witness." The Court of Appeals correctly concluded that in deposing Dr. Scheerer after 17 July 1987, Duke did not violate the order requiring identification and deposition of expert witnesses prior to that date.

[6] Plaintiff, however, presents three further grounds for his argument that the trial court should have imposed sanctions upon Duke. We believe that these grounds are meritorious.

As outlined above, after Duke had referred plaintiff to Mrs. Turner's medical records for identification of witnesses it might call,

the trial court entered an order on 6 August 1986 upon plaintiff's motion, in which it ordered Duke to provide the names and addresses of witnesses and "to provide this information as to specific individuals if requested at a later date by plaintiff's counsel." On 13 May 1987, plaintiff requested Duke to comply with this order. Duke failed to respond. On 2 July 1987, plaintiff received a letter from counsel for Duke which listed several witnesses but failed to provide their addresses or other information. Dr. Havard was identified as a witness for the first time in this letter. Counsel for Dr. Friedman identified Dr. Havard for the first time when he supplemented his answers to interrogatories on 26 June 1987, but he could not supply his address. On 6 July 1987, Duke noticed Dr. Havard's deposition in California for 21 July 1987, a mere six days prior to trial.

Duke argues that the wording in the trial court's order should be interpreted to mean that Duke was required to supply information only if it were asked about a specific individual identified *by plaintiff*, and that Dr. Havard's signature was part of Mrs. Turner's medical records. This argument is disingenuous. A more logical interpretation of the order's somewhat ambiguous language is that Duke was directed to provide information as to specific individuals *whom Duke intended to present as witnesses* if requested to do so at a later date by plaintiff's counsel. Duke presumably knew who its witnesses were. Furthermore, the only identification of Dr. Havard in Mrs. Turner's medical records is in the form of an illegible signature at the bottom of one page of notes. It defies logic to argue that plaintiff should have been expected to decipher an illegible signature in order to make a request for information from Duke concerning that specific individual. In short, plaintiff requested Duke to comply with the trial court's order, but Duke failed to do so. We need not address plaintiff's contention that Duke's conduct smacks of an improper attempt to conceal Dr. Havard's existence from plaintiff.

Plaintiff also argues that Duke violated Rule 11(a) in that the noticing and taking of the depositions of Dr. Scheerer and Dr. Havard threatened a needless increase in litigation costs and an unnecessary delay. At the hearing on plaintiff's motion for Rule 11(a) sanctions, Duke argued to the trial court that Dr. Scheerer's deposition testimony was needed because plaintiff was going to introduce at trial the issue of whether Mrs. Turner's cancer was resectable. Plaintiff's expert witness, Dr. Pace, would testify that in

fact Mrs. Turner's cancer *was* resectable. Since Duke's expert witness, one Dr. Ozer, would only be giving testimony about Mrs. Turner's life expectancy, Dr. Scheerer would testify as to his decision not to resect Mrs. Turner's cancer. The record reveals, however, that Dr. Ozer did indeed express his expert opinion as to resectability. In his deposition, the following exchange took place:

> Q And you say the reason [Mrs. Turner's cancer] was nonresectable was what, now?
>
> A It was adherent to the mediastinum and so, they could not develop what was called a plane between the tumor and the mediastinum itself.

And at trial, Dr. Ozer testified as follows:

> Q Well, doctor, when the tumor crosses the line into the mediastinum, can it be resected or removed?
>
> A It cannot. The only way that one could do that would be to divestate the patient by surgical manipulation and by removal of major organs that it's virtually impossible and doesn't really benefit the patient.

Dr. Scheerer's testimony was thus duplicative and cumulative of Dr. Ozer's expert opinion.

Duke points out that at the hearing on plaintiff's Rule 11(a) motion, plaintiff declined the trial court's suggestion that the depositions be taken by telephone. Duke argues that plaintiff could have reduced costs by accepting this suggestion, since plaintiff's counsel would not then face the expense of flying to California and Florida. The record shows that plaintiff's counsel stated that he did not think telephone depositions would be appropriate under the circumstances. We see no fault in plaintiff's reluctance to accept the suggestion, since the thrust of plaintiff's motion under Rule 11(a) was that the violations by Duke *had already* taken place. The trial court's suggestion would more properly have been directed to the mandatory sanctions clause of Rule 11(a). It was not dispositive of the threshold issue of whether a Rule 11(a) violation had occurred. Duke also argues that plaintiff specifically objected to any continuance of the trial. Since the trial had already twice been continued and was imminent, plaintiff's objection to a further delay seems consonant with the language of Rule 11(a) providing that a violation occurs when a pleading, motion or other paper is inter-

posed for the improper purpose of causing unnecessary delay. We conclude that Duke's noticing and taking of the depositions of Dr. Havard and Dr. Scheerer so close to trial, subsequent to the failure to reveal the existence of Dr. Havard, as well as the duplicative and cumulative nature of Dr. Scheerer's testimony, threatened to increase plaintiff's litigation costs and cause unnecessary delay of the trial in violation of Rule 11(a).

Finally, we note that Dr. Havard's deposition, in California, was scheduled for 21 July 1987, six days prior to trial, and Dr. Scheerer's for 23 July 1987, in Florida, four days prior to trial. Plaintiff quite reasonably argues that these dates would have required him to be absent from his office for at least four of the five business days remaining before the start of the trial on 27 July 1987 and, concomitantly, cut into time reserved for final trial preparation. Both depositions were short: Dr. Havard's consists of fourteen pages of testimony, and Dr. Scheerer's consists of fifteen pages. Had plaintiff's counsel attended these depositions, he would have been unable to attend conscientiously to the needs of his client in preparing for trial. The inference that the noticing and taking of the depositions of Dr. Havard and Dr. Scheerer represents an attempt to harass plaintiff's counsel in violation of Rule 11(a) is not difficult to make. In short, our reading of the record in this case convinces us that several violations of Rule 11(a) occurred here. Since the sanctions clause of Rule 11(a) is mandatory, the trial court should have imposed sanctions on Duke and/or Duke's counsel. Accordingly, the Court of Appeals erred in affirming the trial court's denial of plaintiff's motion for sanctions under N.C.G.S. § 1A-1, Rule 11(a).

We hold that the Court of Appeals erred in affirming the trial court's directed verdict in favor of defendants Dr. Friedman and the Private Diagnostic Clinic and in affirming the trial court's denial of plaintiff's Rule 11(a) motion for mandatory sanctions against Duke. The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the Superior Court, Durham County, for proceedings consistent with this opinion.

Reversed and remanded.

MARK R. COMAN v. THOMAS MANUFACTURING CO., INC.

No. 491A88

(Filed 26 July 1989)

Master and Servant § 10.2— wrongful discharge—employment at will—bad faith and public policy exceptions

The trial court erred by dismissing plaintiff's action for wrongful termination of his at-will employment as a truck driver after plaintiff refused to violate U. S. Department of Transportation regulations by driving excessive hours and falsifying records. This case comes within the reasoning of *Sides v. Duke University*, 74 N.C. App. 331, and, although plaintiff specifically alleges that defendant's acts violated the regulations of the Federal Department of Transportation, this conduct also violated the public policy of North Carolina as established by 19A NCAC 3D .0801 (1988), N.C.G.S. § 20-397, and N.C.G.S. § 20-384. This Court has never held that an employee at will could be discharged in bad faith; to the contrary, *Haskins v. Royster*, 70 N.C. 601 (1874), recognized the principle that a master could not discharge his servant in bad faith.

Am Jur 2d, Master and Servant §§ 48.3, 54.

Justice MEYER dissenting.

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 91 N.C. App. 327, 371 S.E. 2d 731 (1988), affirming dismissal of plaintiff's complaint by *Ross, J.*, at the 25 January 1988 session of Superior Court, DAVIDSON County. Heard in the Supreme Court 15 March 1989.

Larry L. Eubanks, David F. Tamer, and J. Wilson Parker for plaintiff-appellant.

Petree Stockton & Robinson, by W. R. Loftis, Jr., Penni P. Bradshaw, Kenneth S. Broun, and Robin E. Shea, for defendant-appellee.

J. Michael McGuinness for North Carolina Civil Liberties Union Legal Foundation, amicus curiae.

J. Wilson Parker and Deborah Leonard Parker for North Carolina Academy of Trial Lawyers, Lacy H. Thornburg, Attorney General, by Jane P. Gray, Special Deputy Attorney General, for North Carolina Department of Justice, Ralf F. Haskell, Special Deputy Attorney General, for John C. Brooks, North Carolina Commissioner of Labor, amicus curiae.

Weinstein & Sturges, P.A., by John J. Doyle, Jr. and Joyce W. Wheeler, for North Carolina Trucking Association, amicus curiae.

Maupin Taylor Ellis & Adams, P.A., by Robert A. Valois, Thomas A. Farr, and Elizabeth D. Scott, for Capital Associated Industries, Inc., amici curiae.

MARTIN, Justice.

Plaintiff seeks to recover damages from defendant for wrongfully terminating his at-will employment. The trial judge dismissed the action upon defendant's motion pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief may be granted. The North Carolina Court of Appeals affirmed, and upon appeal to this Court, we reverse.

This being a dismissal pursuant to Rule 12(b)(6), we look to the allegations of plaintiff's complaint. Essentially, the complaint alleges that plaintiff began working for defendant, a North Carolina corporation, in 1978. He became a full-time employee in 1984 as a long-distance truck driver, hauling goods in defendant's vehicles to various points in the United States and Canada. Plaintiff was based at defendant's plant in Davidson County. The driving operations of the defendant are governed by the United States Department of Transportation. Its regulations provide that a driver, such as plaintiff, cannot drive a vehicle for longer than a ten-hour shift, which must be followed by a rest period of at least eight hours. A driver must also maintain accurate logs of all travel including route traversed, mileage, and amount of time in service. Defendant required plaintiff, and other drivers, to violate the Department's regulations by driving for periods of time in excess of that allowed by the regulations. Plaintiff was also instructed by his employer that he would have to falsify the logs required by the regulations to show that defendant was in compliance with the regulations. Plaintiff was also informed that he would have to continue to drive for periods of time in violation of the regulations if he chose to retain his employment. Upon plaintiff's refusal to violate the regula-

tions, he was told that his pay would be reduced at least fifty percent, such reduction being tantamount to a discharge of plaintiff.

Rule 12(b)(6) and its application are now familiar learning to the bench and bar. *See generally Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); W. Shuford, *N. C. Civil Practice and Procedure* § 12-10 (3d ed. 1988). It would serve no useful purpose to again repeat the rules applicable to such decisions. Although plaintiff may have some additional remedy in the federal courts,[1] the courts of North Carolina cannot fail to provide a forum to determine a valid cause of action. N. C. Const. art. I, sec. 18 (1984) (open courts clause).

A brief look at the history of the employee-at-will doctrine is appropriate. The English rule prior to our revolution was that an employment without a particular time limitation was presumed to be a hiring for a year. 1 W. Blackstone, *Commentaries* *425. Reasonable notice was required before an employer or employee could terminate the employment. This was said to be in response to the shortage of laborers resulting from the Black Death.

After the revolution, American courts followed the English rule with respect to agricultural and domestic workers, but with the industrial revolution and the development of freedom of contract, our courts moved towards the at-will doctrine. The formulation of the rule was principally the work of Horace Wood, who published in 1877 a work on master-servant relations stating the rule. Subsequent adoption of the rule by the courts greatly facilitated the development of the American economy at the end of the nineteenth century. *See generally* A. Hill, *"Wrongful Discharge" and the Derogation of the At-Will Employment Doctrine*, 31 Labor Relations and Public Policy Series, University of Pennsylvania (1987).

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1. We note that neither party alleged in the pleadings or argued in its brief before the Court of Appeals or this Court the constitutional issue of preemption by the federal government under the supremacy clause. U.S. Const. art. VI, sec. 2. Nor does the record show that this issue was resolved by the trial judge or the Court of Appeals. Constitutional issues will not be reviewed by this Court unless it affirmatively appears from the record that the issue was raised and passed upon in the court below. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980); *Management, Inc. v. Development Co.*, 46 N.C. App. 707, 266 S.E. 2d 368, *disc. rev. denied, appeal dismissed*, 301 N.C. 93, 273 S.E. 2d 299 (1980). This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387 (1953). The issue is not before this Court.

Ordinarily, an employee without a definite term of employment is an employee at will and may be discharged without reason. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). However, the employee-at-will rule is subject to certain exceptions. Statutes may proscribe the discharge of an at-will employee in retaliation for certain protected activities, e.g., filing workers' compensation claims, N.C.G.S. § 97-6.1 (1985); engaging in labor disputes, N.C.G.S. § 95-83 (1985); filing Occupational Safety and Health Act claims, N.C.G.S. § 95-130(8) (1985). *See also* 1 L. Larson, *Unjust Dismissal* § 10.34 (1989).

Our present task is to determine whether we should adopt a public policy exception to the employee-at-will doctrine.[2] Our Court of Appeals, in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985), applied the public policy exception. In *Sides*, the court was reviewing the dismissal of plaintiff's complaint on a Rule 12(b)(6) motion. Sides, an employee at will, alleged that she was discharged from her employment for her refusal to testify untruthfully or incompletely in a court action against Duke Hospital. The Court of Appeals held that the complaint stated a cause of action.

We approve and adopt the following language from *Sides*:

> [W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. A different interpretation would encourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.

Sides v. Duke University, 74 N.C. App. at 342, 328 S.E. 2d at 826 (1985).

We hold that the case at bar comes within the reasoning of *Sides* and that the complaint states a cause of action for wrongful discharge. Certainly perjury and subornation of perjury differ from operating a truck in violation of federal law and falsifying federal records. However, both offend the public policy of North Carolina.

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2. Public policy has been defined as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good. *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P. 2d 25 (1959).

Although plaintiff specifically alleges that defendant's acts violated the regulations of the federal Department of Transportation, this conduct also violated the public policy of North Carolina. N.C.G.S. § 20-384 provides that the Division of Motor Vehicles may promulgate highway safety rules and regulations for interstate and intrastate motor carriers in North Carolina. This has been done in the North Carolina Administrative Code, which provides that the rules and regulations adopted by the federal Department of Transportation in 49 C.F.R. §§ 390-398 shall apply on the highways of North Carolina. 19A NCAC 3D .0801 (1988). Thus, according to plaintiff's allegations when defendant discharged plaintiff, it violated the federal regulations and the public policy of North Carolina as established in the Administrative Code. Further evidence of the public policy of our state regarding the safety of the highways is found in N.C.G.S. § 20-397, which provides criminal penalties for seeking to evade or defeat such regulations.

Moreover, it is the public policy in this jurisdiction that the safety of persons and property on or near the public highways be protected. *See* N.C.G.S. § 20-384 (1988 Cum. Supp.); *Harrell v. Scheidt, Comr. of Motor Vehicles*, 243 N.C. 735, 92 S.E. 2d 182 (1956). Highway safety is one of the paramount concerns of both this state and the nation. At this writing more than 600 people have been killed on the highways of North Carolina during 1989. Actions committed against the safety of the traveling public are contrary to this established public policy.

The state public policy implications in the case at bar are compelling. Our legislature has enacted numerous statutes regulating almost every aspect of transportation and travel on the highways in an effort to promote safety. The actions of defendant, as alleged, impair and violate this public policy. Plaintiff allegedly was faced with the dilemma of violating that public policy and risking imprisonment, N.C.G.S. § 20-397, or complying with the public policy and being fired from his employment. Where the public policy providing for the safety of the traveling public is involved, we find it is in the best interest of the state on behalf of its citizens to encourage employees to refrain from violating that public policy at the demand of their employers. Providing employees with a remedy should they be discharged for refusing to violate this public policy supplies that encouragement.

This Court has never held that an employee at will could be discharged in bad faith. To the contrary, in *Haskins v. Royster*,

70 N.C. 601 (1874), this Court recognized the principle that a master could not discharge his servant in bad faith. Thereafter, this Court stated the issue to be whether an agreement to give the plaintiff a regular permanent job was anything more than an indefinite general hiring terminable in *good faith* at the will of either party. *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943) (emphasis added).[3]

Numerous courts have recognized wrongful discharge theories characterized either as the bad faith exception to the at-will doctrine or under the implied covenant of good faith and fair dealing. *See Mitford v. LaSala*, 666 P. 2d 1000 (Alaska 1983); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E. 2d 1251 (1977); *Kerr v. Gibson's Products Co. of Bozeman*, 733 P. 2d 1292 (Mont. 1987); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A. 2d 549 (1974); 1 L. Larson, *Unjust Dismissal* § 3.05 (1989); H. Perritt, *Employee Dismissal Law and Practice* §§ 1.2, 4.11, 4.23 (2d ed. 1987); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only In Good Faith*, 93 Harv. L. Rev. 1816 (1980). Bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships.

Our decision today is in accord with the holdings of most jurisdictions. About four-fifths of the states now recognize some form of cause of action for wrongful discharge. McGuinness, *The Doctrine of Wrongful Discharge in North Carolina: The Confusing Path from Sides to Guy and the Need for Reform*, 10 Campbell L. Rev. 217 (1988). The case of *McClanahan v. Remington Freight Lines*, 517 N.E. 2d 390 (Ind. 1988), is on all fours with the present appeal. There, the employee refused to drive his employer's truck in violation of law. The Indiana Supreme Court held plaintiff had stated a cause of action for wrongful discharge for refusing to commit an unlawful act. Otherwise, the court held, illegal conduct

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3. Regrettably, the dissent appears to misread *Haskins* and *Malever* as well as this opinion. Clearly, the *Haskins* opinion recognizes the good-faith exception, and Chief Justice Stacy in *Malever* uses the phrase an indefinite general hiring "terminable in good faith" at the will of either party, citing "35 Am. Jur. 460 and 39 C.J. 41." This Court is addressing the issue for the first time, and because this Court, not the legislature, adopted the employee-at-will doctrine in the first instance, it is entirely appropriate for this Court to further interpret the rule. Further, it is important to note that this Court is applying the doctrine in the light of the established public policy and not changing public policy to suit the rule.

by employers and employees would be encouraged. *See also Shaw v. Russell Trucking Line, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982) (public policy exception allowed where employee refused to drive overweight truck); *Palmer v. Brown*, 242 Kan. 893, 752 P. 2d 685 (1988) (employee fired for disclosing medicaid fraud); *Phipps v. Clark Oil & Refining Corp.*, 408 N.W. 2d 569 (Minn. 1987) (employee fired for refusal to violate Clean Air Act); *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W. 2d 755 (1988) (employee reporting illegal activities of employer); *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 337 S.E. 2d 213 (1985) (South Carolina Supreme Court followed *Sides* in allowing public policy exception to terminable-at-will doctrine).

Academic scholars also support our action today. *See, e.g.*, 1 L. Larson, *Unjust Dismissal* §§ 6.01-7.09 (1989); *RIA Guide to the Law of Wrongful Termination*, ¶¶ 110,201-110,273 (1989); A. Hill, *"Wrongful Discharge" and the Derogation of the At Will Employment Doctrine*, 31 Labor Relations and Public Policy Series, University of Pennsylvania (1987); McGuinness, *The Doctrine of Wrongful Discharge in North Carolina: The Confusing Path from Sides to Guy and the Need for Reform*, 10 Campbell L. Rev. 217 (1988); Note, *Sides v. Duke Hospital: A Public Policy Exception to the Employment-at-Will Rule*, 64 N.C. L. Rev. 840 (1986).

Although we do not bottom our opinion upon federal public policy, many courts have held that violations of federal public policy may form the basis for a wrongful discharge action in state courts. *E.g., Kilpatrick v. Delaware County S.P.C.A.*, 632 F. Supp. 542 (E.D. Pa. 1986); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979); *Harless v. First National Bank*, 162 W. Va. 116, 246 S.E. 2d 270 (1978).

In reaching our decision, we have not turned a deaf ear to the warning that we may have spawned a deluge of spurious claims. Our courts have abundant authority to protect employers from frivolous claims, particularly by the imposition of sanctions against attorneys and parties pursuant to Rule 11 of the Rules of Civil Procedure.

The decision of the Court of Appeals is reversed.

Reversed.

Justice MEYER dissenting.

I wish to express at the outset of this dissenting opinion my view that the alleged conduct of the employer in this case cannot be condoned and that if the allegations of the complaint can be proved, the employee should have a remedy and a recovery for his losses and damages in the federal courts. If, in addition to his federal remedy, a state remedy should be provided, it should be provided by our General Assembly and not by judicial legislation of this Court.

Plaintiff has not attempted to pursue any remedies which might be available to him under the federal Surface Transportation Assistance Act of 1982 § 405, 49 U.S.C. app. § 2305(b) (1982). Instead, plaintiff seeks to have the courts of North Carolina recognize a new general "bad faith" exception to the employment-at-will doctrine.

North Carolina strictly adheres to the common law doctrine that employment contracts of indefinite duration are terminable at will. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). The core of the doctrine, which has consistently been reaffirmed, is the mutual privilege of employers *and* employees to terminate an employment relationship at either party's election.

We have consistently acknowledged the wisdom of the employment-at-will doctrine. *See, e.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976) (employee fired for "no just cause" had no recourse against employer); *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (schoolteacher failed to state an action for wrongful discharge when she alleged her discharge was arbitrary and without cause); *Dockery v. Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272, *disc. rev. denied*, 295 N.C. 415, 246 S.E. 2d 215 (1978) (prior to enactment of the remedial statute, employee did not state a wrongful discharge action when he alleged he was fired in retaliation for filing a workers' compensation claim).

I find the majority's characterizations of *Haskins v. Royster*, 70 N.C. 600 (1874), and *Malever v. Jewelry Co.*, 223 N.C. 148, 25 S.E. 2d 436 (1943), misleading. *Haskins*, an 1874 case, does not, as the majority implies, stand for the proposition that the discharge of an at-will employee must be in *good faith. Haskins* was not even an employee discharge case—it involved a suit by one employer

against another for maliciously enticing away sharecroppers who were employed for the crop year to be paid with a portion of the crop. The only mention of bad faith appears in a discussion of a case involving the discharge of contractors employed to build a road "after the contractors had duly performed all or a part of the work, [where] the plaintiff had [discharged them] *mala fide*, or without lawful cause," and the issue was whether the contractors could recover on the contract. *Haskins*, 70 N.C. at 610. It is misleading to cite *Haskins* for the proposition that "this Court recognized the principle that a master could not discharge his servant in bad faith."

The majority's citation of *Malever* is equally misleading. In *Malever*, the plaintiff was working in Fayetteville for $75.00 a week. The defendant offered him employment in a new store in Charlotte at $50.00 a week. Plaintiff agreed to accept the job at the lesser wage because he would "rather work for less in Charlotte and be at home with his family," but he insisted on a permanent job, not just a "Christmas job." *Malever*, 223 N.C. at 148, 25 S.E. 2d at 436. Defendant assured him it would be permanent. After plaintiff worked eight weeks in Charlotte, defendant closed the new store because it operated at a loss. Plaintiff was discharged and, after a discussion, was paid, in addition to his wages, "$200 in full satisfaction," as suggested by the plaintiff, who assured defendant that he "would be happy about it, and that that would be the end of it." *Id.* at 148, 25 S.E. 2d at 436-37. Plaintiff sued and the Court concluded that plaintiff's employment was terminable at will and held as follows:

> The general rule is, that "permanent employment" means steady employment, a steady job, a position of some permanence, as contrasted with a temporary employment or a temporary job. Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, terminable at will. *McKelvy v. Oil Co.*, 52 Okla., 81, 152 P., 414. Here, the plaintiff shows a promise of permanent employment, *simpliciter*, and no more. Anno., 135 A.L.R., 646.
>
> We find nothing on the record to take the case out of the general rule.

Id. at 149, 25 S.E. 2d at 437. There was not the slightest discussion of whether the discharge was required to be "in good faith."

The courts of North Carolina have judicially created but one exception to the employment-at-will doctrine. That exception was established by the Court of Appeals in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985). The plaintiff, Sides, was a nurse anesthetist at Duke University Medical Center. Sides alleged that she had been discharged after she had refused to testify falsely at a medical malpractice trial in which the University was a defendant. The Court of Appeals ruled that Sides had stated a claim for wrongful discharge under theories of both tort and breach of contract. The central principle established by *Sides* is "that no employer in this State, notwithstanding that an employment is at will, has the right to discharge an employee and deprive him of his livelihood without civil liability because he refuses to testify untruthfully or incompletely in a court case." *Id.* at 342, 328 S.E. 2d at 826.

The decision in *Sides* has been strictly construed. "Though the *Sides* court spoke in the broad terms of 'public policy,' its holding was actually very narrow." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 497-98, 340 S.E. 2d 116, 125, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986). The only other reported decision in which a plaintiff has been found to have alleged a valid claim under the *Sides* exception is *Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 370 S.E. 2d 423 (1988). The plaintiff, Williams, testified under subpoena at an unemployment compensation hearing on behalf of a nurse assistant who had been fired by plaintiff's employer. Williams alleged that she was discharged after the hearing because of her truthful testimony in support of the claimant. The Court of Appeals found that Williams' claim fell within the "same narrow exception" created by *Sides* that prohibits employers from discharging employees who refuse to perjure themselves. *Id.* at 39, 370 S.E. 2d at 425. Thus, the only judicially recognized exception to the employment-at-will doctrine involves the refusal or failure to perjure oneself.

The North Carolina General Assembly has created at least five exceptions to the rule that an employer may discharge an at-will employee for any reason or for no reason. Under the Wage and Hour Act, employers are prohibited from discharging an employee for filing a complaint, and employees are entitled to pursue a remedy in state court for such a discharge. N.C.G.S. § 95-25.20 (1985). OSHA expressly prohibits an employer from discharging an

employee for filing a complaint under that statute and provides a remedy for the discharged employee in the form of reinstatement and back pay. N.C.G.S. § 95-130(8), (9) (1985). A remedy in money damages is provided for employees who are denied continuation of employment because of membership in a labor union. N.C.G.S. §§ 95-81, -83 (1985). An at-will employee has a course of action for discharge in retaliation for filing a workers' compensation claim. N.C.G.S. § 97-6.1 (1985). Finally, under the Employment Security Law, any person who discharges or demotes an employee because the employee has testified or been summoned to testify in a proceeding brought under the statute is liable to the aggrieved party in a civil action. N.C.G.S. § 96-15.1 (1988). These are the specific instances to date in which the General Assembly has legislatively created exceptions to the at-will doctrine.

With the exception of employers demanding perjury, North Carolina courts have deferred to the General Assembly in the creation of exceptions to the at-will doctrine. Two Court of Appeals cases and two federal court cases serve to bear this out. In *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), the plaintiff, Trought, was hired by Pitt County Memorial Hospital to serve as vice president for nursing services. Trought alleged that she was discharged because of personnel assignments she implemented to comply with the North Carolina Nursing Practice Act. Trought, unlike Coman, alleged that her discharge violated *state* law (as opposed to federal regulations). Even though Trought's allegations created a disputed factual issue of whether her discharge violated state public policy, the court refused to extend the *Sides* exception to recognize Trought's claim for wrongful discharge.

In *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 363 S.E. 2d 215, *disc. rev. denied*, 322 N.C. 111, 367 S.E. 2d 910 (1988), the plaintiff, Burrow, was employed as a tractor-trailer driver. Burrow alleged that he was terminated after he refused to violate federal regulations that prohibit drivers from operating their trucks when they are physically impaired. The Court of Appeals dismissed Burrow's claim of wrongful discharge and stated: "[W]e find no authority for, and decline to adopt, plaintiff's argument that violation of a federal regulation creates an exception to the employment at will doctrine in North Carolina." *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. at 354, 363 S.E. 2d at 220. The regulations alleged by Burrow and Coman are both contained in subchapter B of

the Federal Motor Carrier Safety regulations. 49 C.F.R. §§ 391.41, 395.1 to 395.13 (1986).

In *Guy v. Travenol Laboratories, Inc.*, 812 F. 2d 911 (4th Cir. 1987), the Fourth Circuit Court of Appeals, applying North Carolina law, held that a former supervisor at a drug manufacturing plant did not state a claim for wrongful discharge by alleging that he was terminated for refusing to falsify records required by federal regulations promulgated by the United States Food and Drug Administration. In *Rupinsky v. Miller Brewing Co.*, 627 F. Supp. 1181 (W.D. Pa. 1986), a United States District Court in Pennsylvania, applying North Carolina law, also refused to recognize a cause of action for wrongful discharge despite plaintiff's argument that his termination was designed to prevent union organization.

The state public policy that gave rise to the *Sides* exception was the threat to our state's judicial system if witnesses could be fired from their employment for refusing to perjure themselves. The compelling reasons that influenced the Court of Appeals to open the courts to a plaintiff discharged for refusing to commit perjury do not exist to justify opening the courts to this plaintiff. No violation of state law is alleged. A federal forum already exists for redress of violations of federal regulations. With the labyrinth of federal regulations which attempt to govern every aspect of commercial life, we can justifiably fear a proliferation of lawsuits under this new exception created by the majority. It will most certainly create an "unwarranted source of trouble in the workplace," if employers must fear a civil action every time an employee at will is terminated. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. at 354, 363 S.E. 2d at 220.

The majority has failed adequately to address the legitimate concerns of employers which must be balanced against the advantages to the discharged employee of the additional remedy provided by this new exception. Some of these concerns are: Any exception to the at-will doctrine which exposes him to the possibility of lawsuits makes an employer more reluctant to discharge an employee even if for good reason. Costs are involved in documenting just cause for termination and in producing evidence that an at-will employee was not terminated for a particular improper reason. If an unreliable or incompetent employee is retained out of fear of a lawsuit, morale problems arise which affect co-workers as well as the employer. Employers may be less willing to "take a chance" on a marginal ap-

plicant if termination is made difficult. Employers will be less likely to discharge economically unnecessary employees.

In *Whittaker v. Care-More, Inc.*, 621 S.W. 2d 395 (Tenn. App. 1981), the Tennessee court said this:

> [B]ased upon our review of this area of the law we are compelled to note that any substantial change in the "employee-at-will" rule should first be microscopically analyzed regarding its effect on the commerce of this state. There must be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized.
>
> . . . Tennessee has made enormous strides in recent years in its attraction of new industry of high quality designed to increase the average per capita income of its citizens and thus, better the quality of their lives. The impact on the continuation of such influx of new businesses should be carefully considered before any substantial modification is made in the employee-at-will rule.

Id. at 396-97. The decision of the majority may indeed have an effect on the economic vitality of our state, particularly on the recruitment of new industry.

The legislature, and not this Court, is the proper body to make the appropriate analysis and strike a proper balance. Any abrogation of the at-will doctrine will necessarily require "line-drawing." As the appellee's brief points out, a large corporation such as IBM should probably be treated differently from the corner grocery store. And what should be done with the great bulk of employers who fall in between? Should arbitration be required in all or some cases? Should employees be treated differently depending on their longevity or their level of employment within the company? Should punitive damages be allowed? The commentators are in almost universal agreement that juries are unduly sympathetic to employees and unable to understand the management considerations necessary in terminating an employee. *See* Comment, *Employment at Will: Just Cause Protection Through Mandatory Arbitration*, 62 Wash. L. Rev. 151 (1987); Harrison, *The Price of the Public Policy Modification of the Terminable-at-Will Rule*, 34 Lab. L.J. 581 (1983).

While the source of the rule may be questionable, a number of our cases have stated the doctrine in this manner: Where a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause, except in those instances in which the employee is protected from discharge by statute. This precise language appears in each of the following cases: *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288; *Buffaloe v. United Carolina Bank*, 89 N.C. App. 693, 695, 366 S.E. 2d 918, 920 (1988); *Harris v. Duke Power Co.*, 83 N.C. App. 195, 197, 349 S.E. 2d 394, 395 (1986), *aff'd*, 319 N.C. 627, 356 S.E. 2d 357 (1987); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 497, 340 S.E. 2d 116, 125, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 140 (1986). *See also* 8 Strong's N.C. Index 3d *Master and Servant* § 10 (1977).

While it may legitimately be argued that the employment-at-will doctrine was judicially created and thus may be judicially altered for sound legal reasons, it should not be altered by the courts for reasons of "public policy." Courts are ill-equipped to determine what the public policy is or should be, whereas that is a basic reason for the existence of our legislature. Whether our economy should be burdened with a bad faith exception to the employment-at-will doctrine on "public policy" grounds is a question that under our Constitution must be decided, if at all, by our state legislature. *Power Co. v. Membership Corp.*, 256 N.C. 62, 64, 122 S.E. 2d 782, 784 (1961) ("Courts have no right to usurp legislative powers and by judicial decrees formulate public policy not declared by the Legislature"); DeFranco, *Modification of the Employee at Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy*, 30 St. Louis U.L.J. 65 (1985). *See also Henson v. Thomas*, 231 N.C. 173, 176, 56 S.E. 2d 432, 434 (1949) ("The 'excelsior cry for a better system' in order to keep step with the new conditions and spirit of a more progressive age must be made to the Legislature, rather than the courts").

The California courts played a leading role in the recognition and development of the tort action for breach of an implied covenant of good faith as an exception to the employment-at-will doctrine. As could be expected, a trend of high verdicts and expensive settlements developed because of jury sympathy for plaintiffs who have been discharged from their jobs. This climate existed in California for a number of years. However, the Supreme Court of Cali-

fornia, disapproving of long lines of court of appeals cases, has recently held that a tort claim for wrongful discharge alleging an implied covenant of good faith would no longer be recognized. Therefore, the tort action for wrongful discharge and the possibility of punitive damages was put to rest in California. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 765 P. 2d 373, 254 Cal. Rptr. 211 (1988). In that same case, the California court refused to extend any exception to the employment-at-will doctrine to employment contracts on public policy grounds, even in breach of contract actions (where punitive damages are not available) alleging a breach of good faith. As one writer has noted, "Concern for maintaining the predictability of contract costs and the stability of the business community supported the majority's decision to defer the problem to the legislature." Bushman, *Wrongful Discharge*, Case and Com., May-June 1989, 3, at 6.

With regard to the statement of the majority that "our decision today is in accord with the holding of most jurisdictions," I note that the California court in *Foley* said this:

> In fact, although Justice Broussard asserts that the weight of authority is in favor of granting a tort remedy, the clear majority of jursidictions [sic] have either expressly rejected the notion of tort damages for breach of the implied covenant in employment cases or impliedly done so by rejecting any application of the covenant in such a context.

Foley, 47 Cal. 3d at 686, 765 P. 2d at 391, 254 Cal. Rptr. at 229 (citation omitted).

It seems that the majority has outraced even the California court.

I vote to affirm the decision of the Court of Appeals.

STATE OF NORTH CAROLINA v. LEE WAYNE HUNT

No. 41A87

(Filed 26 July 1989)

1. Criminal Law § 86.9— character evidence concerning accomplice—defendant not prejudiced

A defendant tried for two first degree murders was not prejudiced by evidence that defendant's accomplice had been arrested for the attempted murder of his girlfriend where defendant had offered evidence through several witnesses that the accomplice, alone, committed both murders for which defendant was on trial, and evidence tending to show that the accomplice was a bad character with a propensity for murder buttressed defendant's evidence and theory of the case.

Am Jur 2d, Criminal Law § 166; Evidence §§ 321, 340.

2. Criminal Law § 48— admission by adoption—conduct of defendant—exception to hearsay rule

In this prosecution for two first degree murders, statements made by an accomplice in defendant's presence that the "fat bitch begged us not to kill her too" and that he "was surprised how easy it was and how easy it had gone over that they got the pot back" were admissible against defendant as implied admissions under Rule 801(d)(B) where the witness also testified that, after each of these statements, defendant looked up and gave the accomplice a long glance "like he had better hush" or "had better shut up," since defendant's affirmative conduct indicating that the accomplice "had better hush" or "had better shut up" could reasonably be found by a jury to manifest defendant's adoption or belief in the truth of the accomplice's statements. N.C.G.S. § 8C-1, Rule 801(d)(B).

Am Jur 2d, Criminal Law § 166; Evidence §§ 610, 623.

3. Criminal Law § 79.1— question concerning accomplice's conviction—objection sustained—defendant not prejudiced

The rule that a conviction of one defendant is not competent evidence of the guilt of another on the same charges was not violated by the prosecutor's question to an accomplice's sister as to whether she had seen her brother convicted on two charges of first degree murder of the victims where the trial court sustained defendant's objection to the question.

Moreover, evidence that the accomplice had been convicted of murdering the victims could not have prejudiced defendant since he sought to establish at trial that the accomplice, alone, committed the murders.

Am Jur 2d, Criminal Law § 166; Evidence §§ 321, 340.

4. **Criminal Law § 169.3— objection to testimony—similar evidence admitted without objection**

The benefit of defendant's objection to testimony referring to defendant's home as "Fort Apache" was lost where similar evidence was admitted without objection.

Am Jur 2d, Evidence § 249.

5. **Criminal Law § 86.1— credibility of defendant—cross-examination about matters while incarcerated**

The prosecutor's cross-examination of defendant concerning certain men he had entrusted to read his mail and write letters for him while he was incarcerated awaiting trial was proper to question the credibility of defendant's testimony that he had trusted two persons other than a State's witness to perform these tasks. Even if the prosecutor improperly suggested in his questions to defendant that one of these men was "facing three life sentences" and that defendant was comfortable with him because "he was the same type of person you were," defendant was not prejudiced thereby where the jury was aware of the prison setting in which defendant found himself and of the types of criminals who might be incarcerated there.

Am Jur 2d, Evidence § 340; Witnesses §§ 495, 534.

6. **Jury § 7.13— peremptory challenges—no authority to increase statutory number**

The trial court had no authority to increase the number of peremptory challenges provided by N.C.G.S. § 15A-1217.

Am Jur 2d, Jury § 242.

7. **Criminal Law § 15.1— pretrial publicity—denial of venue change**

The trial court did not abuse its discretion in the denial of defendant's motion for a change of venue of murder and conspiracy to murder charges because of pretrial publicity where a reporter's affidavit and an attorney's testimony of-

fered by defendant did not show that defendant could not receive a fair trial in the county; newspaper articles relating to the murders of the victims and the charges against defendant were factual and noninflammatory; and jurors who served in the case all indicated unequivocally that they would decide the case based on the evidence at trial and had not formed an impression or preconceived opinion about the guilt or innocence of defendant.

Am Jur 2d, Criminal Law § 378.

8. **Criminal Law § 43.1— photographs of defendant and accomplice—ability of witness to identify defendant and accomplice—illustration of testimony**

Color photographs made of defendant and his alleged accomplice soon after their arrest for the murders of the victims were properly admitted for the purpose of demonstrating the ability of the witness to identify defendant and his accomplice and to illustrate his testimony even though defendant admitted that the witness knew defendant and the accomplice and could identify them.

Am Jur 2d, Evidence § 791.

9. **Criminal Law § 89.1— State's witness—improper character evidence—harmless error**

Assuming arguendo that the chief jailer's testimony that certain security measures were taken after a State's witness reported that defendant's alleged accomplice stood outside the jail and pointed a shotgun at the window of the witness's cell constituted improper evidence of the witness's character for truthfulness in violation of N.C.G.S. § 8C-1, Rule 608, the admission of the jailer's testimony was harmless error where there was no evidence that defendant participated in any way or had any knowledge of the incident, and the probative value of the testimony was so slight that it could not have affected the outcome of the trial.

Am Jur 2d, Witnesses § 563.

APPEAL by the defendant, pursuant to N.C.G.S. § 7A-27(a), from judgments sentencing him to two consecutive terms of life imprisonment entered by *Brannon, J.*, on 17 October 1986 in Superior Court, CUMBERLAND County. On 27 September 1988 the Supreme

Court allowed the defendant's motion to bypass the Court of Appeals as to additional judgments imposing sentences of less than life imprisonment. Heard in the Supreme Court on 10 April 1989.

Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, William N. Farrell, Jr., Special Deputy Attorney General, and Ellen B. Scouten, Assistant Attorney General, for the State.

Gordon Widenhouse for the defendant-appellant.

MITCHELL, Justice.

The defendant Lee Wayne Hunt was tried upon proper bills of indictment charging him with two counts of first degree murder and two counts of conspiracy to commit murder. A jury found the defendant guilty of all crimes as charged. After a sentencing hearing pursuant to N.C.G.S. § 15A-2000, the same jury recommended a sentence of life imprisonment for each murder conviction. The trial court entered judgments sentencing the defendant to two consecutive life sentences for the first degree murder convictions. The trial court also entered judgments sentencing the defendant to two consecutive ten-year terms for the conspiracy to commit murder convictions.

The evidence at trial tended to show that on 7 March 1984, Roland "Tadpole" Matthews and his wife Lisa K. Matthews were found dead in the living room of their Fayetteville home. Roland Matthews was found seated in a chair; Lisa was on her knees, slumped over a coffee table. Their two-year-old child was found unharmed in a bedroom. Autopsies of the bodies revealed that both victims died as a result of being shot and stabbed. Three men—Jerry Dale Cashwell, Kenneth Wayne West, and the defendant—were indicted for the murders.

Gene Williford, Jr. testified for the State under a grant of immunity. He testified that, approximately two weeks prior to the murders, ten to fourteen pounds of marijuana had been "ripped off" from the defendant. On 6 March 1984, the day before the murders, Williford went to the defendant's house around 8:00 a.m. after being told that the defendant wanted to see him. When Williford arrived at the defendant's house, Jerry Cashwell, Kenneth West, and a man named Terry Lofton were there with the defendant. The defendant told the men that he had found out that Roland

Matthews—also known by the nickname "Tadpole"—had stolen the marijuana and that he was going to "teach Tadpole a lesson" that nobody could steal "pot" from him. The defendant gave Cashwell fifty dollars and a bag of marijuana. He then instructed Cashwell to go to Roland Matthews' place of work and wait for him. After buying something for Tadpole with the money, Cashwell was to accompany him home. Williford was to take the defendant and West to the Matthews' home later that night, where the defendant was going to confront Tadpole about the theft. Nothing was said in Williford's presence about how the defendant intended to "teach Tadpole a lesson."

During the early morning hours of 7 March 1984, Williford picked up the defendant and West at the defendant's house. The three men went to River Road where Williford let the defendant and West out near a dirt road not far from the Matthews' residence. The defendant instructed Williford to pick them up in thirty minutes. Williford left and returned in thirty minutes but did not see anyone. He left a second time and returned later to see West, Cashwell and the defendant running up to the car. West was carrying a green trash bag. Williford noticed that West and the defendant "looked like they had blood on them." The defendant told Williford to "shut up and get out of there quick." Williford then drove to the defendant's house.

At the defendant's house, all four men got out of the car, but Williford stayed outside while the others went inside to change clothes and clean up. About fifteen minutes later, West, Cashwell, and the defendant came back out of the house. They had changed clothes and had two green trash bags with them. Williford testified that the defendant told him that they were going to "stash the pot and get rid of the clothes" and for Williford to go home, be careful and get with the defendant later.

Several days later Williford returned to the defendant's residence. While the defendant and Williford were standing outside the house, the defendant told Williford that he and West were going to Florida for a couple of weeks until "all this blew over." The defendant also warned Williford not to say anything about being on River Road "that night" and, if he were questioned, to state that he had not seen the defendant "that night."

Jeffrey Dale Goodman testified that while he and the defendant were in safekeeping at Central Prison, the defendant told him

that he was charged with two counts of first degree murder but that "all they had was just two dead bodies, no witnesses" and that "they would never find the gun." The defendant described the murders to Goodman, stating that the man was shot first, the woman jumped up, and she was shot in the head, their throats were cut and a baby who was too small to tell anything was put in the back room. The defendant told Goodman that the couple was "killed over drug money."

Additional evidence for the State included expert testimony tending to show that the two bullets recovered from Lisa Matthews' body and two other bullets recovered from the Matthews' home were all fired from the same gun. The bullets were either .38 or .357 caliber and were probably made by Remington-Peters.

An officer from the Fayetteville Police Department testified that on 16 March 1984, he received six .38 caliber Remington-Peters bullets from Allen Jernigan. Subsequently, Jernigan turned over a partial box of Remington-Peters .38 caliber ammunition to the authorities. Jernigan testified that Jerry Cashwell gave him the box of ammunition after the victims were murdered. Expert testimony tended to show that the four fired bullets recovered from the crime scene and the unfired bullets from the box were so similar that it was likely that they all came from the same box.

The defendant offered evidence that Jerry Cashwell, alone, was responsible for the murders. Several people testified that Cashwell told them how he had killed the victims. The defendant also testified that Cashwell told him that he (Cashwell) had murdered the victims.

In rebuttal, the State offered the testimony of Samuel Thompson. He said that Cashwell told him while they were both inmates in the Cumberland County Jail that West, Cashwell, and the defendant had killed Lisa and Roland Matthews. Thompson also testified that Cashwell informed him that he (Cashwell) was in jail for attempted murder of his girlfriend.

[1] By his first assignment of error the defendant contends that the trial court committed reversible error by admitting evidence that Jerry Cashwell had been arrested for attempted murder of his girlfriend. He argues that this evidence was inadmissible because it amounted to improper impeachment of Cashwell's statements which had been introduced by the defendant and because it was

inadmissible evidence of Cashwell's character. The defendant points out that this Court ruled that this same evidence was irrelevant and unduly prejudicial to Cashwell in his own trial. *State v. Cashwell*, 322 N.C. 574, 369 S.E. 2d 566 (1988).

When, as here, alleged errors relate to rights arising other than under the Constitution of the United States, a defendant is prejudiced only when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached. N.C.G.S. § 15A-1443(a) (1988). The defendant has the burden of showing such prejudice. *Id.*

In the present case, even if it is assumed *arguendo* that it was error to admit the evidence the defendant complains of, it was not prejudicial. The defendant offered evidence through several witnesses that Cashwell, alone, committed both murders. The evidence that Cashwell had attempted to kill his girlfriend, if anything, buttressed the defendant's evidence and theory of the case. The defendant could only benefit from evidence that tended to show that Cashwell was a bad character with a propensity for murder. The defendant having failed to show prejudice, we overrule the defendant's first assignment of error.

[2] The defendant next assigns as error the trial court's admission into evidence of testimony concerning certain statements made by West several days after the victims were killed. Williford testified that he returned to the defendant's residence several days after the victims were killed. After talking to the defendant outside the house, Williford accompanied him inside. Cashwell, West and Terry Lofton were present. Williford testified that during this time someone—West thought it was Lofton—asked "what happened," and West made the statements "that fat bitch begged us not to kill her too" and that he "was surprised how easy it was and how easy it had gone over that they got the pot back." Williford also testified that after each of these statements, the conversation ceased and the defendant looked up and gave West "a long glance like he had better shut up."

The defendant argues that Williford's testimony concerning West's statements and the defendant's reaction was inadmissible hearsay because the defendant's "silence" did not meet the requirements for implied admissions under Rule 801(d)(B) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 801(d)(B) (1986). We conclude, however, that the defendant's affirmative conduct indi-

cating that West "had better hush" or "had better shut up" could reasonably be found by a jury to manifest the defendant's adoption or belief in the truth of West's statements, thereby making them admissible under Rule 801(d)(B).

"An admission or other declaration, though not made during or in furtherance of the conspiracy, is admissible against a defendant if made in his presence and *adopted by him by conduct* or silence . . . ." 2 Brandis on North Carolina Evidence § 173 (3d ed. 1988) (emphasis added). In the present case, there was evidence from which the jury could reasonably find that West had firsthand knowledge concerning the events he referred to in his statements. Furthermore, there is evidence from Williford's testimony that the defendant was present and heard West make the statements. Williford testified, over the defendant's objections, that after West made each of the statements, conversation ceased and the defendant "just looked at . . . [West], you know, like he had better hush" or "had better shut up." Such testimony by Williford was "a shorthand statement of facts," and, therefore, was admissible when, as here, the facts on which the witness bases his testimony are difficult to describe in a way which will permit jurors to draw their own inferences. *State v. Williams*, 319 N.C. 73, 352 S.E. 2d 428 (1987); 1 Brandis on North Carolina Evidence § 125 (3d ed. 1988). *See* N.C.G.S. § 8C-1, Rules 602 and 701 (1986). Based on Williford's testimony in this regard, the jury would have been justified in believing that the defendant's *conduct* in reaction to West's statements indicated that the defendant understood that the "us" West referred to included the defendant and that West "had better hush" or "had better shut up," but not that West's statements were untrue. Therefore, the jury could have reasonably found that the defendant's affirmative actions amounted to *conduct* manifesting his adoption of West's statements or his belief in their truthfulness. *See generally* Annotation, *Nonverbal Reaction to Accusation, Other Than Silence Alone, as Constituting Adoptive Admission Under Hearsay Rule*, 87 A.L.R. 3d 706 (1978 & Supp. 1988). "[A] response which is not the equivalent of a denial may indicate acquiescence and be considered by the jury for what it is worth." 2 Brandis on North Carolina Evidence § 179 at 55 (3d ed. 1988). This assignment of error is without merit.

[3] By his next assignment of error, the defendant maintains that he is entitled to a new trial because the trial court erred in permitting the prosecutor to cross-examine Joann Cashwell—the sister of

Jerry Cashwell—about her brother's previous trial and convictions for the murders of the victims. The defendant called Joann Cashwell to testify. She was cross-examined, over the defendant's objections, regarding whether she had testified at her brother's trial. Then, in his recross-examination of Joann, the prosecutor asked her if she had attended her brother's trial and seen him convicted of two counts of first degree murder. Although the trial court sustained his objection and allowed the motion to strike, the defendant argues that the prosecutor's questions contained improper information about Cashwell's convictions which resulted in unfair prejudice to the defendant.

The general rule is that a conviction of one defendant is not competent as evidence of the guilt of another on the same charges. *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979). Even if it is assumed *arguendo* that the State sought to introduce such evidence for that purpose, however, the rule was not violated in the present case. The trial court sustained the defendant's objection to the question concerning the disposition of the charges against Jerry Cashwell. Generally, the asking of a question alone will not result in prejudice. *Id.* at 399, 250 S.E. 2d at 230; *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970). Furthermore, it is difficult to see how evidence that Cashwell previously had been tried and convicted of these murders could have prejudiced the defendant in the present case, since the defendant sought to establish by his own evidence at trial that Cashwell, alone, had committed them. This assignment of error is without merit.

[4] By his next assignment of error, the defendant contends that the State's introduction of evidence referring to his home as "Fort Apache" was inadmissible character evidence prohibited by Rule 404(a) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 404(a) (1986). The defendant points to the use of the term in the testimony of Gene Williford. Williford had testified that he had met West at the defendant's house where they both had spent a lot of their free time. The prosecutor asked where the defendant's house was located. The following exchange then occurred:

> GENE WILLIFORD: It's over in East Fayetteville, across from the Pay-Lo service station, off of Highway 53.
>
> MR. COMAN: Does that area have any common name that it is known by in the community?

MR. COOPER: Objection.

COURT: Overruled.

WILLIFORD: It's been referred to as Fort Apache before.

. . . .

COURT: This is received solely for the purpose of identification of a given place and for no other purpose.

The defendant asserts that the fact that a person "lives in a home commonly referred to as a fort suggests a violent disposition . . . ." However, the defendant has neither cited authority nor given any additional reasoning to support this contention.

The defendant's counsel made references to "Fort Apache" to prospective jurors during jury selection. Further, at one point in the trial, the defendant specifically withdrew his objection to the State's use of a report referring to his home as "Fort Apache." This Court frequently has held that when, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); 1 Brandis on North Carolina Evidence § 30 (3d ed. 1988). This assignment is without merit.

[5] In support of his next assignment, the defendant argues that the trial court erred in allowing the prosecutor, over objection, to cross-examine him concerning certain men he had entrusted to read his mail and write for him while he was incarcerated awaiting trial. He contends that the prosecutor impermissibly suggested in his questions during cross-examination of the defendant that one of these men, Alton Green, was "facing three life sentences" and that the defendant was "comfortable with Green because he was the same type of person you were . . . ." Furthermore, he maintains that although the trial court attempted to limit the jury's consideration of this testimony solely to the question of why the defendant relied on certain persons to read his mail for him, the prejudice was overwhelming.

During his testimony, the defendant denied making the inculpatory statement in prison attributed to him by the State's witness Jeffrey Goodman and denied that Goodman had read his mail or written letters for him. On re-direct examination by his counsel, the defendant again denied that Goodman wrote letters

for him and testified that Green or a man named "Spider" wrote his letters for him. In this context, the prosecutor's questions would appear to involve proper cross-examination seeking to question the credibility of the defendant's testimony that he had trusted Green and Spider as opposed to the State's witness Goodman by inquiring as to why the defendant would trust those men rather than Goodman.

Even assuming *arguendo* that it was error for the trial court to permit the prosecutor to ask such questions, the defendant has not carried his burden of showing that there is a reasonable possibility a different result would have been reached at trial had the error not been committed. N.C.G.S. § 15A-1443(a) (1988). There was unobjected-to testimony that the defendant, as well as Spider, Green, and Goodman, were together in Central Prison. Therefore, the jury was aware of the prison setting in which the defendant found himself and of the types of criminals who might be incarcerated there. This assignment is without merit.

By another assignment, the defendant contends that the following question by the prosecutor to an investigating officer resulted in reversible error:

> Q: Now, during the course of your investigation into this matter, have you had occasion to become familiar with the reputation of this Defendant for the use of violence?
>
> A: Yes, sir. I have.

The defendant's objection was sustained by the trial court. Nevertheless, the defendant contends that he was prejudiced by the mere asking of the question. As we previously noted, a defendant is not ordinarily prejudiced when his objection to an improper question is sustained. *State v. Whisenant*, 308 N.C. 791, 303 S.E. 2d 784 (1983) (no prejudice found when objection sustained to a question asking if the witness knew that the defendant was a convicted felon). We detect no prejudice to the defendant in the present case. This assignment is without merit.

The defendant next assigns as error the trial court's refusal to allow his motions for a change of venue or, in the alternative, for additional peremptory challenges. He argues that he demonstrated to the trial court that inflammatory and emotionally charged pretrial publicity concerning his case made it reasonably likely that he could not receive a fair trial in Cumberland County.

[6] Initially, we note that the trial court did not err in refusing to permit the defendant to exercise more peremptory challenges than provided for by N.C.G.S. § 15A-1217. The trial court had no authority to increase the number of peremptory challenges provided by that statute. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

[7] We turn, then, to consider the defendant's motion for a change of venue. On a motion for change of venue pursuant to N.C.G.S. § 15A-957, the defendant has the burden of demonstrating that, due to pretrial publicity, there is a reasonable likelihood that he will not receive a fair trial. *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983). In most cases, the defendant must specifically identify prejudice among the jurors who were selected and actually served in his case in order to carry this burden. *State v. Hunt*, 323 N.C. 407, 415, 373 S.E. 2d 400, 407 (1988). In determining if there is identifiable prejudice, it is important to examine the statements of the jurors regarding whether they can decide the case based on the evidence and not on pretrial publicity. *Id.* Additionally, a motion for a change of venue is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983).

After examining the newspaper articles, affidavit, and the transcript of the testimony which the defendant offered in support of his venue motion as well as the statements by the jurors during the jury *voir dire* in this case, we conclude that the trial court did not abuse its discretion.

The affidavit offered by the defendant was from a local reporter who merely indicated that he believed people living within two miles of the defendant's residence would be influenced by the defendant's reputation. We find no indication in the reporter's affidavit that the defendant could not otherwise receive a fair trial in Cumberland County.

The defendant also offered the testimony of an attorney in support of his motion for change of venue. This testimony established that certain newspaper articles were published concerning the defendant. Further, the attorney had talked with three or four people in his church about the defendant's case, but he could not say that a jury selected in Cumberland County at the time of defendant's trial would have any particular knowledge of the matter.

The newspaper articles in evidence relating to the murders of the victims and the charges against the defendant were factual and noninflammatory. Even if some of the articles can be deemed to have contained inflammatory statements, the defendant has made no showing that it was reasonably likely that the jurors in his case would base their decisions upon pretrial information rather than the evidence presented at trial or would be unable to remove from their minds any preconceived impressions they may have formed.

In *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799, this Court stated that "the most persuasive evidence that the pretrial publicity was not prejudicial or inflammatory" was the potential jurors' responses to questions asked during the *voir dire* hearing conducted to select the jury. 308 N.C. at 480, 302 S.E. 2d at 805. We noted in *Richardson* that when prospective jurors were questioned about their knowledge of the case out of the presence of the others, "almost all admitted to having read about the case in the newspaper or having heard about it on television. However, their recollections of those media accounts could only be described as vague." *Id.* Moreover, we stated in *Richardson* that the most important evidence that the pretrial publicity about the case was not prejudicial was that each juror selected to hear the case "unequivocally answered in the affirmative when asked if they could set aside what they had previously heard about defendant's case and determine defendant's guilt or innocence based solely on the evidence introduced at trial." *Id.*

In the present case, the trial court permitted individual *voir dire* questioning of each prospective juror concerning his or her knowledge of the case, out of the presence of the other jurors. Five jurors who served in this case indicated that they had no prior knowledge of the case before they were selected to serve on the jury. The other seven jurors indicated they had a vague memory of reading or hearing news accounts of the murders at the time that they had occurred more than two years previously. The jurors who served in this case all indicated unequivocally that they would decide the case based on the evidence at trial and had not formed an impression or preconceived opinion about the guilt or innocence of the defendant. As in *Richardson*, the defendant has not made a showing of identifiable prejudice in his case. Therefore, this assignment of error is without merit.

[8] The defendant contends by his next assignment of error that the trial court erred in allowing the State to introduce certain photographs into evidence. Specifically, he challenges the introduction of two 8 by 10 inch color photographs—one of his alleged accomplice, Jerry Cashwell, and one of the defendant himself—which were made soon after their arrests for the murders of the victims. The defendant maintains that the photographs were irrelevant because neither his identity nor Cashwell's identity was at issue in this case. Moreover, he argues that they were prejudicial to him because both men appeared unkempt and unshaven. He argues that both photographs unfairly suggest that the subjects have criminal histories.

Having examined the photographs, which were used to illustrate Williford's testimony, we find no merit to the defendant's argument. First, the defendant has made no showing that the photographs in question made the men look any different than they actually appeared in March 1984 at the time of the murders; however, there is some indication from the record that the men's appearances had changed from the time of the murders to the time of the trial. Even a stipulation by the defendant cannot limit the State's *right* to prove all essential elements of its theory of the case. *State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982); *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); 2 Brandis on North Carolina Evidence § 166 (3d ed. 1988). The defendant's admission that Williford knew Cashwell and the defendant and that Williford could identify them did not preclude the State from introducing photographs to illustrate Williford's testimony concerning his ability to identify the defendant and Cashwell at the time of the murders and at the time of trial. The State had a right to show that Williford was not confused about the identity of the men.

The defendant cites the recent holding in *State v. Hennis*, 323 N.C. 279, 372 S.E. 2d 523 (1988), where this Court concluded that the trial court's admission of photographic evidence was error and awarded a new trial. That case is easily distinguishable from the present case. *Hennis* turns on the repetitious introduction of an excessive number of large, gruesome photographs of the victims' bodies, from which this Court concluded that the probative value of the photographs was outweighed by their unduly prejudicial effect. *Id.* In the present case, only one picture of each of two alleged participants in the murders was admitted into evidence

for the purpose of demonstrating the ability of the witness to identify them and to illustrate his testimony.

In his brief the defendant raises more specific complaints referring to Cashwell's photograph than to his own. He contends that Cashwell appears with "the bright red eyes of an animal occasioned by the inartful use of a flashbulb" and "looks wild and mean." The defendant could not have been harmed by the jury's exposure to an unflattering photograph of Cashwell which "suggested a criminal history" and in which he appeared "wild and mean." The defendant himself sought to show at trial that Cashwell, alone, had committed the murders. We conclude that the admission of these photographs was not error.

[9] Finally, the defendant assigns as error the admission into evidence of the testimony of the chief jailer for Cumberland County that security improvements were instituted at the jail after the State's witness Gene Williford reported an incident. First, Williford had testified, over the defendant's objection, that he told officials at the Cumberland County jail that West had threatened him. Williford testified that West stood outside the jail below Williford's cell window, made threatening gestures, and pointed a gun at the window. The trial court admitted this testimony to show Williford's state of mind. Later in its case-in-chief, the State called the chief jailer to testify that certain security measures were installed after Williford reported the incident.

The defendant vigorously cross-examined Williford at trial and sought to establish his lack of credibility by, among many other tactics, showing that in his first statement to police, Williford did not implicate West in the murders. Therefore, we detect no error in allowing the State to rebut any lack of credibility implicit in Williford's failure to mention West in the first statement by having Williford testify that West had threatened Williford and his family if Williford talked to police. Williford testified that this occurred on one occasion at Williford's residence and on another occasion in front of the jail, when West pointed a shotgun at Williford who was inside.

The defendant argues, however, that allowing the chief jailer to testify that certain security measures were taken after Williford reported the alleged incident at the jail improperly permitted the State to introduce evidence of Williford's character for truthfulness in violation of N.C.G.S. § 8C-1, Rule 608. Assuming *arguendo* that

the trial court erred by allowing the State to introduce the testimony of the chief jailer, we conclude that the error was harmless. The testimony of the chief jailer related only to the actions of jail officials in taking certain security measures after receiving a report of an alleged incident between Williford and West but did not indicate that the defendant Hunt participated in any way or had any knowledge of the incident. Although the testimony of the chief jailer had very little, if any, relevance to any fact or matter at issue in the defendant's trial, we conclude that its probative value was so slight that it could not have affected the outcome. The defendant having failed to carry his burden of showing prejudice in this regard, we find no merit in this assignment of error.

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error.

No error.

HAZEL M. WARD v. DURHAM LIFE INSURANCE COMPANY

No. 309A88

(Filed 26 July 1989)

1. **Insurance § 18; Rules of Civil Procedure § 56.3— summary judgment hearing—plaintiff's affidavit—striking of legal conclusions—other statements not hearsay**

The trial court properly struck portions of plaintiff's affidavit stating that defendant insurer had notice of insured's medical treatment for high blood pressure and his conviction for driving under the influence of alcohol and the reason that insured signed the application since those portions are conclusions rather than statements of fact. However, the trial court erred in striking as hearsay portions of the affidavit relating statements made by plaintiff and the insured to defendant's agent since they were offered to prove that defendant's agent had notice of the matters contained in the statements and not to prove the truth of those matters.

Am Jur 2d, Summary Judgment §§ 18, 35.

2. Insurance § 18.1— life insurance application—high blood pressure treatment—misrepresentation material

A misrepresentation in an application for a life insurance policy that the applicant had never been treated for high blood pressure was material as a matter of law.

Am Jur 2d, Insurance § 1055.

3. Insurance § 19— life insurance application—material misrepresentation—knowledge of facts by insurer

Even material misrepresentations in applications for insurance do not void the policy if the insurer knew the facts surrounding the misrepresentations at the time it accepted the application and issued its policy based thereon.

Am Jur 2d, Insurance § 1581.

4. Insurance § 19.1— life insurance application—agent's knowledge of misrepresentations—apparent authority

An insurance agent had apparent authority to act for the insurer in receiving insurance applications and assisting applicants in properly completing them, and she acted within the scope of this apparent authority if she accepted an application with knowledge of misrepresentations therein.

Am Jur 2d, Insurance § 1592.

5. Insurance § 19.1— life insurance application—agent's knowledge of material misrepresentations—imputation to insurer

An insurer's authorized agent's knowledge of false material answers on a life insurance application is imputed to the insurer unless both the agent and the applicant intend to perpetrate a fraud on the insurer by submitting the false answers.

Am Jur 2d, Insurance §§ 1582-1587.

6. Insurance § 19.1— life insurance application—applicant's signing of application—material misrepresentations—knowledge by agent—imputation to insurer

The mere signing of a life insurance application with false material answers by an applicant who can read and write is not enough to avoid imputation of the agent's knowledge of the false answers to the insurer. Whether the knowledge is imputed depends ultimately on whether the applicant participated with the agent in committing a fraud on the insurer.

Am Jur 2d, Insurance §§ 1582-1587.

7. Insurance § 19.1— life insurance application—misrepresentations—insured's collusion with agent

Where an insured understandingly executes an application he knows contains false material answers or executes it under circumstances that would put a reasonable person on notice that the application contains such answers, he ipso facto colludes with the agent in misleading the company.

Am Jur 2d, Insurance § 1620.

8. Insurance § 19.1— life insurance application—false material answers—agent's knowledge imputable to insurer—material issue of fact

Plaintiff's forecast of evidence presented a material issue of fact as to whether knowledge by defendant insurer's agent of false material misrepresentations in an application for life insurance should be imputed to defendant insurer where it tended to show that negative answers to questions as to whether insured had ever been arrested for the use of alcohol and treated for high blood pressure were false; insured signed the application only after defendant's agent assured him that, since the events in question occurred more than two years earlier, they would not affect his insurability; and insured could have reasonably believed that the questions were truthfully answered in the negative because none of the events to which they referred occurred within this two-year period.

Am Jur 2d, Summary Judgment § 27.

ON defendant's appeal pursuant to N.C.G.S. § 7A-30(2) of a decision of a divided panel of the Court of Appeals, 90 N.C. App. 286, 368 S.E. 2d 391, *disc. rev. granted*, 322 N.C. 838, 371 S.E. 2d 284 (1988), reversing summary judgment in favor of defendant entered by *Llewellyn, J.*, at the 29 April 1987 session of Superior Court, BEAUFORT County, and upon defendant's petition for discretionary review as to additional issues pursuant to N.C.G.S. § 7A-31. Heard in the Supreme Court 16 November 1988.

Stephen A. Graves for plaintiff appellant.

Young, Moore, Henderson & Alvis, P.A., by Robert C. Paschal and Theodore S. Danchi, for defendant appellant.

EXUM, Chief Justice.

This is an action to recover proceeds allegedly due under a life insurance policy issued by defendant on the life of plaintiff's deceased husband. Refusing to pay the proceeds, defendant relies on what it contends are material misrepresentations made in the application for the policy. The question is whether on the factual showing made at the hearing defendant is entitled to summary judgment on the material misrepresentation defense. The Court of Appeals concluded it was not. *Ward v. Durham Life Ins. Co.*, 90 N.C. App. 286, 292, 368 S.E. 2d 391, 395, *disc. rev. granted*, 322 N.C. 838, 371 S.E. 2d 284 (1988). We affirm.

I.

In support of its motion for summary judgment defendant offered three affidavits, one from each of three vice-presidents. These affidavits tended to show the following:

On 5 October 1985 plaintiff and her husband, Vernon J. Ward, agreed to apply for a life insurance policy through defendant's agent and Mr. Ward's first cousin, Brenda W. Ward. After advising the Wards that she was an agent for defendant, Brenda asked the Wards to answer questions from an insurance application form. After the Wards answered the questions orally, Brenda recorded their answers on the application form. After all questions had been asked and answered and recorded by Brenda on the form, Mr. Ward signed the application and paid the requested premium.

Apparently "Question 30.k" on the form asked whether the applicant had ever been "arrested for the use of alcohol," and "Question 32.d" asked whether applicant had ever been treated for high blood pressure. The form as signed by Mr. Ward showed negative answers to these questions.[1]

On 15 October 1985 defendant issued its policy insuring the life of Mr. Ward in the amount of $10,000 with an additional accidental death benefit of $10,000. The policy designated plaintiff as beneficiary.

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1. Although the actual application form is referred to as Exhibit F in defendant's affidavits, neither this nor other exhibits referred to in these affidavits were brought forward on appeal. Thus, we cannot tell precisely what the questions on the form were. There is some discrepancy in the references to the questions on the form made by the plaintiff's affidavit on one hand and defendant's affidavits on the other; but we do not think the discrepancies are material to the issues in the case. The characterization of questions in the text comes from defendant's affidavits.

On 26 January 1986 Mr. Ward was killed in a single car accident on the Pamlico Beach Road in Beaufort County. Thereafter Mrs. Ward submitted to defendant a timely notice of Mr. Ward's accidental death and claimed the benefits allegedly due her under the policy.

Because Mr. Ward's death occurred within the two-year contestable period provided for in the policy, defendant investigated Mr. Ward's medical history. Mr. Ward's medical records showed that on 29 September 1983 Mr. Ward was diagnosed by a local physician as having high blood pressure for which the physician prescribed medication. Because his death resulted from an automobile accident, defendant obtained a copy of the investigative report of the accident from the Division of Motor Vehicles. The accident report indicated that at the time of the accident Mr. Ward was traveling at an excessive speed and had been using alcohol. Prompted by this information defendant checked local court records, which showed that Mr. Ward had pled guilty to "driving under the influence on October 5, 1982."

Claiming that Mr. Ward had not provided truthful answers on his insurance application form with regard to his high blood pressure and his arrest relating to alcohol use and that had truthful answers been given defendant would not have issued its policy, defendant on 5 June 1986 denied Mrs. Ward's claim for benefits and offered a full refund of premiums paid. This action followed.

Mrs. Ward offered in opposition to defendant's motion for summary judgment her own affidavit. In it she swore essentially as follows: When in October 1985 defendant's agent, Brenda Ward, reached question 30(d) on the application form, she asked Mr. Ward if he had ever been convicted of driving under the influence.[2] Mr. and Mrs. Ward informed Brenda that he had been so convicted in October 1982. Brenda responded that since the conviction was more than two years old it would not prevent him from obtaining insurance with her company. As to question 32(d), Brenda asked Mr. Ward if he had ever been treated for high blood pressure. Mr. Ward informed Brenda that: He had been treated for high blood pressure in 1983; medication was prescribed and taken according to the prescription; the prescription was not refilled; and Mr. Ward, who had reduced his intake of salty and fatty foods, had had no symptoms of high blood pressure since that time. Brenda responded that since the treatment had occurred more than two

2. This and the following characterizations in the text come, as indicated, from plaintiff's affidavit. See n.1, *supra*.

years ago it "was all right" and would not prevent Mr. Ward from obtaining insurance with her company.

Mrs. Ward swore in her affidavit that "my husband and I truthfully and completely answered the questions on the application taken by Ms. Brenda Ward, the agent for Durham Life Insurance Company. . . . That Brenda Ward said that these things were no problem and would not prevent us from obtaining insurance and she marked the application accordingly." After Brenda completed marking the application, Mr. Ward signed it and paid the initial premium.

Defendant moved to strike the following four quoted portions of plaintiff's affidavit as inadmissible evidence:

[1] That as to question 30(d) and (k), my husband and I advised Ms. Ward that he had in fact been convicted of driving under the influence in the District Court of Beaufort County in October of 1982 and that he had obtained a limited driving privilege.

[2] My husband advised her that he had been treated by Dr. Boyette for high blood pressure in 1983. Then she asked whether or not this had occurred within two years. My husband and I then conferred and advised her that it had been more than two years since he had been treated by Dr. Boyette and he had not had any problems since that time.

[3] That as a result of the responses that were given by my husband and I to Ms. Brenda Ward, Durham Life Insurance Company had notice of my husband's medical treatment for high blood pressure and his conviction for driving under the influence of alcohol in 1982.

[4] My husband signed the application based on this representation.

The trial court allowed the motion and granted summary judgment in favor of defendant.

A majority of the Court of Appeals concluded that the trial court erred in striking portions [1] and [2] from plaintiff's affidavit but that it properly struck portions [3] and [4]. *Id.* at 289, 368 S.E. 2d at 393. The majority then held "that the pleadings and affidavits present a material issue of fact on whether the knowledge of the misrepresentation [in the application] should be imputed to the insurer." *Id.* at 292, 368 S.E. 2d at 395. The majority reversed

the order of summary judgment and remanded for further proceedings. *Id.* The dissenting opinion disagreed, concluding in part that there was no forecast of evidence at the summary judgment hearing sufficient to show under any legal theory that the agent's knowledge of misrepresentations on the application should be imputed to defendant. *Id.* at 292-94, 368 S.E. 2d at 395-96 (Parker, J., dissenting). Defendant appealed on the basis of the dissenting opinion in the Court of Appeals, and we allowed defendant's petition for discretionary review of the additional issue regarding the motion to strike portions of plaintiff's affidavit.

II.

[1] As to the trial court's order striking portions of plaintiff's affidavit, we hold the Court of Appeals correctly affirmed as to those portions of the affidavit designated above as [3] and [4] inasmuch as those portions are conclusions rather than statements of fact. *See* 1 Brandis on North Carolina Evidence § 130 (3d ed. 1988); *see also Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E. 2d 400, 405 (1972) (holding an affidavit statement referring to the notice required for a binding contract was inadmissible as a legal conclusion). We also hold the Court of Appeals correctly reversed the order as to those portions designated [1] and [2].

Those portions of plaintiff's affidavit designated [1] and [2] are not hearsay as the trial court apparently thought and defendant argues. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.R. Evid. 801(c); *accord State v. Sidden*, 315 N.C. 539, 551, 340 S.E. 2d 340, 348 (1986). Hearsay is not admissible except as provided by statute or by the rules of evidence. N.C.R. Evid. 802; *accord* 1 Brandis on North Carolina Evidence § 138 (3d ed. 1988); *see also State v. Adcock*, 310 N.C. 1, 37, 310 S.E. 2d 587, 608 (1983) (affidavit offered by defendant was found "clearly hearsay and inadmissible"). If a statement is offered for any purpose other than that of proving the truth of the matter stated, however, it is not objectionable as hearsay and therefore may be admissible. *State v. Irick*, 291 N.C. 480, 498, 231 S.E. 2d 833, 844-45 (1977) (quoting 1 Stansbury's N.C. Evidence, § 141 (Brandis Rev. 1973) at 467-71); 1 Brandis on North Carolina Evidence § 141 (1988); *see* N.C.R. Evid. 801(c). As one example, "[t]he declarations of one person are frequently admitted to prove a particular state of mind of another person who

heard or read them—*e.g.*, to charge him with knowledge or notice of the facts declared." 1 Brandis on North Carolina Evidence § 141 (3d ed. 1988); *accord State v. Foster*, 293 N.C. 674, 683, 239 S.E. 2d 449, 455 (1977). Such statements are admissible since they are offered to show knowledge or notice rather than to prove the truth of the matter stated. 1 Brandis on North Carolina Evidence § 141 (3d ed. 1988).

The statements made to defendant's agent by Mr. and Mrs. Ward, as related by Mrs. Ward's affidavit, were not, as the Court of Appeals correctly concluded, offered to prove the truth of the matters contained in the statements. They were offered to prove simply that defendant's agent had notice of these matters. They were properly admissible and should not have been stricken by the trial court.

III.

The more difficult question is whether Mrs. Ward's affidavit is a sufficient forecast of evidence to show that at trial she will be able to surmount defendant's affirmative defense of material misrepresentations in Mr. Ward's application for insurance.

Familiar, pertinent principles applicable to the ruling on summary judgment are:

> The movant must clearly demonstrate the lack of any triable issue of fact . . . . "[A]ll inferences of fact from the proofs proffered . . . must be drawn against the movant and in favor of the party opposing the motion."
>
> In ruling on summary judgment, a court does not resolve questions of fact but determines whether there is a genuine issue of material fact. . . . Thus a defending party is entitled to summary judgment if he can show that claimant cannot prove the existence of an essential element of his claim *or cannot surmount an affirmative defense which would bar the claim.*
>
> Summary judgment is . . . a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a *prima facie* case *or that he will be able to surmount an affirmative defense.* Under such circum-

> ances claimant need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is non-existent *or that he cannot surmount an affirmative defense.*

Dickens v. Puryear, 302 N.C. 437, 453, 276 S.E. 2d 325, 335 (1981) (citations omitted) (emphases supplied).

There is little question that, standing alone, the misrepresentations in the application would be enough to void the policy. "A policy of life insurance may be avoided by showing that the insured made representations which were material and false." 7 Strong's N.C. Index 3d *Insurance* § 18 (1977); *accord Rhinehardt v. Insurance Co.*, 254 N.C. 671, 673, 119 S.E. 2d 614, 616 (1961) (per curiam); *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. 278, 282, 77 S.E. 2d 692, 695 (1953); *Tolbert v. Insurance Co.*, 236 N.C. 416, 418, 72 S.E. 2d 915, 917 (1952); *Assurance Society v. Ashby*, 215 N.C. 280, 283, 1 S.E. 2d 830, 833 (1939); *Inman v. Woodmen of the World*, 211 N.C. 179, 181, 189 S.E. 496, 497 (1937); *Gardner v. Insurance Co.*, 163 N.C. 367, 374, 79 S.E. 806, 809 (1913). A representation in a life insurance application is material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract and accepting the risk. *Wells v. Insurance Co. and Nicholson v. Insurance Co.*, 211 N.C. 427, 429, 190 S.E. 744, 745 (1937); *Schas v. Insurance Co.*, 166 N.C. 55, 58, 81 S.E. 1014, 1015 (1914); 7 Strong's N.C. Index 3d *Insurance* § 18 (1977). Moreover, in an application for a life insurance policy, written questions and answers relating to health are deemed material as a matter of law. *Rhinehardt v. Insurance Co.*, 254 N.C. at 673, 119 S.E. 2d at 616; *Jones v. Insurance Co.*, 254 N.C. 407, 412, 119 S.E. 2d 215, 218-19 (1961); *Assurance Society v. Ashby*, 215 N.C. at 284, 1 S.E. 2d at 833; 7 Strong's N.C. Index 3d *Insurance* § 18.1 (1977).

[2] The misrepresentation in Mr. Ward's application concerning his health history is, under the foregoing authorities, material. So, arguably, is the misrepresentation concerning his arrests for violations involving alcohol, although we do not here decide this question.

[3] Even material misrepresentations in applications for insurance do not void the policy if the insurer knew the facts surrounding the misrepresentations at the time it accepted the application and issued its policy based thereon. It is well settled that

> an insurance company cannot avoid liability on a policy issued by it by reason of any facts which were known to it at the

> time the policy was delivered, and that any knowledge of an agent or representative, while acting in the scope of the powers entrusted to him, will, in the absence of fraud or collusion between the insured and the agent or representative, be imputed to the company, though the policy contains a stipulation to the contrary.

Cox v. Assurance Society, 209 N.C. 778, 782, 185 S.E. 12, 15 (1936); *accord Heilig v. Insurance Co.*, 222 N.C. 231, 233, 22 S.E. 2d 429, 431 (1942); *Smith v. Insurance Co.*, 208 N.C. 99, 102, 179 S.E. 457, 459 (1935); *Short v. Insurance Co.*, 194 N.C. 649, 650, 140 S.E. 302, 303 (1927); *Ins. Co. v. Grady*, 185 N.C. 348, 353, 117 S.E. 289, 291 (1923); 7 Strong's N.C. Index 3d *Insurance* § 19.1 (1977).

The question before us thus distills to this: Are the facts contained in Mrs. Ward's affidavit, if believed, sufficient to show that defendant's agent, Brenda, had knowledge of the misrepresentations contained in Mr. Ward's application under circumstances which would, under applicable legal principles, make this knowledge imputable to defendant. If they are and if offered at trial, then the defense of material misrepresentations in the application would be surmounted and defendant would not be entitled to summary judgment on the basis of this defense.

[4] First we deal with defendant's contention that its agent, Brenda, was acting outside the scope of her authority if she accepted Mr. Ward's application with knowledge of the misrepresentations. The doctrine of apparent authority completely answers this contention adversely to defendant. In *Hornthal v. Insurance Co.*, 88 N.C. 71 (1883), this Court said:

> A general agent . . . represents his principal . . . and may bind him by any act or agreement fairly within the apparent cope [sic] of his employment; and this, although there may have been limitations put on his authority unknown to those with whom, in such capacity, he may have dealings. Thus . . . notice to him is notice to his principal, and his knowledge is the knowledge of the company; he may waive a forfeiture and dispense with what would otherwise cause it.

Id. at 74-75 (citations omitted). Subsequently, in *Thompson v. Assurance Society*, 199 N.C. 59, 154 S.E. 21 (1930), this Court, addressing the same topic, likewise stated:

> The principal is not bound by or liable for the act of his agent which is beyond the actual, and not within the apparent scope of the agent's authority. . . . Where the act of the agent, although beyond the actual scope of his authority, is within its apparent scope, and the person dealing with the agent acts in good faith, and with reasonable prudence, the principal is bound.

Id. at 64, 154 S.E. 2d at 24. An agent's "*[a]pparent authority* is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses," *Investors Title Ins. Co. v. Herzig*, 320 N.C. 770, 773-74, 360 S.E. 2d 786, 788-89 (1987) (emphasis supplied). A principal's liability in any particular case "must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 30-31, 209 S.E. 2d 795, 799 (1974).

There can be no question here but that defendant had clothed its agent, Brenda, with apparent authority to act for it in receiving insurance applications and assisting applicants in properly completing them. *See, e.g., Thompson v. Assurance Society*, 199 N.C. at 64, 154 S.E. at 24. At least the evidentiary forecast here is that plaintiff will be able to show this at trial.

[5] We are now brought to the central and most difficult question raised by this appeal. There is no doubt, if Mrs. Ward's affidavit is believed, that defendant's agent, Brenda, knew of the falsity of some of the answers on Mr. Ward's application. The troublesome question is whether her knowledge under the forecast of evidence presented by Mrs. Ward's affidavit could at trial be shown to be imputable to defendant. The rule is that an insurer's authorized agent's knowledge of false material answers on an insurance application is imputed to the insurer unless both the agent and the applicant intend to perpetrate a fraud on the insurer by submitting the false answers. "In the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same." *Ins. Co. v. Grady*, 185 N.C. at 353, 117 S.E. at 291.

[6] Defendant argues "the fact that Mr. Ward could read and write and yet signed the application containing the misrepresentations makes the false information imputable to the applicant and not the insurer. . . ." There is language in several cases relied on by defendant and the dissenting opinion below which support this proposition. The cases are *Thomas-Yelverton Co. v. Insurance Co.*, 238 N.C. at 278, 77 S.E. 2d at 692; *Inman v. Woodmen of the World*, 211 N.C. at 179, 189 S.E. at 496; and *McCrimmon v. N.C. Mutual Life Ins. Co.*, 69 N.C. App. 683, 317 S.E. 2d 709, *disc. rev. denied*, 312 N.C. 84, 322 S.E. 2d 175 (1984). A careful reading of these cases reveals, however, that the results are all consistent with the general rule. These cases should not be read to hold that an applicant's mere signing of an application with false material answers is under all circumstances enough to avoid imputation of the agent's knowledge of the false answers to the insurer. Whether the knowledge is imputed depends ultimately on whether the applicant participated with the agent in committing a fraud on the insurer.

In *Thomas-Yelverton*, questions on the application asked whether the applicant had ever suffered from stomach disease and whether he had been attended by a physician during the last two years. *Thomas-Yelverton Co.*, 238 N.C. at 279, 77 S.E. 2d at 693. Applicant answered negatively. *Id.* Insurer's evidence at trial tended to show that applicant had been a patient of a physician within two years preceding the application and had suffered with a "peptic ulcer" and other serious gastro-intestinal problems for which he had been hospitalized. *Id.* at 280, 77 S.E. 2d at 693. Plaintiff beneficiary's evidence tended to show that defendant's agent, after having been fully informed of the applicant's medical problems, asked whether the applicant was working. *Id.* When told that he was, the agent replied, " 'If he's able to work, I can get insurance on him.' " When told that the applicant had been previously refused insurance by other companies, the agent asked in what name the prior applications were made. *Id.* When told the name was Roney Boykin, the agent asked if he had a middle name. *Id.* When told the middle name was Dan, the agent suggested the present application be made in the name of Roney D. Boykin. *Id.* This Court held that on the foregoing evidence the trial court properly allowed defendant insurer's motion for nonsuit, saying:

> [W]hen the insured signed the application he knew the agent had written the answers to the questions contained in it; and by

> signing it in the form submitted, he represented that the answers were true. The plaintiff's evidence clearly establishes the truth of the affirmative defenses [material misrepresentations in the application] of the defendant.

Id. at 283, 77 S.E. 2d at 695.

Notwithstanding this statement, which is the concluding paragraph of the Court's opinion in *Thomas-Yelverton*, the holding in the case rests on the general rule that absent fraud or collusion between agent and applicant knowledge of the agent is imputed to the insurer. This rule is set out and discussed in the opinion. *Id.* at 281-82, 77 S.E. 2d at 694. Further, the Court was careful to note that at trial when plaintiff rested after putting on evidence in rebuttal, "defendant moved . . . to amend its pleadings to allege fraud. The motion was allowed and the pleadings so amended, and the defendant again moved for judgment as of nonsuit. The motion was allowed . . . ." *Id.* at 281, 77 S.E. 2d at 693. Defendant had unsuccessfully moved for nonsuit at the close of its evidence which tended to prove the false answers in the application. *Id.* at 280, 77 S.E. 2d at 693. Defendant had called its agent as a witness. *Id.* During cross-examination the agent equivocated as to the extent of his knowledge of the falsity of the answers. *Id.* After plaintiff's evidence in rebuttal, the amendment to the pleadings alleging fraud was made and the nonsuit motion granted. *Id.* at 281, 77 S.E. 2d at 693. It seems clear that both the nonsuit at trial and this Court's affirmance were based on the false application and fraud in which both the agent and applicant participated.

Defendant's reliance on *Inman v. Woodmen of the World*, 211 N.C. at 179, 189 S.E. at 496, and its progeny *McCrimmon v. N.C. Mutual Life Ins. Co.*, 69 N.C. App. at 683, 317 S.E. 2d at 709 is also misplaced. In *Inman* this Court held that knowledge of the soliciting agent of misrepresentations contained in a written application of life insurance at the time it was signed by the applicant could not be imputed to the insurer. *Inman*, 211 N.C. at 182, 189 S.E. at 497.

We agree with the Court of Appeals that the case before us is distinguishable from *Inman*. See *Ward v. Durham Life Ins. Co.*, 90 N.C. App. at 291, 368 S.E. 2d at 394. In *Inman*, the evidence showed that the insurer's agent solicited the application for insurance. *Inman*, 211 N.C. at 180, 189 S.E. at 496. The applicant stated that he wanted insurance but doubted whether he could get

it because of his medical history which included having been gassed as a soldier during the World War. *Id.* In addition, applicant stated he had received disability payments, had been treated for high blood pressure, and had been a patient at several veterans hospitals. *Id.* at 180, 189 S.E. at 496-97. All this information the applicant gave to the agent, who said, nevertheless, " 'I think I can get you by. You don't have to have a medical examination anyhow.' " *Id.* at 180, 189 S.E. at 496-97. The agent wrote the answers to questions appearing in the application and without reading the completed application to the insured, requested applicant to sign it. *Id.* at 181, 189 S.E. at 497. Applicant signed it in the agent's presence. *Id.* The application contained several false negative answers concerning applicant's medical history. *Id.* On the basis of this evidence the trial court allowed defendant insurer's motion for nonsuit. *Id.* This Court affirmed, holding the agent's knowledge of the application's false answers could not be imputed to the insurer. *Id.* at 182, 189 S.E. at 497.

Significant to the *Inman* decision is the agent's statement to the applicant after the applicant had doubted his ability to obtain insurance because of his medical history, that "I think I can get you by. You don't have to have a medical examination anyhow." This was followed by the agent's request that the applicant sign the application without having it read to him and, apparently, without reading it himself. *Id.* at 181, 189 S.E. at 497. It seems clear that both the nonsuit at trial and this Court's decision affirming it were grounded on fraud and collusion between agent and applicant so that the agent's knowledge was not imputable to the insurer. Indeed, this was the expressed basis of Justice Clarkson's concurring opinion. *Id.* at 182, 189 S.E. at 497-98 (Clarkson, J., concurring).

The concluding paragraph of the main opinion in *Inman* that the applicant's failure to read, or have read, the application "was not induced by any fraud on the part of the agent" should be read to mean that the agent did not commit a fraud on the applicant, not that there was an absence of fraud by both agent and applicant on the insurer. *Id.* at 182, 189 S.E. at 497. Again, *Inman* should not be read to mean that an applicant's signature on an application for insurance, known by the agent to contain false answers, is under all circumstances enough to preclude imputation of the agent's knowledge to the insurer.

In *McCrimmon*, plaintiff purchased life insurance on his son who suffered brain damage at birth. *McCrimmon*, 69 N.C. App. at

684, 317 S.E. 2d at 709. Although plaintiff informed the insurance agent of his son's condition, the agent failed to include this information in the application. *Id.* at 684, 317 S.E. 2d at 710. Plaintiff, without reading it, signed the completed application which falsely stated his child "did not have a defect or deformity and had not consulted a doctor within the last five years for any condition not set out in the application." *Id.* The Court of Appeals, believing it was bound by *Inman*, held plaintiff was barred from recovery under the policy because the false statements were not imputable to the insurer. *Id.* at 685, 317 S.E. 2d at 710.

[7] There is a fundamental factual difference between *Thomas-Yelverton*, *Inman*, and *McCrimmon* and the case before us. In all these other cases the evidence showed a culpable applicant. In these cases the applicants either knew or should have known that the application contained false answers to questions relating to their insurability. *Thomas-Yelverton*, 238 N.C. at 280, 77 S.E. 2d at 692-93; *Inman*, 211 N.C. at 180-81, 189 S.E. at 496-97; *McCrimmon*, 69 N.C. App. at 684, 317 S.E. 2d at 709-10. These cases taken together stand for a specific application of the general rule. They hold that where an insured understandingly executes an application he knows contains false material answers or executes it under circumstances that would put a reasonable person on notice that the application contains such answers, he ipso facto colludes with the agent in misleading the company.

[8] Here plaintiff's forecast of evidence presented by Mrs. Ward's affidavit is enough to demonstrate that she will at trial be able to show that Mr. Ward was an innocent applicant. She will be able to show that he signed the application only after defendant's agent assured him that since the events in question occurred more than two years earlier, they would not affect his insurability. Mr. Ward could, then, have reasonably believed the questions, as explained by defendant's agent, called for positive answers only if the events to which they related occurred within two years of the application. The questions were, therefore, truthfully answerable in the negative because none of the events to which they referred occurred within this two-year period. If, indeed, the insurer's agent sought to mislead her company, the forecast of evidence at the summary judgment hearing indicates that Mr. Ward was not a participant in this effort.

In conclusion and for the reasons stated, we hold that the factual showing at the summary judgment hearing presents a material issue of fact on whether the agent's knowledge of misrepresentations in the application for insurance should be imputed to defendant insurer. The Court of Appeals' decision reversing the trial court's summary judgment for defendant is, therefore,

Affirmed.

STATE OF NORTH CAROLINA v. LILLIE ANN BEAM

No. 524PA88

(Filed 26 July 1989)

Searches and Seizures § 23— narcotics—search warrant—informants' tips—probable cause

The trial court erred in a narcotics prosecution by allowing defendant's motion to suppress evidence seized from defendant's home under a search warrant where the warrant was issued based on the officers' personal knowledge and information from two confidential informants. The magistrate had before him evidence that the suspect had had a pound of marijuana in her home a week earlier; that the suspect had sold marijuana the day the warrant was issued; and that the suspect had a prior history of involvement with drugs and was on probation for violation of the Controlled Substances Act. The reliability of the informants was shown by the officers' sworn statement that the first informant had provided the officer with reliable information in the past and the second informant had told the officer that defendant had sold him marijuana, thus admitting the informant's purchase of a controlled substance. Moreover, the reliable informant saw defendant with approximately a pound of marijuana at defendant's home, so that there was a substantial basis for the magistrate to conclude that there was a fair probability that the marijuana would be found at defendant's residence on the date the warrant was issued.

Am Jur 2d, Searches and Seizures §§ 65, 68, 69.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 91 N.C. App. 629, 372 S.E. 2d 894 (1988), which affirmed an order entered by *Lamm, J.*, in Superior Court, MITCHELL County, on 30 September 1987, allowing defendant's motion to suppress. Heard in the Supreme Court 10 May 1989.

Lacy H. Thornburg, Attorney General, by David N. Kirkman, Associate Attorney General, for the State.

Watson and Hunt, by Charlie A. Hunt, Jr., for defendant-appellee.

FRYE, Justice.

The issue before this Court is whether the evidence presented to the issuing magistrate, when taken as a whole, provides a substantial basis to support the magistrate's finding of probable cause for the issuance of the search warrant. We answer in the affirmative and reverse the Court of Appeals' decision which affirmed the trial court's order suppressing the evidence.

The facts, basically undisputed, are as follows: On 7 February 1987, Detective Hollifield of the Mitchell County Sheriff's Department applied for a warrant to search defendant's home for a controlled substance. In the written application for a search warrant, Detective Hollifield gave a description of and directions to the residence of Lillie Ann Beam, the defendant. As a part of the application, he swore to the following facts to establish probable cause for the issuance of the search warrant:

> [T]he information contained in this application is based upon my personal knowledge and upon factual information I have received from others. A reliable informant who has provided accurate and reliable information in the past and whose information in the past has led to arrest and convictions under the N.C. Controlled Substance Act has told the undersigned [Detective Hollifield] that appx. one week ago the informant saw Lilly Ann Beam with appx. 1 pound of marijuana at her home on Ridge Road. Another informant told the undersigned [Detective Hollifield] that Lilly Ann Beam sold marijuana to them on 02/07/87. Lilly Ann Beam is on probation for violation of Controlled Substance Act.

The magistrate issued the warrant on 7 February 1987. Acting pursuant to the search warrant, Detective Hollifield conducted a

search of defendant's home on the same date. Numerous items were seized during the search:

> One (1) plastic [sic] of marijuana (approximately ½ ounce);
>
> Several marijuana leaves;
>
> One (1) small pipe;
>
> One (1) pack of rolling papers;
>
> One (1) ceramic bowl with cigarette butts and metal clips;
>
> One (1) bag of plant stems;
>
> One (1) small plastic bag of marijuana found in a green jacket;
>
> One (1) small set of postage scales;
>
> Assorted magazines and personal effects . . . .

Defendant was charged with possession of more than one and one-half ounces of marijuana; possession of marijuana with intent to sell; and possession "with intent to use drug paraphernalia, pipes, straws, scales, roach clips, to introduce into the body a controlled substance which it would be unlawful to possess."

Pursuant to N.C.G.S. § 15A-974 defendant made a motion to suppress the evidence seized at her home on the ground that the search warrant was not supported by probable cause. Defendant contended that the two confidential informants' tips which formed the basis of Detective Hollifield's application for the search warrant were either stale or unreliable. The trial court agreed and entered an order suppressing the evidence seized pursuant to the search warrant. The trial court concluded that

> [A]s a Matter of Law . . . considering the totality of the circumstances, the issuing magistrate, had no substantial basis, based upon the information sworn to before him by Deputy Hollifield set out in the affidavit, for concluding that probable cause existed for issuance of the search warrant to search Defendant's residence.

The State appealed and the Court of Appeals affirmed the trial court's decision and stated:

> [I]nformation from a reliable informant showing the defendant possessed one pound of marijuana approximately a week earlier at her home and information from another informant that de-

fendant was selling marijuana at an unspecified location the day the warrant was issued, does not supply a magistrate with a substantial basis for determining there was a fair probability that contraband would be found in defendant's home. There is nothing in the affidavit to support a finding of an ongoing activity of drug selling at defendant's residence. *Cf. State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979) (large number of persons coming and going from defendant's house corroborated other information concerning ongoing activity); *State v. Arrington, supra* (one informant gave information of growing marijuana plants, corroborated by information of a steady flow of traffic by people known to use drugs to and from the premises to be searched is evidence of ongoing activity).

91 N.C. App. 629, 632, 372 S.E. 2d 894, 896 (1988).

We allowed the State's petition for discretionary review and we now reverse.

Our legislature has provided that all applications for a search warrant must contain:

(1) The name and title of the applicant; and

(2) A statement that there is probable cause to believe that items subject to seizure under G.S. 15A-242 may be found in or upon a designated or described place, vehicle, or person; and

(3) Allegations of fact supporting the statement. The statement must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched; and

(4) A request that the court issue a search warrant directing a search for the seizure of the items in question.

N.C.G.S. § 15A-244 (1988). The only question at issue here relates to the sufficiency of the affidavit particularly setting forth the facts and circumstances establishing probable cause.

In *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984), this Court adopted the "totality of the circumstances" test enunciated in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527 (1983),

for determining under our state constitution whether probable cause exists for the issuance of a search warrant. In *Gates*, the Supreme Court abandoned the two-pronged test it formerly used. *See Aguilar v. Texas*, 378 U.S. 108, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637 (1969). The totality of the circumstances test may be described as follows:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Arrington, 311 N.C. at 638, 319 S.E. 2d at 257-58 (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 76 L.Ed. 2d 527, 548). Under this test the question is whether the evidence as a whole provides a substantial basis for concluding that probable cause exists.

In the instant case the magistrate had before him evidence (1) that the suspect had a pound of marijuana in her home a week earlier, (2) that the suspect had sold marijuana the day the warrant was issued, and (3) that the suspect had a prior history of involvement with drugs (and was still on probation for violation of the Controlled Substances Act).

The reliability of the informants is shown by Detective Hollifield's sworn statement. His affidavit states that the first informant, who had previously provided Detective Hollifield with reliable information in the past which led to previous convictions, informed him that he saw defendant with approximately a pound of marijuana in her home. Such a showing of veracity has been accepted by this Court. *State v. Arrington*, 311 N.C. 633, 642, 319 S.E. 2d 254, 260. On the same day the search warrant was issued, the second informant told Detective Hollifield, a law enforcement officer, that defendant sold him marijuana, thus admitting the informant's purchase of a controlled substance. Statements against penal interest carry their own indicia of credibility sufficient to support a finding of probable cause to search. *Id.* at 641, 319 S.E. 2d at 259.

The reliable informant saw defendant with approximately a pound of marijuana at defendant's home. If the marijuana was

for personal use, it is unlikely that she would consume such a large quantity in a week's time. Therefore, at least a portion of it would likely remain in her home a week later. On the other hand, if the marijuana was kept in defendant's home for purposes of sale, then the informants' tips, taken together, indicate that defendant was engaged in the ongoing criminal activity of selling marijuana. Under either scenario there was a substantial basis for the magistrate to conclude that there was a fair probability that marijuana would be found at defendant's residence on the date the warrant was issued. Thus, we hold that, under the totality of the circumstances, the magistrate had a substantial basis for finding probable cause to issue the search warrant. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Mitchell County, for proceedings not inconsistent with this decision.

Reversed and remanded.

STATE OF NORTH CAROLINA v. TRAVIS OSBORNE PHILLIPS

No. 139PA88

(Filed 26 July 1989)

Criminal Law § 138.7— non-capital case—use of victim impact statements

A defendant being sentenced for placing LSD in a pot of coffee at a campus restaurant at Applachian State University did not show that he was prejudiced by the use of victim impact statements at the sentencing hearing. Defendant was shown the victim impact statements at the sentencing hearings; he objected to their admission but did not move for a continuance to seek evidence in rebuttal or to issue subpoenas for the persons who made the statements; it cannot be said that the court would have denied such a motion had it been made; the two victims testified at trial to the things that were contained in the victim impact statements and were cross-examined by defendant's attorney; and the court did not find an aggravating factor based on the evidence adduced by the victim impact statements.

Am Jur 2d, Criminal Law § 527.

ON writ of certiorari to review the decision of the Court of Appeals reported at 88 N.C. App. 526, 364 S.E. 2d 196 (1988), which found error in the defendant's sentencing hearing before *Griffin (Kenneth A.), J.*, at the 23 February 1987 Session of Superior Court, WATAUGA County. Heard in the Supreme Court 14 March 1989.

The defendant was convicted of possession of a controlled substance, a violation of N.C.G.S. § 90-95(a)(3), and placing a controlled substance in a position of human accessibility, a violation of N.C.G.S. § 14-401.11(a)(2). The evidence showed the defendant and one other person placed Lysergic Acid Diethylamide (LSD) in a pot of coffee at the Sweet Shop, a restaurant on the campus of Appalachian State University. At least eight people drank coffee from the coffeepot and had drug-induced hallucinations as a result.

After the defendant was convicted a sentencing hearing was held. The evidence showed that the defendant had two prior convictions. Ben Blackburn, a victim-witness coordinator, testified and the State put into evidence through him two victim impact statements. One of the statements was by A. V. Mosteller. Mr. Mosteller said that as a result of ingesting the LSD he has had strange abnormal dreams, that several times weekly he has severe headaches lasting up to thirty-six hours, that his vision seems to be impaired and that worries him because he is a truck driver, that he now is afraid to eat away from home and that he fears he will have a flashback while he is driving a truck which could result in a serious injury. Mr. Mosteller said he had lost $160.00 in wages. Abigail Sheets made a statement in which she described her experiences in hallucinating after ingesting the LSD, her fear of eating in public places and her distrust of people which has developed as a result of the incident. She also told of how her grades had suffered and testified that she had incurred a medical bill of $105.00 as a result of ingesting the LSD.

The superior court found as an aggravating factor that the defendant had a prior conviction or convictions of criminal offenses punishable by more than sixty days confinement. It found as a mitigating factor that the defendant had been a person of good character and reputation in the community in which he lived. The court found the aggravating factor outweighed the mitigating factor and imposed the maximum sentence on each charge with the sentences to be served consecutively.

The Court of Appeals found no error in the trial but held there was error in the sentencing hearing which required a new hearing. This Court allowed the State's petition for certiorari.

Lacy H. Thornburg, Attorney General, by Debra C. Graves, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for the defendant appellee.

WEBB, Justice.

The Court of Appeals did not hold that a victim impact statement may not be used at a sentencing hearing. Relying on the confrontation clause of the Sixth Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution as well as the law of the land clause of Article I, Sec. 19 of the Constitution of North Carolina, the Court of Appeals held that a defendant must be given prior notice of any victim impact statement which is to be used at a sentencing hearing.

N.C.G.S. § 15A-825 provides for the use of victim impact statements and, pursuant to N.C.G.S. § 15A-1334(b) which provides that formal rules of evidence do not apply at sentencing hearings, hearsay evidence can be used at such hearings. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The use of hearsay evidence at sentencing hearings does not violate the Constitution of the United States. *Williams v. New York*, 337 U.S. 241, 93 L.Ed. 1337 (1949). In *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed. 2d 440 (1987) the United States Supreme Court held that the Eighth Amendment to the United States Constitution proscribes the use of victim impact statements at the penalty phase of death cases but specifically said it implied no opinion as to the use of such evidence in non-capital cases. The Sixth Amendment does not include the right to discovery or notice of evidence to be presented. *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed. 2d 40 (1987).

The Court of Appeals said it failed "to see how the defendant was prejudiced by the trial court's action" and we agree with them, in part because the court did not find an aggravating factor based on the evidence adduced by the victim impact statements. The defendant had the right to have brought to his attention all

information received by the court which tended to aggravate punishment with the full opportunity to refute or explain it. *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962). We do not believe the defendant has shown he was deprived of this right. He was shown the victim impact statements at the sentencing hearings. He objected to their admission but he did not move for a continuance to seek evidence in rebuttal or to issue subpoenas for the persons who made the statements. Indeed, the last thing the defendant may have wanted was to have the victims appear in person. We cannot say the court would have denied such a motion if it had been made by the defendant. In addition, the two victims testified at trial to the things that were contained in the victim impact statements and they were cross-examined by the defendant's attorney. The matters contained in the victim impact statements were thus brought to the court's attention without the victim impact statements being introduced. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). We hold the defendant has not shown he was prejudiced by the sentencing hearing in this case.

We reverse the Court of Appeals and remand for remand to the superior court for reinstatement of the judgments.

Reversed and remanded.

STATE OF NORTH CAROLINA v. RICHARD A. STURKIE

No. 439PA88

(Filed 26 July 1989)

ON appeal and discretionary review of the decision of the Court of Appeals, 91 N.C. App. 249, 371 S.E. 2d 288 (1988), setting aside a judgment entered by *Kirby, J.*, in the Superior Court, GASTON County, on 14 July 1987, and awarding the defendant a new trial. Heard in the Supreme Court on 13 March 1989.

Lacy H. Thornburg, Attorney General, by L. Darlene Graham, John H. Watters and Norma S. Harrell, Assistant Attorneys General, for the State appellant.

Frank Patton Cooke, by Malcolm B. McSpadden, for the defendant appellee.

PER CURIAM.

The defendant was tried at the 13 July 1987 session of Superior Court, Gaston County, for felonious possession of stolen property. At the beginning of trial, the defendant moved to suppress use of the stolen property as evidence, contending that it had been obtained by police officers through an unlawful warrantless search and seizure in violation of his constitutional rights. After a suppression hearing, the trial court held the warrantless search and seizure to have been lawful and admitted the property into evidence. The defendant was found guilty of felonious possession of stolen property, and he appealed to the Court of Appeals.

On appeal, the Court of Appeals concluded that the trial court's findings and conclusions to the effect that the person with exclusive use and control of the searched premises voluntarily consented to both the search and the seizure were supported by evidence and free of error. The Court of Appeals further held, however, that the trial court should have suppressed the evidence because police officers did not have probable cause to believe the property seized was stolen and, therefore, it was not lawfully seized. The Court of Appeals ordered a new trial on that basis.

The State filed an appeal to this Court and also petitioned for discretionary review; discretionary review was allowed. In its notice of appeal and petition for discretionary review, the State did not seek to contest the conclusion of the Court of Appeals on the probable cause question. Instead, the State, relying upon *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387 (1978), and *State v. Greenwood*, 301 N.C. 705, 273 S.E. 2d 438 (1981), sought only to have this Court review the question of whether the defendant had a sufficient interest in the property seized to establish a violation of his own constitutional rights. Therefore, only that single question is before us by virtue of the State's appeal and our granting of the State's petition for discretionary review. App. R. 16(a). Our review of the complete record now before us indicates that the arguments the State has now presented concerning this issue were made directly for the first time in this case in its petition and its brief before this Court. Without deciding whether the issue the State has brought forward is properly before us and, further, without deciding any question concerning the correctness of any part of the decision and opinion of the Court of Appeals, we now conclude that our discretionary review in this case was improvidently

allowed and that the State's appeal should be dismissed. Our holding in this regard is without value as precedent. *See Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E. 2d 133 (1973).

Review improvidently allowed; appeal dismissed.

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

ALEXVALE FURNITURE v. ALEXANDER & ALEXANDER

No. 203P89.

Case below: 93 N.C. App. 478.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

BARKER v. AGEE

No. 224PA89.

Case below: 93 N.C. App. 537.

Petition by defendants/third-party plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 26 July 1989.

FINK v. REDDING

No. 231P89.

Case below: 93 N.C. App. 790.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

IN RE FORECLOSURE OF FIRST RESORT PROPERTIES

No. 283A89.

Case below: 94 N.C. App. 99.

Petition by Billings for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 31 July 1989.

N.C. BAPTIST HOSP. v. FORSYTH CO.
DEPT. OF SOCIAL SERV.

No. 204P89.

Case below: 93 N.C. App. 513.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

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

NELSON v. PINEHURST ENTERPRISES, INC.

No. 202P89.

Case below: 93 N.C. App. 513.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

SHORE v. BROWN

No. 470PA88.

Case below: 91 N.C. App. 288.

Petition by third-party defendant (General Motors Company) for writ of certiorari to the North Carolina Court of Appeals denied 26 July 1989.

SPAULDING v. R. J. REYNOLDS TOBACCO CO.

No. 254A89.

Case below: 93 N.C. App. 770.

Notice by plaintiff of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30 dismissed 26 July 1989.

STATE v. DAVIS

No. 230P89.

Case below: 93 N.C. App. 790.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

STATE v. FREEMAN

No. 201P89.

Case below: 93 N.C. App. 380.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

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

STATE v. KNIGHT

No. 207P89.

Case below: 93 N.C. App. 460.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

STATE v. PENNINGTON

No. 210P89.

Case below: 93 N.C. App. 514.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

WALKER v. FIRST FEDERAL SAVINGS AND LOAN

No. 221P89.

Case below: 93 N.C. App. 528.

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

WALTON v. CAROLINA TELEPHONE

No. 209P89.

Case below: 93 N.C. App. 368.

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 26 July 1989.

WOOLARD v. N.C. DEPT. OF TRANSPORTATION

No. 240P89.

Case below: 93 N.C. App. 214.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 26 July 1989.

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

PETITION TO REHEAR

WHITTAKER GENERAL MEDICAL CORP. v. DANIEL

No. 6PA88.

Case below: 324 N.C. 523.

Petition by defendant (Connie Daniel) to rehear denied 26 July 1989.

STATE OF NORTH CAROLINA v. ALTON REID HOYLE, JR.

No. 432A88

(Filed 6 September 1989)

1. **Constitutional Law § 76; Criminal Law § 48.1— comment on defendant's silence—closing argument on defendant's silence—prejudicial error**

The trial court erred in a prosecution for first degree murder by allowing the prosecutor to ask certain questions regarding defendant's post-arrest silence and to refer to defendant's silence in his closing argument before the jury. The State did not demonstrate beyond a reasonable doubt that it was harmless to attack the credibility of defendant by improper evidence which was reinforced by the jury argument.

Am Jur 2d, Trial § 254.

2. **Criminal Law § 75.7— statement prior to Miranda warnings—inadmissible**

The trial court erred in a first degree murder prosecution by admitting into evidence a statement by defendant where officers went to defendant's home; defendant agreed to go to police headquarters; defendant started towards his closet to get his coat; an officer stopped him and got his coat for him; one of the officers took into his possession a pistol that was on a nearby shelf; defendant asked the officers if they had a warrant and was informed that they did not; one of the officers then told defendant that he would obtain a warrant and leave an officer at the defendant's home until a warrant could be procured; defendant then went with the officers; and, as they were leaving defendant's home, one of the officers asked defendant how long he had been at home, to which the defendant replied, "all night." Defendant was deprived of his freedom in a significant way when an officer told him that he would get a warrant for him and would leave an officer at defendant's home until a warrant could be procured and it was necessary to advise him of his rights for his answer to be introduced into evidence.

Am Jur 2d, Evidence § 614.

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

The evidence was sufficient for the jury to find beyond a reasonable doubt all the elements of first degree murder in a prosecution in which a new trial was awarded on other grounds where the State's evidence showed that defendant and the victim were in a restaurant in Asheville with two other persons; the two other persons left the restaurant and shortly thereafter the defendant and the victim left; defendant entered his truck in the restaurant parking lot, leaving the victim standing on the passenger side of the truck; the defendant was seen pointing a gun at the victim, who walked around the front of the truck and leaned against the window on the driver's side; defendant left the parking lot in his truck a few minutes later; the victim was found lying in the parking lot with a bullet wound in his head; officers went to defendant's residence and carried him to police headquarters, where defendant answered some questions but replied when asked what happened when the victim followed him to the truck that he would rather not say without talking to his lawyer; defendant testified that he had argued with the victim and told the victim he would not give him a ride to his home; the victim entered on the passenger side when defendant entered the truck on the driver's side and struck defendant in the face with a glass; defendant then left the truck and the victim followed, kicking defendant in the back and head; defendant returned to his truck and retrieved his pistol from the floor of the truck; the victim leaned through the open window and grabbed defendant around the neck while defendant was searching for the keys to the truck; and the gun went off while the two struggled for the gun.

Am Jur 2d, Homicide §§ 45 et seq.

Justice MEYER dissenting.

APPEAL as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by *Hyatt, J.*, at the 18 April 1988 Criminal Session of Superior Court, BUNCOMBE County. Heard in the Supreme Court 10 April 1989.

The defendant was tried for first degree murder. The State's evidence showed that the defendant and Terry Kicinski were in T. K. Tripps, a restaurant in Asheville, with two other persons

on the evening of Friday, 20 November 1987. The other two persons left the restaurant and shortly thereafter the defendant, followed by Terry Kicinski, left. The defendant entered his truck in the restaurant parking lot, leaving Mr. Kicinski standing on the passenger side of the truck. The defendant was seen pointing a gun at Mr. Kicinski who walked around the front of the truck and leaned against the window on the driver's side. The State's evidence showed that the defendant left the parking lot in his truck a few minutes later. A short time later Terry Kicinski was found lying in the parking lot with a bullet wound in his head. He died approximately twelve hours later.

Officers of the City of Asheville Police Department went to the defendant's residence that night and carried him to police headquarters. The evidence showed that at the police headquarters the officers advised the defendant of his constitutional right to remain silent and to have an attorney. The defendant told the officers he would not sign a waiver of his rights without a lawyer being present but that he would answer questions. The defendant answered some of the questions of the officers but when they asked him "what happened when the male followed him to his truck?" he replied he would "rather not say without having talked with his lawyer." The officers did not question him further about this.

The defendant testified at the trial that he had argued with Mr. Kicinski and had told Mr. Kicinski he would not give him a ride to his home. When the defendant entered the truck on the driver's side, Terry Kicinski entered on the passenger side and struck the defendant in the face with a glass. Next, according to the defendant, he left the truck and Mr. Kicinski followed, kicking the defendant in the back and head. The defendant returned to his truck and retrieved his pistol from the floor of the truck. While the defendant was searching for the keys to the truck, Mr. Kicinski leaned through the open window and grabbed the defendant around the neck. The two men struggled for the gun and it discharged, hitting Mr. Kicinski.

The defendant was convicted of first degree murder. The State offered no evidence in aggravation of the crime and the defendant was sentenced to life in prison. He appealed.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Associate Attorney General, for the State.

Elmore & Powell, P.A., by Bruce A. Elmore, Sr. and Shirley H. Brown, for defendant appellant.

WEBB, Justice.

[1] We address first the defendant's assignment of error as to whether the court erred in allowing the prosecutor to ask certain questions regarding defendant's post-arrest silence.

At trial, the prosecutor repeatedly questioned Detectives Jenkins and Dayton and the defendant about whether the defendant had ever informed anyone that Terry Kicinski had attacked him on the night of the incident. The following are excerpted portions of the interchange that took place between the prosecutor and Detective Jenkins.

Q: Did he mention anything about any attack by anyone whatsoever at all?

A: No.

MRS. BROWN: Objection.

COURT: Overruled.

Q: Did he ever tell you on that occasion or the next day that Terry Kicinski had done anything at all to him?

MRS. BROWN: Objection.

COURT: Sustained.

Q: Did he tell you that Terry Kicinski attacked him?

MRS. BROWN: Objection.

COURT: Sustained.

Similar questions were asked of the defendant:

Q: Mr. Hoyle, you never recontacted the police officers and gave them this story that you have just given these jurors here today have you?

A: I beg your pardon?

Q: You never got back in touch with any of these police officers and told them what you have told these jurors today about what Terry Kicinski did?

MR. ELMORE: Objection.

COURT: Objection sustained.

Q: You never mentioned the night or early morning hours of the 21st when you agreed to answer questions that you had been attacked in any way, did you?

MR. ELMORE: Objection.

COURT: Overruled.

A: No, I did not.

Q: And you complained of no injuries?

A: No, I did not.

Finally, the prosecutor made reference to defendant's silence when he made his closing argument before the jury:

> Who said anything, until yesterday, about Terry Kicinski having grabbed his gun? Who? When was there an opportunity to say that? For months and that night. You think what you would do. If somebody had severely beaten you, if somebody had caused you to think that you had to defend yourself, if somebody had struggled with you over a gun and had accidently shot themselves, don't you think, when the police were there and polite and nice and trying to get to the truth . . . don't you think you would tell him then?

The United States Supreme Court held in *Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed.2d 91 (1976), that when a person under arrest has been advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), which includes the right to remain silent, there is an implicit promise that the silence will not be used against that person. The Court in *Doyle* held it is a violation of a defendant's rights under the Fourteenth Amendment to the Constitution of the United States to then impeach the defendant on cross-examination by questioning him about the silence.

We hold that the rule of *Doyle* was violated in this case. The defendant told the officers he would not answer questions

as to what happened when Terry Kicinski followed him to the truck. He had a constitutional right not to answer such questions and *Doyle* holds it was a violation of this right for his silence to be used against him. The questions of the district attorney and the argument to the jury as to the defendant's failure to tell the police of his defense were in violation of *Doyle*.

In *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980) this Court held it was prejudicial error to allow a defendant to be cross-examined as to why he did not tell the officers of the alibi he used at trial. We said that the defendant had the right under article I, section 23 of the Constitution of North Carolina as well as the Fifth Amendment to the Constitution of the United States made applicable to the states by the Fourteenth Amendment to remain silent and "any comment upon the exercise of this right, nothing else appearing, was impermissible." Under *Lane* it was error to comment on the defendant's silence in this case. *See also State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986); *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975); *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974).

The State contends that if it was error to allow the questions and the jury argument it was not prejudicial. N.C.G.S. § 15A-1443(b) provides:

> 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.

In this case there was not an eyewitness to the shooting other than the defendant. His defense depended on the jury's acceptance of his version of the event. The State has not demonstrated beyond a reasonable doubt that it was harmless to attack the credibility of this version by improper evidence, which improper evidence was reinforced by jury argument. We hold this was prejudicial error requiring a new trial. *See State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981).

[2] In another assignment of error the defendant contends it was error to admit into evidence a statement he made at his home shortly before he was taken to police headquarters. When the officers were at the home of the defendant he agreed with them

to go to police headquarters. At that time the defendant started towards his closet to get his coat. The officers stopped him and got his coat for him. One of the officers took into his possession a pistol that was on a nearby shelf. The defendant asked the officers if they had a warrant and was informed that they did not. One of the officers then told the defendant he would obtain a warrant and would leave an officer at the defendant's home until a warrant could be procured. The defendant then went with the officers. As they were leaving the defendant's home one of the officers asked the defendant how long he had been at home to which the defendant replied, "all night." It is to the admission of this statement that the defendant assigns error.

When a person is taken into custody or otherwise deprived of his freedom by the authorities in any significant way he must be advised of his rights to remain silent and to have counsel before any responses he may make to interrogation may be introduced in evidence. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694; *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512 (1977); *State v. McLean*, 294 N.C. 623, 242 S.E.2d 814 (1978). We hold that when an officer told the defendant that he would get a warrant for him and would leave an officer at the defendant's home until the warrant could be procured, the defendant was deprived of his freedom in a significant way. It was necessary to advise him of his rights before his answer to the question as to how long he had been at his home could be introduced into evidence. In light of our holding that the defendant must have a new trial on other grounds, we need not determine whether this error was so prejudicial as to require a new trial.

[3] The defendant has also assigned error to the denial of his motion to dismiss at the close of all the evidence. We hold that the evidence as recited in this opinion was sufficient for a jury to find beyond a reasonable doubt all the elements of first degree murder. *State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858 (1969).

The defendant has made numerous other assignments of error. We have examined them and they are either without merit or the questions they raise may not recur at a new trial.

New trial.

Justice MEYER dissenting.

A fuller recitation of the pertinent facts is necessary to an understanding of my view of this case.

At the hospital where the victim was treated, detectives learned from the victim's brother that, earlier in the evening, the victim had left a private club with the defendant to go to T.K. Tripps. Following up on this information, the detectives and officers went to defendant's home where they found a vehicle in the driveway that matched the description of the vehicle seen at the scene of the crime. The detectives knocked on the front door of the house, and defendant's wife invited them in. When defendant joined them, the detectives told him that they were investigating an assault. Upon the detectives' request, defendant agreed to accompany them to the station for questioning. Preparing to leave, defendant moved toward the closet door. One of the detectives saw that a gun was lying upon a desk beside the closet door, picked it up, and gave it to another officer, who unloaded it. Then an officer got defendant's coat from the closet. Defendant asked one of the detectives if he had a warrant, to which the detective responded that he did not but would leave an officer with defendant while he obtained one. Defendant pursued this no further. As they were leaving the home, a detective asked defendant how long he had been at home, and defendant replied, "All night."

The police asked defendant no questions on the trip from defendant's house to the station. Upon arrival at the station, the detectives read defendant his *Miranda* rights, and defendant acknowledged that he understood them. Defendant refused to sign a waiver of rights form without having an attorney present, but he said that he would answer the detectives' questions. Defendant then answered questions concerning the events of the previous evening. He stated that he had left T.K. Tripps alone but that a man had followed him to his truck and had tried to get into the passenger side. The detective then asked defendant what had happened to the man. Defendant responded that "he had rather not say without having talked with his lawyer." However, defendant said that he would answer any other questions. More questioning occurred, and the interview ended after approximately twenty-five minutes. Defendant was not handcuffed during the questioning and was allowed to go to the rest room.

After the hearing on defendant's motion to suppress the statements he had made before being given his *Miranda* warning, the trial judge concluded that none of defendant's constitutional rights had been violated; that all of defendant's statements had been made "freely, voluntarily and understandingly"; and that defendant had "freely, knowingly, intelligently and voluntarily" waived his right to remain silent. Contrary to the majority's view, I fail to find any error on the part of the trial court. The majority analyzed two issues, which, for the sake of convenience, I will address in reverse order.

The second issue the majority addressed was whether the trial judge erred in admitting into evidence the statement made by defendant shortly before he accompanied the officers to the police station to the effect that he had been home all night. The majority concludes that the trial judge erred. I disagree. In order for defendant's responses to police interrogation to be admissible into evidence, the police must advise him of his right to remain silent after he is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and before any police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Here, the majority reasoned that defendant was significantly deprived of his freedom when the detective told defendant (after defendant freely and voluntarily agreed to go to the station to answer some questions) that he would get a warrant for defendant, if defendant wanted a warrant, while another officer waited for the detective to return with the warrant. The majority asserts that this statement of the detective and the removal of defendant's gun from his reach when he moved toward the closet to get his coat are proof of a "coercive atmosphere"; that defendant was thus "in custody"; and that, therefore, his statement that he had been at home all night was inadmissible. I disagree.

Miranda "warnings are not required when defendant is not in custody or otherwise deprived of his freedom of action in any significant way." *State v. Biggs*, 292 N.C. 328, 333, 233 S.E.2d 512, 515 (1977). In deciding whether a defendant is "in custody," the United States Supreme Court has stated that a court may look to all the circumstances of the case. *California v. Beheler*, 463 U.S. 1121, 77 L. Ed. 2d 1275 (1983). However, the Supreme Court further explained:

> Although the circumstances of each case must certainly influence a determination of whether a suspect is "in custody"

> for purposes of receiving Miranda protection, the ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. *Mathiason, supra,* at 495, 50 L Ed 2d 714, 97 S Ct 711.

Id. at 1125, 77 L. Ed. 2d at 1279. The deciding factor is whether there is a formal arrest or the functional equivalent of a formal arrest.

In *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714 (1977), the United States Supreme Court further defined "custodial interrogation." In *Mathiason*, defendant voluntarily met an officer in the police patrol office to discuss a theft under investigation. The officer told defendant he was not under arrest. Defendant followed the officer into an office, where the officer asked defendant about his knowledge of the theft. The officer told defendant that defendant was a suspect and falsely told defendant that the police had discovered his fingerprints at the crime scene. A few minutes later, defendant confessed to the burglary. The officer then gave defendant a *Miranda* warning and taped defendant's confession. The officer did not arrest defendant but allowed him to go home. Based on these facts, the United States Supreme Court held that there had not been a "custodial interrogation." Defendant had not had his freedom restricted, he had come to the police office voluntarily, and he had not been placed under arrest. Finally, the Court stated:

> Such a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the . . . questioned person is one whom the police suspect.

Id. at 495, 50 L. Ed. 2d at 719. Thus, a "coercive environment" is not determinative of whether questioning is conducted "in custody."

The fact situation in *Mathiason* was much more coercive than the situation in the case at bar.

In *State v. Biggs*, 292 N.C. 328, 233 S.E.2d 512, the police responded to a report of a stabbing. Once on the scene, they could not find the victim. Directed to defendant's house as a place to look for the victim, the deputy sheriff found defendant and his father and brother. The deputy sheriff asked defendant if he had been at the victim's house that night, and defendant replied, "yes." Defendant, who had not been formally arrested at this point, agreed to accompany the deputy sheriff to the victim's house to help locate her. The deputy asked defendant if he had a knife. Defendant said, "yes," and gave the knife to the deputy. On their way back to the victim's house, defendant asked the deputy if the victim was in the house. The deputy said that she was not. Defendant responded, "I don't see how the bitch could go any place the way she was hurt." *State v. Biggs*, 292 N.C. at 331, 233 S.E.2d at 514. Based on the above facts, the trial court concluded, and this Court agreed, that defendant had made the above statements "freely and voluntarily and in a noncustodial situation." *Id.* at 333, 233 S.E.2d at 514. This Court reasoned that there was no "in-custody" interrogation because the defendant was not under arrest nor was his freedom significantly restricted.

In *State v. Meadows*, 272 N.C. 327, 158 S.E.2d 638 (1968), this Court held that the questioning of defendant by police officers at the scene of a shooting did not constitute "in-custody interrogation." Having been informed of a shooting, the officers went to the scene to investigate. When they arrived they saw the victim lying in defendant's yard. The victim was bleeding from a gunshot wound to his neck. When an officer asked defendant what had happened, defendant replied that he had shot the victim. When the officer asked why, defendant explained. Defendant's responses were allowed into evidence, and this Court ruled that the evidence had been properly admitted, holding that there had been no "in-custody interrogation" of defendant because defendant was not under arrest or in custody when he made the statement. Additionally, the Court concluded that the police were merely conducting an investigation to determine whether a crime had been committed by the defendant, who was a suspect when the officer questioned him. This Court stated:

> A general investigation by police officers, when called to the scene of a shooting, automobile collision, or other occur-

> rence calling for police investigation, including the questioning of those present, is a far cry from the "in-custody interrogation" condemned in *Miranda.*

Id. at 337, 158 S.E.2d at 645.

The majority holds that when the officer told defendant that he would get a warrant for him and would leave an officer there until it was procured, defendant was in custody and that this single question was "custodial interrogation." As in *Mathiason*, *Biggs*, and *Meadows*, defendant was not placed under arrest nor was defendant's freedom restrained. My review of these cases causes me to conclude that defendant was not in custody when he answered the detective's question as to how long defendant had been at home. From the totality of the circumstances, I do not believe defendant was either under arrest or under its functional equivalent when he answered the detective's question as to how long he had been at home. There was ample evidence to support the trial judge's findings of fact, and those findings support his conclusions.

The first issue the majority addressed was "whether the court erred in allowing the prosecutor to ask certain questions regarding defendant's *post-arrest* silence." (Emphasis added.) The prosecutor's allegedly improper questions ask about defendant's silence, after defendant received *Miranda* warnings, on the subject of what his alleged attacker did. The majority, relying on *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1966), reasons that because defendant had informed police that he would not answer the questions solely about what had happened to the man who had allegedly attacked him, the prosecutor erred in asking defendant at trial about defendant's silence on subjects other than his alleged attacker. The prosecutor specifically asked if defendant had told anyone about the alleged attack and if defendant had inquired about the alleged attacker's condition. Because I believe the questions were proper, I disagree with the majority's holding.

First, I would observe that, as to defendant's silence prior to his arrest, there is no constitutional violation when a defendant's *pre-arrest* silence is used *for impeachment purposes. Jenkins v. Anderson*, 447 U.S. 231, 65 L. Ed. 2d 86 (1980). Therefore, there was nothing wrong with the prosecutor's questions or defendant's answers about defendant's pre-*Miranda* warning silence on the subject of defendant's alleged attacker.

Second, as to defendant's *post-arrest* silence, a defendant may waive his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694. The waiver may be made through an express written or oral statement or may be implied by law from the facts and circumstances of the case. *North Carolina v. Butler*, 441 U.S. 369, 60 L. Ed. 2d 286 (1979). In *Butler*, the United States Supreme Court held that the defendant validly waived his rights when, as here, he told police agents that he would talk but refused to sign a waiver form. *See also Connecticut v. Barrett*, 479 U.S. 523, 93 L. Ed. 2d 920 (1987). For a waiver to be valid, defendant must relinquish his rights voluntarily, knowingly, and intelligently; to determine whether defendant has validly waived his rights, the court will look at the totality of the circumstances. *Moran v. Burbine*, 475 U.S. 412, 89 L. Ed. 2d 410 (1986). *See also State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987).

When the police brought defendant to the station for questioning, the police informed him of his *Miranda* rights. He waived his right to remain silent and voluntarily answered all questions except those concerning his alleged attacker. The trial judge found that defendant had waived his rights voluntarily, knowingly, and intelligently. Under the holding in *Butler*, 441 U.S. 369, 60 L. Ed. 2d 286, the fact that defendant refused to sign a waiver form is not relevant. Therefore, to the extent that any of the prosecutor's questions concerned matters to which defendant waived his right to be silent, there was no error. As to those matters, defendant had clearly waived his right to silence.

With regard to the questions concerning the sole matter to which defendant chose to remain silent, that is, what happened when the man followed him to his truck, the prosecutor's questions were also proper. While *Doyle* sets forth the general rule, subsequent cases define *Doyle's* intended application. In *Anderson v. Charles*, 447 U.S. 404, 65 L. Ed. 2d 222 (1980), the United States Supreme Court said that *Doyle*

> does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving Miranda warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Id. at 408, 65 L. Ed. 2d at 226.

> A *failure to assert* a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of evidence. There may be explanations, indicating that the person had in truth no belief of that tenor; but the conduct is "prima facie" an inconsistency.

3A Wigmore, *Evidence* § 1042(1) (Chadbourn rev. 1970) (citation omitted).

This Court has recognized that a defendant's silence may amount to an inconsistent statement admissible for impeachment purposes. Defendant's silence will be considered an inconsistent statement "when defendant's silence amounts to a contradiction of his testimony at trial and occurs only when, at the time of defendant's silence, it would have been natural for him to speak and give the substance of his trial testimony." *State v. Odom*, 303 N.C. 163, 166 n.2, 277 S.E.2d 352, 354 n.2, *cert. denied*, 454 U.S. 1052, 70 L. Ed. 2d 587 (1981), *reh'g denied*, 454 U.S. 1165, 71 L. Ed. 2d 322 (1982).

In *State v. McGinnis*, 70 N.C. App. 421, 320 S.E.2d 297 (1984), the defendant testified at trial that the shooting giving rise to his arrest had been accidental. The prosecution then sought to impeach him by asking why he did not tell the police of the alleged accident at the time of his arrest. The Court of Appeals held that the question was proper because "it would clearly have been natural for defendant to have told the arresting police officer that the shooting with which defendant was accused was accidental." *Id.* at 424, 320 S.E.2d at 300. In *State v. Hunt*, 72 N.C. App. 59, 323 S.E.2d 490 (1984), *aff'd by an equally divided Court without precedential value*, 313 N.C. 593, 330 S.E.2d 205 (1985), the Court of Appeals once again applied the rules from *Odom* and concluded that the prosecution could properly use defendant's pretrial silence to impeach defendant's in-court testimony.

In the case now before us, it would have been natural for defendant to have told the detectives that the victim attacked him and that he shot him during the attack. This is particularly true in view of the fact that he so freely discussed all the other facts in the case with the detectives. I conclude that this case presents the situation where a defendant's silence is the equivalent of a prior inconsistent statement and is admissible for impeachment

purposes. The prosecutor's questions do not violate *Doyle*, as *Doyle* allows cross-examination by prior inconsistent statements.

In summary, I conclude that defendant was not "in custody" when he answered the detective's question as to how long he had been at home, and therefore that question and defendant's response were properly admitted into evidence. I also conclude that there exists no error with regard to the prosecutor's questions to the detectives and to defendant as to defendant's silence. I vote to affirm the defendant's conviction.

JAMES PEARSON v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 310PA88

(Filed 6 September 1989)

1. **Insurance § 95.1— automobile insurance—nonpayment of premium—notice of cancellation—effective date**

An insurer's notice of cancellation of an automobile insurance policy must state the date on which the cancellation is to become effective, and when cancellation is for nonpayment of premium, the date so stated must be at least fifteen days from the date the insurer mails or delivers the notice. N.C.G.S. §§ 20-310(f)(2), 20-310(d)(1), and 20-310(e)(4).

Am Jur 2d, Insurance §§ 387 et seq.

2. **Insurance § 95.1— automobile insurance—nonpayment of premium—notice of cancellation—failure to state effective date and provide fifteen days**

Defendant insurer's notice of cancellation of an automobile liability policy for nonpayment of premium did not comply with the cancellation statutes where (1) it failed to state the date upon which cancellation was to become effective, and (2) however one calculates the cancellation date pursuant to the notice, the latest possible cancellation date failed to provide the insured with the statutorily required fifteen days from the date of mailing of the notice.

Am Jur 2d, Insurance §§ 387 et seq.

3. Insurance § 95.1— automobile insurance—nonpayment of premium—notice of cancellation—strict compliance with statute

In order to cancel an automobile insurance policy for nonpayment of premium, the insurer must strictly comply with the requirements of the automobile insurance cancellation notice statute, N.C.G.S. § 20-310(f), both as to stating the effective date of cancellation and giving the statutorily required time period.

Am Jur 2d, Insurance §§ 387 et seq.

4. Insurance § 95.1— automobile insurance—nonpayment of premium—notice of cancellation—failure to state effective date and provide required time—no substantial compliance with statute

A cancellation notice which both fails to state the date upon which cancellation becomes effective, as required by statute, and fails to give by its terms the statutorily required period of time does not comply, even substantially, with the notice statute.

Am Jur 2d, Insurance §§ 387 et seq.

5. Insurance § 95.1— automobile insurance—notice of cancellation—specification of effective date

For the protection of both the motoring public and the insured, automobile insurance cancellation dates must be expressly and carefully specified with certainty.

Am Jur 2d, Insurance §§ 387 et seq.

6. Insurance § 95.1— automobile insurance—notice of cancellation—"state the date" requirement

The automobile insurance notice of cancellation statute, N.C.G.S. § 20-310(f)(2), does not require that the date of cancellation be stated only when the policy is being cancelled for reasons other than nonpayment of premium. Rather, the legislature intended for the "state the date" requirement to apply to cancellation notices when cancellation is either for nonpayment of premium or for some other reason.

Am Jur 2d, Insurance §§ 387 et seq.

7. Insurance § 95.1— automobile insurance—effect of insufficient notice of cancellation

Where the insurer's mid-term notice of cancellation of an automobile insurance policy for nonpayment of premium failed to comply with the statutory requirements of N.C.G.S. § 20-310(f), the notice was not effective to cancel the policy, and the policy remained in effect until the termination date specified in the policy when it was issued.

Am Jur 2d, Insurance §§ 387 et seq.

ON discretionary review of the Court of Appeals' decision, 90 N.C. App. 295, 368 S.E.2d 406 (1988), reversing summary judgment for defendant entered by *Ross, J.*, at the 12 June 1987 Civil Session of the Superior Court, GUILFORD County. Heard in the Supreme Court 10 April 1989.

Haworth, Riggs, Kuhn and Haworth, by William B. Haworth, for plaintiff appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates, for defendant appellant.

EXUM, Chief Justice.

This is an action to recover an unsatisfied judgment which plaintiff claims defendant is obligated to pay under an automobile liability insurance policy issued by defendant to its insured. Plaintiff was injured while riding as a passenger in defendant's insured's automobile and obtained a judgment for damages against the insured. Refusing to pay the judgment, defendant contends that before the date of the accident causing plaintiff's injuries it had cancelled the insured's policy due to nonpayment of premiums. The question presented is whether defendant's notice of cancellation complied with the statutory requirements of N.C.G.S. § 20-310 governing such notices. The Court of Appeals, contrary to the trial court's ruling, concluded it did not. *Pearson v. Nationwide Mutual Ins. Co.*, 90 N.C. App. 295, 301-02, 368 S.E.2d 406, 410, *disc. rev. denied*, 323 N.C. 175, 373 S.E.2d 112, *rec'n and disc. rev. granted*, 323 N.C. 477, 373 S.E.2d 866 (1988). We affirm the Court of Appeals' decision.

I.

Both parties moved in superior court for summary judgment. The factual showing made by the parties was as follows:

On 20 September 1981 plaintiff was injured while riding as a passenger in a 1977 Datsun automobile the title to which was registered in the name of defendant's insured, Ms. Barbara Harrington, and which was being operated by her husband, Mr. Charles Harrington. On 18 August 1986, in a civil action against Mr. and Ms. Harrington to recover damages for the injuries suffered in the accident, plaintiff recovered a judgment for $73,000.00 which has since remained wholly unsatisfied.

On 17 April 1981 defendant issued an automobile liability policy to Ms. Harrington. The policy declarations page provided that the policy period was from 4/17/81 to 10/17/81 "BUT ONLY IF THE REQUIRED PREMIUM FOR THIS PERIOD HAS BEEN PAID." Ms. Harrington chose defendant's policy option of paying her premium on an installment plan under which she made an initial payment of $40.40 with the balance to be paid in a single, second payment. The declarations page stated "YOUR NEXT INSTALLMENT WILL BE $39.39 DUE ON 06-28-81 PLUS AN INSTALLMENT PREMIUM LOADING OF $1.00."

On 8 June 1981 defendant mailed to Ms. Harrington a "PREMIUM NOTICE" which stated that an installment payment of $39.39 for her policy was due on 28 June 1981.

On 6 July 1981 defendant, having failed to receive the second payment, mailed to Ms. Harrington's last known address a "NOTICE OF CANCELLATION FOR NON PAYMENT OF PREMIUM." This notice showed a premium of $39.39 "DUE" on 28 June 1981. It stated in part:

> Because . . . . Your premium has not been received, this auto policy is terminated at 12:01 A.M. on the 20th day after the due date.
>
> IMPORTANT
>
> You may keep this protection continuous if your payment is received before the termination date. We would like to continue serving you. Won't you take a minute now to send your payment?

On this factual showing the trial court allowed defendant's motion for summary judgment, holding the policy was effectively cancelled before, and provided no coverage for, the accident in which plaintiff was injured. The Court of Appeals reversed and remanded for entry of summary judgment for plaintiff. *Id.* at 303,

368 S.E.2d at 410. The Court of Appeals held "that mid-term cancellation by the insurer of a compulsory insurance policy for nonpayment of premium installments is not effective unless and until the insurer has strictly complied with the provisions of N.C. Gen. Stat. § 20-310(f)." *Id.* at 301, 368 S.E.2d at 410. The court concluded that since defendant failed to give notice of cancellation in accordance with the statute "[t]he policy remained in effect until 17 October 1981, the termination date specified in the policy when it was issued . . . ." *Id.* at 301-02, 368 S.E.2d at 410. We ultimately allowed defendant's petition for further review, and we now affirm the decision of the Court of Appeals.

II.

The provisions of N.C.G.S. § 20-310 pertinent to this case are as follows:

> (f) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall have given the policyholder notice at his last known post-office address by certificate of mailing a written notice of the cancellation or refusal to renew. Such notice shall:
>
> . . . .
>
> (2) *State the date*, not less than 60 days after mailing to the insured of notice of cancellation or notice of intention not to renew, on which such cancellation or refusal to renew shall become effective, *except that such effective date may be 15 days from the date of mailing or delivery* when it is being cancelled or not renewed for the reasons set forth in subdivision (1) of subsection (d) and in subdivision (4) of subsection (e) of this section;

N.C.G.S. § 20-310(f)(2) (1983 & Cum. Supp. 1988) (emphases supplied). Subdivision (1) of subsection (d) states:

> No insurer shall cancel a policy of automobile insurance except for the following reasons:
>
> (1) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.

N.C.G.S. § 20-310(d)(1) (1983). Likewise, subdivision (4) of subsection (e) states:

> No insurer shall refuse to renew a policy of automobile insurance except for one or more of the following reasons:
>
> . . . .
>
> (4) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.

N.C.G.S. § 20-310(e)(4) (1983).

[1] In summary the statutes provide in part that an insurer's notice of cancellation of automobile insurance must state the date on which the cancellation is to become effective. The statutes also require that, when cancellation is for nonpayment of premiums, the date so stated be at least fifteen days from the date the insurer mails or delivers the notice. *See* J. Snyder, Jr., *N.C. Automobile Insurance Law* § 6-1 (1988). Defendant's cancellation notice, which it mailed on 6 July 1981, showed the second installment on the premium "DUE" on 28 June 1981. It then advised the insured that the policy would be cancelled effective "the 20th day after the due date" if payment was not made "before the termination date."[1]

[2] Defendant's cancellation notice does not comply with the cancellation statutes. First, it fails to "[s]tate the date" upon which cancellation is to become effective. N.C.G.S. § 20-310(f)(2) (1983 & Cum. Supp. 1988). Rather the notice requires whoever may be concerned to try to ascertain this date by making a date calculation. Date calculations can be problematical at best,[2] as the one in this

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1. In our discussion of the sufficiency of this notice which follows, we overlook the ambiguity in the words, "termination date." It would not be unlikely that an insured could think this to mean the date on which the policy by its terms terminates rather than, as is probably intended by the insurer, the date on which the policy is cancelled pursuant to the notice.

2. Lawyers have enough difficulty with date calculations that it was thought well to have a rule in our Rules of Civil Procedure dealing with the subject. Rule 6(a) provides in part that in computing periods of time

case aptly illustrates.[3] Second, however one calculates the cancellation date pursuant to defendant's cancellation notice, using either Rule 6(a) or N.C.G.S. § 103-5, or both, or neither,[4] the latest possible cancellation date is Monday, 20 July 1981. This date fails to provide the insured with the statutorily required fifteen days from the date of mailing of the notice; for fifteen days from that date, 6 July 1981, is Tuesday, 21 July 1981, figured according to Rule 6(a).

Defendant, conceding that it has not complied strictly with the automobile insurance cancellation notice statute, N.C.G.S. § 20-310(f), argues that only substantial compliance is required and that it has substantially complied so that the cancellation notice should be given effect. Defendant argues that the cancellation notice should be construed so as to make the effective date of cancellation 21 July 1981, fifteen days from the date it mailed the notice, figured according to Rule 6(a).

[3, 4] We conclude, both as to stating the date and giving the statutorily required period of time, that the insurer must strictly

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> prescribed . . . by any applicable statute, . . . the day of the act . . . after which the . . . period . . . begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

N.C.R. Civ. P. 6(a).

3. Is the date calculation required by defendant's notice of cancellation to be made according to Rule 6(a)? See n.2, above. If it is, because the period of time the notice is required to give is prescribed by statute, then the first problem here would be to determine the day of the event after which the period of time begins to run. The date the second installment on the premium was due was 28 June 1981, which was a Sunday. N.C.G.S. § 103-5 provides in pertinent part: "Where the day or the last day for doing an act required or permitted by law to be done falls on Sunday or a holiday the act may be done on the next succeeding secular or business day . . . ." If N.C.G.S. § 103-5 applies, the actual "due date" of this installment becomes Monday, 29 June 1981. The twentieth date after this due date is 19 July 1981, a Sunday. Again, however, if Rule 6(a) applies, the twenty day period would be extended to Monday, 20 July 1981. On the other hand if neither Rule 6(a) nor N.C.G.S. § 103-5 apply, then one could argue that the 20 day period after the "due date" called for in the cancellation notice expired on Saturday, 18 July 1981. Other calculations are possible if either Rule 6(a) or N.C.G.S. § 103-5, but not both, applies. It is apparent that the legislature exercised great wisdom in requiring that insurance cancellation notices "[s]tate the date" upon which the cancellation becomes effective. N.C.G.S. § 20-310(f)(2) (1983 & Cum. Supp. 1988).

4. See n.3, *supra*, for a discussion of the possible applicability of Rule 6(a) and N.C.G.S. § 103-5 to this case.

comply with the statute. We also conclude that a cancellation notice which both fails to state the date upon which cancellation becomes effective, as required by the statute, and fails to give by its terms the statutorily required period of time does not comply, even substantially, with the statute.

[5] For the protection of both the motoring public and the insured, automobile insurance cancellation dates must be expressly and carefully specified with certainty. They should not be left to the possible vagaries of date calculations nor to the uncertainties which result when less than the statutorily prescribed period of time has been given. When accidents occur and questions of insurance coverage arise it becomes essential to know the precise date and time at which a policy, which might otherwise provide coverage, was in fact and in law cancelled. The insured also should know with precision the date upon which he or she must act to avoid loss of coverage. *See Levinson v. Indemnity Co.*, 258 N.C. 672, 674, 129 S.E.2d 297, 300 (1963); J. Snyder, Jr., *N.C. Automobile Insurance Law*, § 6-1 (1988). Insureds should not be expected to make what can become relatively complex date calculations to ascertain a date of such crucial importance, nor should they be expected to reason that the date stated or calculated is not really the effective date because it does not give them the time period mandated by the statute. Were defendant's position adopted, notices, like the one at issue here, failing to state the date or giving less than the statutorily required period of time, would necessarily make uncertain the precise date of cancellation. Given the purposes of the statutory requirements, such notices should not suffice to cancel a policy.

Our cases support these conclusions. The provisions of The Vehicle Responsibility Act of 1957, of which N.C.G.S. § 20-310 is a part, must be read into insurance policies and construed liberally so as to effectuate the purpose of that act. *Harrelson v. Insurance Co.*, 272 N.C. 603, 610, 158 S.E.2d 812, 817-18 (1968); *see Insurance Co. v. Hale*, 270 N.C. 195, 200, 154 S.E.2d 79, 84 (1967). "The purpose of that act is to assure the protection of liability insurance, or other type of established financial responsibility, up to the minimum amount specified in the act, to persons injured by the negligent operation of a motor vehicle upon the highways of this State." *Harrelson v. Insurance Co.*, 272 N.C. at 610, 158 S.E.2d at 818; *accord Perkins v. Insurance Co.*, 274 N.C. 134, 140, 161 S.E.2d 536, 540 (1968); *Insurance Co. v. Hale*, 270 N.C. at 200,

154 S.E.2d at 84. In order to cancel a policy the carrier must comply with the procedural requirements of the statute or the attempt at cancellation fails and the policy will continue in effect despite the insured's failure to pay in full the required premium. *Perkins v. Insurance Co.*, 274 N.C. at 140, 161 S.E.2d at 540; *see, e.g., Harrelson v. Insurance Co.*, 272 N.C. at 610-11, 158 S.E.2d at 818; *Insurance Co. v. Hale*, 270 N.C. at 200, 154 S.E.2d at 84; *Levinson v. Indemnity Co.*, 258 N.C. at 674, 129 S.E.2d at 300; J. Snyder, Jr., *N.C. Automobile Insurance Law* § 6-1 (1988).

This Court has recognized

> that where a compulsory automobile insurance policy is cancelled by the insurer mid-term or where the carrier refuses to renew a compulsory policy, it is a serious matter for the insured. The provisions of N.C.G.S. 20-310 exist for precisely such cases. They require the carrier to give the policyholder *specific* notice . . . .

Smith v. Nationwide Mut. Ins. Co., 315 N.C. 262, 272, 337 S.E.2d 569, 575 (1985) (emphasis supplied). Moreover, this Court has stated that notice provisions of earlier versions of our current N.C.G.S. § 20-310(f) are "mandatory." *Perkins v. Insurance Co.*, 274 N.C. at 140, 161 S.E.2d at 540.[5]

Defendant relies essentially on this Court's decision in *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E.2d 149 (1962), for the

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5. The version of N.C.G.S. § 20-310 relevant to the decision in *Perkins v. Insurance Co.*, 274 N.C. 134, 161 S.E.2d 536 (1968) provided:

> "No contract of insurance or renewal thereof shall be terminated by cancellation or failure to renew by the insurer until at least fifteen (15) days after mailing a notice of termination to the named insured at the address shown on the policy. Time of the effective date and hour of termination stated in the notice shall become the end of the policy period. Every such notice of termination for any cause whatsoever sent to the insured shall include on the face of the notice a statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor. Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination."

Id. at 139, 161 S.E.2d at 539.

proposition that a policy may be effectively cancelled by an insurer who merely *substantially* complies with N.C.G.S. § 20-310(f). In *Crisp* this Court stated: "In order to effectively cancel a policy an insurer must substantially comply with the requirements of [N.C.G.S. § 20-310]." *Id.* at 414, 124 S.E.2d at 154. We went on to hold in *Crisp*, however, that the cancellation notice mailed to the insured was void and ineffective to cancel the insured's policy because the notice failed to include on its face, as required by statute, the following: " '[A] statement that proof of financial responsibility is required to be maintained continuously throughout the registration period and that operation of a motor vehicle without maintaining such proof of financial responsibility is a misdemeanor.' " *Id.* Though we did use the words "substantially comply," we also emphasized the statute's mandatory language that the omitted statement "*shall* be included on the face of the notice," and we noted that this requirement was "not merely formal and directory." *Id.*[6]

The current cancellation provisions of N.C.G.S. § 20-310(f) also require that the notice "shall" state the date when the cancellation will become effective and, when the cancellation is due to nonpayment of premiums, that such date must be at least fifteen days from the date of mailing or delivery of notice to the insured. This language, as in *Crisp*, is also mandatory and is not merely formal and directory. *Crisp*, 256 N.C. at 414, 124 S.E.2d at 154. We therefore believe our holding requiring strict compliance with N.C.G.S. § 20-310(f) is consistent with our holding in *Crisp*.

As further support for our holding, we note that our 1957 Vehicle Financial Responsibility Act was essentially copied from the New York statute and this Court has looked to that jurisdiction for guidance when interpreting the notice of cancellation provisions of N.C.G.S. § 20-310. *See Nixon v. Insurance Co.*, 258 N.C. 41, 44, 127 S.E.2d 892, 894 (1962); *Faizan v. Insurance Co.*, 254 N.C. 47, 57-58, 118 S.E.2d 303, 310-11 (1961). In interpreting the statutory equivalent of N.C.G.S. § 20-310(f), New York's highest court has stated "[i]t is well established that a notice of cancellation is ineffective unless in strict compliance with the requirements of [the statute] and of regulations of the Commissioner if properly filed and not inconsistent with specific statutory provision." *Barile v. Kavanaugh*,

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6. The version of N.C.G.S. § 20-310 construed in *Crisp v. Insurance Co.*, 256 N.C. 408, 124 S.E.2d 149 (1962), is identical to that set out above in n.4. *Id.* at 413-14, 124 S.E.2d at 153-54.

67 N.Y.2d 392, 399, 494 N.E.2d 82, 86, 502 N.Y.S.2d 977, 981 (1986) (citations omitted).[7]

Finally, it is held generally in other jurisdictions that strict compliance by the insurer with a statute governing cancellation notices is essential to effect cancellation by such notices. *See* 43 Am. Jur. *Insurance* § 388 (1982); 45 C.J.S. *Insurance* § 450b.(1) (1946).

To support its argument that its notice should not fail merely because it provides less than the statutorily required period, defendant relies essentially on *Faizan v. Insurance Co.*, 254 N.C. at 47, 118 S.E.2d at 303, *Nixon v. Insurance Co.*, 258 N.C. at 41, 127 S.E.2d at 892, and *Insurance Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971). None of these decisions compel our adoption of defendant's position.

In *Faizan* we held that a notice of cancellation containing an erroneous expiration date did not extend the insured's coverage because the insured had previously failed to accept the insurer's offer of renewal. *Faizan*, 254 N.C. at 59, 118 S.E.2d at 311-12. Our holding in *Faizan* did not rest on the proposition that the insurance contract was terminated by the insurer, but rather on the proposition that the insured rejected the company's offer to renew its policy upon the condition that the insured pay a premium

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7. The New York statutory equivalent of N.C.G.S. § 20-310(f)(2) states in relevant part:

> No contract of insurance for which a certificate of insurance has been filed with the commissioner shall be terminated by cancellation by the insurer until at least twenty days after mailing to the named insured at the address shown on the policy a notice of termination by regular mail, with a certificate of mailing, properly endorsed by the postal service to be obtained, except where the cancellation is for non-payment of premium in which case fifteen days notice of cancellation by the insurer shall be sufficient, provided, however, if another insurance contract has been procured, such other insurance contract shall, as of its effective date and hour, terminate the insurance previously in effect with respect to any motor vehicles designated in both contracts. No contract of insurance for which a certificate of insurance has been filed with the commissioner in which a natural person is the named insured and the motor vehicle is used predominantly for non-business purposes shall be non-renewed by an insurer unless at least forty-five, but not more than sixty days in advance of the renewal date the insurer mails or delivers to the named insured at the address shown on the policy a written notice of its intention not to renew . . . . Time of the effective date and hour of termination stated in the notice shall become the end of the policy period.

N.Y. VEHICLE AND TRAFFIC LAW § 313(1)(a) (McKinney 1986).

by a stated date. *Id.* Since the insured rejected renewal of the policy and obtained other insurance, this Court held that the insurer "was under no obligation to give plaintiff further notice of termination under the provisions of G.S. 20-310." *Id.* at 59, 127 S.E.2d at 312. Here in contrast, there was no rejection of a renewal offer by the insured; rather there was only defendant's attempt to cancel the six-month policy for nonpayment of premiums. The provisions of N.C.G.S. § 20-310(f) remained controlling, and defendant was required to comply strictly with them. *See, e.g., Perkins v. Insurance Co.*, 274 N.C. at 140, 161 S.E.2d at 540; J. Snyder, Jr., *N.C. Automobile Insurance Law* § 6-1 (1988).

In *Nixon* and *Cotten* we held that when the insured's policy was effectively cancelled in compliance with the applicable statutory provisions, coverage ended upon the date stated in the insurer's notice, notwithstanding that the insurer's notice of cancellation to the then Department, or Commissioner, of Motor Vehicles was defective under the statute. *Cotten*, 280 N.C. at 29-30, 185 S.E.2d at 188; *Nixon*, 258 N.C. at 43-44, 127 S.E.2d at 894.[8] Again, as with *Faizan*, *Nixon* and *Cotten* are factually distinguishable from the case before us. Central to our holding in *Nixon* and *Cotten* was that the notice under scrutiny was the notice required to be sent to the then Department, or Commissioner, of Motor Vehicles rather than the notice required to be sent to the insured. *Id.* We noted the legal distinction between the two types of notices, stating:

> It was stipulated that the notice of cancellation *to insured* fully complied with the requirements of the statute . . . . This is crystal clear; the cancellation was effective . . . at the hour stated in the notice. Neither defective notice, nor failure to give notice, *to the Commissioner* affects the validity or binding effect of the cancellation; the notice to the Commissioner serves an entirely different purpose. . . . Notice to the Commissioner *follows* cancellation. Notice of cancellation

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8. In *Cotten* the statute at issue, N.C.G.S. § 20-309(e), required the insurer to notify the Department of Motor Vehicles "immediately" upon termination of an insured's policy. *Insurance Co. v. Cotten*, 280 N.C. 20, 29, 185 S.E.2d 182, 188 (1971). In *Nixon* the relevant statute at issue, N.C.G.S. § 20-310 stated in part: "Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination." *Nixon v. Insurance Co.*, 258 N.C. 41, 43, 127 S.E.2d 892, 894 (1962).

> could not be mailed to the Commissioner if there had been no cancellation. The language of the statute relative to notice of cancellation to the Commissioner is in sharp contrast with the provision relating to notice to insured. The notice to Commissioner is for the purpose of alerting him to the fact that the motor vehicle owner no longer maintains financial responsibility, and that owner's registration and license plates are subject to recall. . . . Cancellation of a policy is not conditioned upon the statutory notice to Commissioner.

Nixon v. Insurance Co., 258 N.C. at 43-44, 127 S.E.2d at 894; *accord Insurance Co. v. Cotten*, 280 N.C. at 29-30, 185 S.E.2d at 188.

III.

[6] Finally, defendant argues the notice of cancellation statute contains an exception to the "[s]tate the date" requirement which is triggered when the policy is cancelled for nonpayment of premium. N.C.G.S. § 20-310(f)(2) (1983 & Cum. Supp. 1988). Defendant would construe the statute to require stating the date only when the policy is being cancelled for reasons other than nonpayment of premium. When cancelled for nonpayment of premium, defendant argues, the statute both provides a new notice period and eliminates the "[s]tate the date" requirement.

We disagree. Construing the statute to give effect to its purpose, we read N.C.G.S. § 20-310(f)(2), insofar as it deals with a cancellation notice for nonpayment of premium, not to create an exception to the "[s]tate the date" requirement, but rather to create an exception only to the period of time required to be given in the notice. *See* J. Snyder, Jr., *N.C. Automobile Insurance Law* § 6-1 (1988). We do not think it reasonable to construe the statute to eliminate the requirement of stating the date when cancellation is for nonpayment of premium. Because automobile insurance cancellation has the effect of rendering the insured and third parties without automobile insurance protection, there is, for reasons we have already noted, a need to establish the cancellation date with precision. The legislature recognized this need by requiring the cancellation notice to "[s]tate the date" of cancellation. Because the effect of cancellation insofar as it deprives the insured and third parties of insurance protection is the same whether the cancellation is for nonpayment of premium or for some other reason, the need for precision in establishing the cancellation date remains the same in both instances. The need for precision being the same

and being satisfied by the "[s]tate the date" requirement, we are confident the legislature intended this requirement to apply to cancellation notices when cancellation is either for nonpayment of premium or for some other reason.

[7] In conclusion and for the reasons stated, we hold that defendant's notice of cancellation failed to comply with the statutory requirements of N.C.G.S. § 20-310(f). The notice was not, therefore, effective to cancel the policy at issue. This policy remained in effect until 17 October 1981, the termination date specified in the policy when it was issued. The Court of Appeals' decision reversing the trial court's summary judgment for defendant and remanding for entry of summary judgment for plaintiff is

Affirmed.

SHERRY S. SUTTON v. THE AETNA CASUALTY & SURETY COMPANY

No. 539PA88

(Filed 6 September 1989)

1. **Insurance § 69.1— underinsured motorist coverage—statute prevails over policy terms**

The North Carolina statute which provides for stacking or aggregation of underinsured motorist coverage (UIM), N.C.G.S. § 20-279.21(b)(4), prevails over language in the policy; furthermore, the statute requires that the underinsured motorist coverages for each vehicle in a single policy and all such coverages in both policies be aggregated. Interpreting the statute to allow both intrapolicy and interpolicy stacking is consistent with the nature and purpose of the Financial Responsibility Act, which is to compensate innocent victims of financially irresponsible motorists.

Am Jur 2d, Automobile Insurance §§ 322, 329.

2. **Insurance § 69— underinsured motorist coverage never excess or additional coverage**

Underinsured motorist coverage can never be excess or additional coverage within the meaning of N.C.G.S. § 20-279.21(g), which would exclude it from statutory provisions, because a

tortfeasor who has at least some liability insurance must always have at least the minimum amount, so that UIM coverage is available only in amounts which exceed the minimum. Since the UIM coverage in any given policy must always equal the policy's basic liability coverage and that coverage must always exceed the minimum mandatory amount, there can never be any excess or additional UIM coverage as contemplated by N.C.G.S. § 20-279.21(g).

Am Jur 2d, Automobile Insurance §§ 322, 329.

3. Insurance § 69— underinsured motorist coverage—statutory terms controlling

Defendant's argument that UIM coverage is not required by the Financial Responsibility Act since it may be rejected by the insured, and that the terms of UIM are therefore controlled by the parties and the contract rather than the Act, was rejected because the provisions governing aggregation of UIM coverages in N.C.G.S. § 20-279.21(b)(4) would otherwise be written out of the Financial Responsibility Act and rendered useless and redundant.

Am Jur 2d, Automobile Insurance §§ 322, 329.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of a declaratory judgment for defendant entered by *Llewellyn, J.*, at the 6 August 1988 Session of Superior Court in NEW HANOVER County. Heard in the Supreme Court on 14 March 1989.

Yow, Yow, Culbreth, Fox & Pennington, by Stephen E. Culbreth and Ralph S. Pennington, for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Ronald H. Woodruff, for defendant appellee.

EXUM, Chief Justice.

The question presented is what is the effect, if any, of N.C.G.S. § 20-279.21(b)(4) on an insurer's obligation to aggregate, or stack, underinsured motorist (UIM) coverages for several vehicles all contained within a single automobile insurance policy.

Plaintiff seeks a declaratory judgment that defendant is obligated to stack the limits of liability of UIM coverages for each

of four separate vehicles listed in two separate policies issued by defendant and upon which plaintiff has paid a separate premium for each coverage. The trial court awarded judgment for defendant. It ruled:

> The Plaintiff is not entitled to aggregate or stack underinsured coverage provided in the policies of insurance issued by the Defendant to the Plaintiff based on the number of vehicles listed in each policy. The limit of liability for such underinsured coverage for any one person is established by the terms of the applicable policies without regard to the number of vehicles listed in said policies or the premiums paid on said policies.

On discretionary review in this Court, plaintiff contends the trial court erred in holding she was not entitled to stack, or aggregate, separate UIM coverages, for each of which she had paid a separate and distinct premium, on the ground the coverages were contained in a single policy. We agree and reverse the judgment of the trial court.

I.

The parties stipulated to these facts: Defendant issued two policies of insurance to plaintiff. The policies were numbered 225SX10699637PCA (Policy A) and 225SX17972951PCA (Policy B). In addition to basic bodily injury liability coverage of $50,000 per person for each of two vehicles, a Buick Regal and a Chevrolet Camaro, Policy A provided $50,000 per person UIM bodily injury coverage on each of these vehicles. The premium charged for this UIM coverage was $3.00 per vehicle. In addition to basic bodily injury liability coverage of $100,000 per person for each of two vehicles, a Chevrolet pickup truck and a Plymouth, Policy B provided $100,000 per person UIM bodily injury coverage on each of these vehicles. The premium charged for this UIM coverage was $6.00 for the Plymouth and $3.00 for the pickup truck.

As we understand the stipulations both Policy A and Policy B contained the following provision:

> *The limit of bodily injury liability shown in the Declarations for "each person", for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident.* Subject to this limit for "each person" the limit of bodily injury liability shown in the Declarations for "each accident" for Uninsured

> Motorists Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one accident. The limit of property damage liability shown in the Declarations for "each accident" for Uninsured Motorists Coverage is our maximum limit of liability for all damages to all property resulting from any one accident. *This is the most we will pay for bodily injury and property damage regardless of the number of*:
>
> 1. **Covered persons**;
> 2. Claims made;
> 3. *Vehicles or premiums shown in the Declarations*; or
> 4. Vehicles involved in the accident.

On 31 May 1986 plaintiff was involved in an automobile accident when the vehicle she was operating was struck by a vehicle operated by Anthony V. Genesio, deceased. Plaintiff filed suit against the estate of Genesio seeking compensatory damages. The Genesio vehicle was insured by Nationwide Insurance Company (Nationwide) and had automobile personal injury liability limits of $50,000 per person. Nationwide petitioned the court for and received authority to pay its entire $50,000 coverage into court for the benefit of plaintiff. With plaintiff alleging in excess of $70,000 in medical expenses and the inability to return to her employment, she brought this declaratory judgment action which forms the basis of this appeal.

N.C.G.S. § 279.21(b)(4) of the Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended effective 1 October 1985, provides in relevant part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist *coverages* provided in the owner's policies of insurance; *it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply*, the benefit of all limits of liability of underinsured motorist coverage under all such policies: *Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-131.36(9) and (10).*

[Emphasis supplied.]

Plaintiff contends her policies provide a limit of UIM coverage totaling $300,000. Her argument is that N.C.G.S. § 279.21(b)(4) controls and that it requires that she be permitted to stack, or aggregate, the UIM coverages for each vehicle in both policies. The result under this position would be that she is entitled to $50,000 UIM coverage for each of the two vehicles for which this coverage is provided in Policy A and to $100,000 UIM coverage for each of the two vehicles for which this coverage is provided in Policy B. Thus Policy A would provide $100,000 UIM coverage and Policy B, $200,000 UIM coverage.

The questions before us are first, whether the statute prevails over the policy language and second, if it does, whether the statute should be interpreted as plaintiff contends.

II.

[1] We are confident the statute prevails over the language of the policy.

This Court has established the principle that when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the statute, the provisions of the statute will prevail. *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977); *see, e.g., Insurance Co. v. Casualty Co.*, 283 N.C. 87, 91, 194 S.E.2d 834, 837 (1973).

We conclude further that the statute, as plaintiff contends, requires that the UIM coverages for each vehicle in a single policy and all such coverages in both policies be aggregated.

UIM insurance in North Carolina is an outgrowth from and development of uninsured motorist insurance. J. Snyder, Jr., *N.C. Automobile Insurance Law*, § 30-1 (1988). Uninsured motorist insurance allows a recovery for an injured party where a tortfeasor has no liability insurance. *Id.* By comparison, UIM coverage allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party. *Id.* N.C.G.S. § 20-279.21(b)(4) requires that policies of automobile liability insurance which are written at limits that exceed minimum statutory limits and which afford uninsured motorist coverage must provide UIM coverage unless "any insured named

in the policy rejects the" UIM coverage.[1] This provision also requires that UIM coverage must be in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy. N.C.G.S. § 20-279.21(b)(4) (1983 & Cum. Supp. 1988).

Though this Court has never addressed the issue, there has been considerable litigation in other jurisdictions involving the question of whether an insured should be allowed intrapolicy stacking of *uninsured* motorist coverages. *See* J. Snyder, Jr., *N.C. Automobile Insurance Law* § 33-1 (1988); 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 40.1 (2d ed. 1987); Annot. "Combining or 'Stacking' Uninsured Motorist Coverages Provided in Single Policy Applicable to Different Vehicles of Individual Insured," 23 A.L.R. 4th 12 (1983). Given the close relationship between *uninsured* and *underinsured* coverages the principles applicable to *uninsured* motorist intrapolicy stacking should be equally applicable to factual situations giving rise to *underinsured* intrapolicy stacking questions. *See* J. Snyder, Jr., *N.C. Automobile Insurance Law* § 33-1 (1988); 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 40.1 (2d ed. 1987). The question of the validity of intrapolicy stacking of uninsured motorist coverages is "unsettled." Annot. "Combining or 'Stacking' Uninsured Motorist Coverages Provided in Single Policy Applicable to Different Vehicles of Individual Insured," 23 A.L.R. 4th 12 (1983). In determining whether intrapolicy stacking should be allowed courts have considered a variety of factors including: The requirements of state statutes; the policy language; and the payment of separate premiums. Annot. "Combining or 'Stacking' Uninsured Motorist Coverages Provided in Single Policy Applicable to Different Vehicles of Individual Insured," 23 A.L.R. 4th 12, 16 (1983). In general, the determination of this issue "requires a close examination of case law, statutory provisions, and applicable insurance clauses." J. Snyder, Jr., *N.C. Automobile Insurance Law* § 33-1 (1988).

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1. The statute mandates the following minimum limits of liability coverage: $25,000 because of bodily injury to or death of one person in any one accident; $50,000 because of bodily injury to or death of two or more persons in any one accident; and $10,000 because of injury to or destruction of property of others in any one accident. N.C.G.S. § 20-279.21(b)(2) (1983 & Cum. Supp. 1988). In addition, the statute likewise requires that uninsured motorist coverage must be provided in the minimum amount of $25,000 for bodily injury or death of one person, and $50,000 because of bodily injury to or death of two or more persons in any one accident. *See id.* § 20-279.21(b)(3).

Having concluded that in North Carolina N.C.G.S. § 20-279.21(b)(4) governs the question, we proceed to interpret that provision.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978); *see, e.g., Insurance Co. v. Chantos*, 293 N.C. at 440, 238 S.E.2d at 603. Legislative intent can be ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other. *See In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978); *see, e.g., Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). "The Court will not adopt an interpretation which results in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences." *Insurance Co. v. Chantos*, 293 N.C. at 440, 238 S.E.2d at 603 (citations omitted); *accord Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978).

The avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986); *e.g., Insurance Co. v. Chantos*, 293 N.C. at 440, 238 S.E.2d at 604. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. *Moore v. Insurance Co.*, 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967).

With these principles in mind we conclude the legislature intended N.C.G.S. § 20-279.21(b)(4) to require both interpolicy and intrapolicy stacking of UIM coverages. The statute refers to "coverages provided in the owner's policies of insurance," clearly suggesting the provision was intended to require both the stacking of "coverages" and "policies," or intrapolicy and interpolicy stacking. The next line, however, states: "it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply," suggesting the provision only applies to multiple policies or interpolicy stacking. *See* Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C.L. Rev. 1408, 1417 (1986).

We believe some light on legislative intent is shed by the proviso which states: "Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-131.36(9) and (10)." A fleet policy is a single policy designed to provide coverage for a multiple and changing number of motor vehicles used in an insured's business. *See* 6B J. Appleman, *Insurance Law and Practice* § 4291.5 (1979); *cf.* N.C.G.S. § 58-131.35A (Cum. Supp. 1988) (defining a "Nonfleet" motor vehicle as one "not eligible for classification as a fleet vehicle for the reason that the motor vehicle is one of four or less motor vehicles owned or hired under a long-term contract by the policy named insured). If the paragraph under consideration were intended to require both interpolicy and intrapolicy stacking, an exception for fleet policies would be anticipated. This exception would preclude any argument that UIM limits in a fleet policy were figured by multiplying the UIM coverage by the number of vehicles ordinarily insured in the fleet. This kind of intrapolicy stacking within a fleet policy, where many vehicles are often involved, would give the insured an amount of UIM coverage conceivably far in excess of what either party bargained for.[2] If, on the other hand, the legislature intended to provide for no intrapolicy stacking at all, there would be less need for a fleet policy exception.

It is less reasonable to think that the legislature intended by the proviso to preclude merely the interpolicy stacking of several fleet policies. Since, as with nonfleet policies, one insured is not likely to have more than two or three fleet policies, we can see no reason to distinguish between fleet and nonfleet policies vis-a-vis interpolicy stacking. There is more reason, as we have shown, to distinguish between fleet and nonfleet policies vis-a-vis intrapolicy stacking of coverages.

Interpreting the statute to allow both interpolicy and intrapolicy stacking is consistent with the nature and purpose of the act, which as noted is to compensate innocent victims of financially irresponsible motorists. *Cf.* Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C.L. Rev. 1408, 1417 (1986)

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2. For example, suppose the insured has a fleet policy which provides coverage for 100 automobiles and contains UIM coverage liability limits of $50,000 per injured person. Without a fleet policy exception, the insured could at least argue that the maximum limit of UIM coverage was 100 × $50,000 or $5,000,000 per person, particularly if the total premium for this coverage was figured by multiplying a base premium by the number of vehicles ordinarily insured in the fleet.

(commenting that "the public policy underlying the statute—to compensate the innocent victim of an accident caused by an uninsured or underinsured motorist—is not served" by construing the statute as only requiring interpolicy stacking). Requiring both interpolicy and intrapolicy stacking enhances the injured party's potential for full recovery of all damages.

Our construction of the statute avoids anomalous results, is fairer to the insured and is consistent with preexisting common law—all of which lead us to believe that it is in keeping with the legislature's intent. Our construction prevents the "anomalous situation that an insured is better off—for purposes of the underinsured motorist coverage—if separate policies were purchased for each vehicle." 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 40.1 (2d ed. 1987); *cf.* Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C.L. Rev. 1408, 1417 (1986) ("Neither logic nor equity supports a denial of stacking on multivehicle policies, while permitting stacking of policies that list only one vehicle."). Our construction also gives the insured due consideration for the separate premiums paid for each UIM coverage within a policy. Finally, our construction is consistent with our preexisting common law by which automobile insurance policies have been construed to require intrapolicy stacking of medical payments coverage, *Woods v. Insurance Co.*, 295 N.C. 500, 509, 246 S.E.2d 773, 779-80 (1978), and uninsured motorist coverage. *Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 323-24, 335 S.E.2d 228, 232 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

III.

[2] Defendant contends that even if N.C.G.S. § 20-279.21(b)(4) requires both intrapolicy and interpolicy stacking, it does not control to the extent the policy coverages at issue exceed the mandatory minimum coverage required by the Financial Responsibility Act. Defendant's argument rests on N.C.G.S. § 20-279.21(g), which provides:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article. With respect to a policy which grants such excess or additional

coverage the term "motor vehicle liability policy" shall apply only to that part of the coverage which is required by this section.

Insofar as UIM coverage is concerned, the question is whether it can ever be "excess or additional coverage" within the meaning of N.C.G.S. § 20-279.21(g). We conclude that it cannot. An owner's policy of liability insurance must, subject to rejection by the insured, provide UIM coverage "only with policies that are written at limits that exceed" minimum statutory limits and that afford uninsured motorist coverage. N.C.G.S. § 20-279.21(b)(4) (1983 & Cum. Supp. 1988). UIM coverage must be in an amount equal to the policy limits for bodily injury liability as specified in the policy. *Id.* Because of these statutory prerequisites for UIM coverage, there can never be excess or additional UIM coverage within the meaning of N.C.G.S. § 20-279.21(g). UIM coverage is designed, as we have already noted, to cover the situation where the tortfeasor has some but not enough liability insurance to compensate the injured party for his full damages. Since a tortfeasor who has at least some liability insurance must always have at least the minimum amount, UIM coverage is available only in amounts which exceed this minimum. Since the UIM coverage in any given policy must always equal the policy's basic liability coverage and that coverage must always exceed the minimum mandatory amount, there can never be any excess or additional UIM coverage as contemplated by N.C.G.S. § 20-279.21(g).

[3] Finally, defendant argues that since any UIM coverage may ultimately be rejected by the insured, it is not required by the Financial Responsibility Act; therefore, the terms of it are controlled by the parties and the insurance contract and not by the act.

We disagree. In construing statutes to give effect to legislative intent, the act must be considered as a whole and none of its provisions should be rendered useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose. *State v. Harvey*, 281 N.C. 1, 19-20, 187 S.E.2d 706, 718 (1972); *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968). If defendant's position were adopted, the provisions governing aggregation of UIM coverages in N.C.G.S. § 20-279.21(b)(4) would be written out of the Financial Responsibility Act and rendered useless and redundant. All UIM coverages

would, under defendant's position, be governed by the policy and none by the statute.

We conclude, therefore, that plaintiff is entitled to have all UIM coverages in both policies aggregated. The result is that the total UIM coverage available to plaintiff is $300,000. The decision of the trial court to the contrary is reversed and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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

BENBOW v. BENBOW

No. 239P89

Case below: 93 N.C. App. 791

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

BROWN v. BURLINGTON INDUSTRIES, INC.

No. 206PA89

Case below: 93 N.C. App. 431

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 September 1989.

CALDWELL v. CALDWELL

No. 248P89

Case below: 93 N.C. App. 740

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

CRAVER v. NAKAGAMA

No. 286P89

Case below: 94 N.C. App. 158

Petition by defendant (Betty L. Burton) for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

FEDERAL LAND BANK v. LACKEY

No. 328PA89

Case below: 94 N.C. App. 553

Petition by plaintiff for writ of supersedeas and temporary stay allowed 14 August 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 14 August 1989. Motion by defendants to dismiss appeal for lack of substantial constitutional question denied 18 August 1989.

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

GENSINGER v. WESTON

No. 366P89

Case below: 95 N.C. App. 223

Petition by defendant for temporary stay allowed 7 September 1989 pending consideration and determination of the petition for discretionary review.

HAJMM CO. v. HOUSE OF RAEFORD FARMS

No. 271A89

Case below: 94 N.C. App. 1

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed as to unfair trade practice issue only 23 August 1989.

IN RE ESTATE OF TUCCI

No. 294A89

Case below: 94 N.C. App. 428

Petition by Estate for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

IN RE FORECLOSURE OF FULLER

No. 245P89

Case below: 94 N.C. App. 207

Petition by R. Bruce Fuller and wife, Dianne B. Fuller, for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

J. W. CROSS INDUSTRIES v. WARNER HARDWARE CO.

No. 268P89

Case below: 94 N.C. App. 184

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

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

JENNINGS v. JESSEN

No. 247A89

Case below: 93 N.C. App. 731

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 September 1989.

LAMM v. BISSETTE REALTY

No. 280A89

Case below: 94 N.C. App. 145

Petition for discretionary review by defendant pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed 6 September 1989.

McMILLAN v. STATE FARM FIRE AND CASUALTY CO.

No. 246P89

Case below: 93 N.C. App. 748

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

MULLIS v. THE PANTRY, INC.

No. 262P89

Case below: 93 N.C. App. 591

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

PERRY-GRIFFIN FOUNDATION v. THORNBURG

No. 229P89

Case below: 93 N.C. App. 790

Petition by intervenor-plaintiff (Jimmie C. Proctor) for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

PETTEWAY v. SOUTH CAROLINA INSURANCE CO.

No. 256P89

Case below: 93 N.C. App. 776

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

SELF v. CITIZENS SAVINGS BANK

No. 250P89

Case below: 93 N.C. App. 792

Petition by plaintiff (Ruth E. Self) for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

SLAUGHTER v. SLAUGHTER

No. 252PA89

Case below: 93 N.C. App. 717

Petition by defendant (Veasey) for discretionary review pursuant to G.S. 7A-31 allowed 6 September 1989.

SMALL v. SMALL

No. 241P89

Case below: 93 N.C. App. 614

Petition by Shelby H. Small for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. ALLEN

No. 320P89

Case below: 94 N.C. App. 390

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 September 1989.

STATE v. CALLAHAN

No. 232P89

Case below: 93 N.C. App. 579

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. ENSLEY

No. 273P89

Case below: 94 N.C. App. 390

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. HARTNESS

No. 258PA89

Case below: 94 N.C. App. 224

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 September 1989.

STATE v. HINES

No. 318P89

Case below: 93 N.C. App. 790

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 September 1989.

STATE v. HORNE

No. 196P89

Case below: 93 N.C. App. 514

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

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

STATE v. JETER

No. 199PA89

Case below: 93 N.C. App. 588

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 September 1989.

STATE v. McCARTY

No. 266PA89

Case below: 94 N.C. App. 390

Petition by the State for discretionary review pursuant to G.S. 7A-31 allowed 6 September 1989. Petition by the State for writ of supersedeas allowed 6 September 1989.

STATE v. MARSHALL

No. 277P89

Case below: 94 N.C. App. 20

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 September 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. ROSARIO

No. 251P89

Case below: 93 N.C. App. 627

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. STEVENS

No. 263P89

Case below: 94 N.C. App. 194

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

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

STATE v. THORPE

No. 267A89

Case below: 94 N.C. App. 270

Petition by defendant for discretionary review to the North Carolina Court of Appeals pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. WARD

No. 249P89

Case below: 93 N.C. App. 682

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STATE v. WIGGINS

No. 322P89

Case below: 93 N.C. App. 793

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 6 September 1989.

STEELCASE, INC. v. THE LILLY CO.

No. 253P89

Case below: 93 N.C. App. 697

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

STRICKLAND v. CENTRAL SERVICE MOTOR CO.

No. 270P89

Case below: 94 N.C. App. 79

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 September 1989.

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

WILLIAMS v. SKINNER

No. 290P89

Case below: 93 N.C. App. 665

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 6 September 1989. Amended petition by plaintiff for writ of certiorari denied 6 September 1989.

PETITIONS TO REHEAR

MANNING v. FLETCHER

No. 492PA88

Case below: 324 N.C. 513

Petition by plaintiffs to rehear denied 6 September 1989 without prejudice to any rights plaintiffs may have to argue before the trial division the proper calculation of the amounts due them.

WHITTAKER GENERAL MEDICAL CORP. v. DANIEL

No. 6PA88

Case below: 324 N.C. 523; 325 N.C. 231

Petition by plaintiff to rehear denied 6 September 1989.

STATE OF NORTH CAROLINA v. ROSCOE ARTIS

No. 504A84

(Filed 5 October 1989)

1. **Jury § 6.1 (NCI3d); Criminal Law § 1318 (NCI4th)— first degree murder—jury selection—instruction on bifurcated trial**

The trial court did not abuse its discretion in a murder prosecution by refusing to substitute defendant's proffered jury instructions for the preliminary pattern jury instructions. The purpose of the pattern jury instruction, N.C.P.I. Crim. 106.10, is to explain the bifurcated nature of first degree murder trials and to limit the jury's attention to consideration of issues concerned with the guilt phase of the trial; to instruct the jurors in addition about the sentencing process of weighing aggravating circumstances against mitigating circumstances could be fruitless, distracting, and prejudicial.

Am Jur 2d, Criminal Law § 555; Jury § 50.

2. **Jury § 6.3 (NCI3d)— first degree murder—voir dire—no imbalance in questions**

The trial court did not abuse its discretion during jury selection for a first degree murder prosecution by allowing greater latitude to the prosecution than to the defense in the questions asked the venire. The record reflects no gross imbalance in the trial court's responses to defendant's inquiries as opposed to those of the prosecution. More notable is the fact that the prosecution objected more frequently.

Am Jur 2d, Jury § 202.

3. **Jury § 6 (NCI3d)— first degree murder—jury selection—private conversation between juror and court—harmless error**

There was no prejudicial error during the jury selection process of a first degree murder prosecution where a juror responded when the court asked whether any problems had developed with any of the jurors, the juror was consequently invited to the court's chambers, the trial court later conducted an in camera hearing in the presence of counsel and the court reporter, the record of the in camera hearing reflects the juror's growing unease with her ability to impose the death penalty, and the juror was thereafter promptly and properly

removed for cause. It is within the trial court's discretion to reopen examination of a juror previously accepted by both parties and the juror's removal obviated the possibility that anything said to her privately by the court might infect the jury as a whole.

Am Jur 2d, Jury § 198.

4. **Criminal Law § 34.7 (NCI3d)— first degree murder—prior offense—ten years old—admission not prejudicial error**

There was no prejudicial error in a first degree murder prosecution by admitting testimony from a witness who described defendant's conduct toward her on a night ten years before this trial where the earlier incident led to a conviction for assault on a female, a fact defendant's counsel later raised on direct examination of defendant himself. Similarities between the earlier attack and the murder in this case support the relevancy of the testimony, and whether ten years' remoteness so erodes the commonalities between the two offenses that the probative value of the testimony is outweighed by its tendency to prejudice is arguable; however, even assuming error, there was no reasonable possibility that a different result would have been reached had the error not been committed. N.C.G.S. § 8C-1, Rule 404(b). N.C.G.S. § 15A-1443(a).

Am Jur 2d, Homicide §§ 310, 311.

5. **Criminal Law § 34.7 (NCI3d)— first degree murder—prior offense—instructions—no prejudicial error**

Defendant in a first degree murder prosecution failed to demonstrate prejudice or plain error from the court's instruction that the jury could consider testimony or conduct ten years earlier leading to a conviction for assault on a female to show motive, intent and scienter. N.C.G.S. § 15A-1443.

Am Jur 2d, Homicide §§ 310, 311.

6. **Criminal Law § 434 (NCI4th)— first degree murder—prior offense—prosecutor's argument**

There was no error in a first degree murder prosecution in the prosecutor's closing argument concerning a prior offense where the record revealed that the prosecutor took no liberties outside the wide latitude allowed parties in closing argument.

Am Jur 2d, Homicide §§ 310, 311.

7. Homicide § 21.5 (NCI3d)— first degree murder—evidence of premeditation and deliberation—sufficient

The trial court did not err in a prosecution for first degree murder by denying defendant's motion to dismiss based on insufficient evidence of premeditation and deliberation where defendant's own statements and the testimony of a witness amply established that defendant and the victim were arguing vehemently shortly before her death; defendant admitted striking her with a stick as thick as his wrist, bringing her to the ground, then dragging her so forcefully to another spot that she lost her shoes and her wig; defendant admitted telling the victim to take her clothes off and that she complied out of fear; defendant then hit her on the head with the stick so hard that she no longer moved; he positioned her body in order to force intercourse with her, heard her labored breathing, and stopped only when it "didn't feel right" and it occurred to him that she might be dying; medical evidence established that the victim died of manual strangulation in the midst of sexual intercourse; although defendant's first statement did not indicate that it was his own hands that were causing the victim to be "breathing kind of hard," there is ample evidence from which the jury could infer not only that fact but the specific intent to kill that accompanied it; moreover, if these acts were not enough incontestably to prove a premeditated and deliberated killing, then the callous and calculating acts of scattering dirt and leaves on the body, hiding the victim's jeans, and going home to bed rather than seeking medical help surely do.

Am Jur 2d, Homicide § 439.

8. Criminal Law § 73 (NCI3d)— first degree murder—anonymous letter—victim's statement heard by defendant—properly excluded

The trial court did not err in a first degree murder prosecution by refusing to admit an anonymous letter received by defendant's sister which stated that defendant was not responsible for the victim's death, or testimony by defendant that he had heard the victim say to her mother that she was going to get killed if "the people" ever caught up to her. Neither the statement nor the letter fit within any category of excep-

tion to the hearsay rule under N.C.G.S. § 8C-1, Rule 803 or Rule 804(b).

Am Jur 2d, Homicide §§ 329, 330.

9. **Criminal Law § 169.3 (NCI3d)— first degree murder—I.Q. of defendant—excluded, then admitted—no error**

There was no prejudicial error in a first degree murder prosecution from the exclusion of testimony from a clinical psychologist concerning the results of an I.Q. test he had administered to defendant where the test was in fact belatedly admitted.

Am Jur 2d, Criminal Law § 79.

10. **Criminal Law § 86.2 (NCI3d)— first degree murder—prior offenses more than ten years old—admission harmless error**

There was no prejudicial error in a prosecution for first degree murder from erroneously permitting the State to cross-examine defendant about convictions for assault on a female in 1957 and 1967. Specific facts and circumstances supporting the probative value of the evidence were neither apparent from the record nor recounted by the trial court; however, given the evidentiary weight of guilt borne by defendant's statement alone, there is no possibility the improper admission of the convictions could have prejudiced defendant in any way. N.C.G.S. § 8C-1, Rule 609. N.C.G.S. § 15A-1443(b).

Am Jur 2d, Homicide § 582.

11. **Criminal Law § 821 (NCI4th)— first degree murder— instruction on prior inconsistent statements—no error**

The trial court did not err in a first degree murder prosecution by applying its charge on prior inconsistent statements to two defense witnesses but not to two prosecution witnesses where the words of the trial court's charge clearly revealed that, rather than expressing an opinion regarding the prior statements, the court admonished the jury to determine whether the statements had been made and, if so, whether they conflicted with the testimony presented at trial. Moreover, the variations in the prosecution testimony cited by defendant were de minimus and immaterial, and the court's omission

of them from its cited examples of prior inconsistent statements was proper. N.C.G.S. § 15A-1232.

Am Jur 2d, Witnesses §§ 597, 608, 609.

12. Homicide § 25.2 (NCI3d)— first degree murder—instructions—premeditation and deliberation

There was substantial evidence in a first degree murder prosecution supporting all of the circumstances submitted by the trial court to the jury indicating a killing effected after premeditation and deliberation.

Am Jur 2d, Homicide § 501.

13. Criminal Law § 1360 (NCI4th)— first degree murder—mitigating factors—impaired capacity

The trial court did not err during the sentencing phase of a first degree murder prosecution by submitting a separate nonstatutory mitigating circumstance instructing the jury to consider whether defendant's mild mental retardation was a mitigating factor rather than relating the mental retardation specifically to the statutory impaired capacity mitigating circumstance. While bare evidence of a low I.Q. can justify the submission of a properly worded nonstatutory mitigating circumstance, it is not sufficient without more to require an instruction relating this evidence to the impaired capacity statutory mitigating circumstance. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Homicide §§ 513, 516.

14. Criminal Law § 1355 (NCI4th)— first degree murder—sentencing—no significant history of crime—not submitted

The trial court did not err during the sentencing portion of a first degree murder prosecution by failing to instruct the jury on the statutory mitigating circumstance that defendant had no significant prior criminal activity where a voir dire examination of defendant by the prosecutor revealed a number of past convictions. Even though defendant admitted to only two of the convictions before the jury, the trial court was aware of the plethora of past convictions, defendant suffered no prejudice by virtue of the court's action because the jury found the aggravating circumstance that defendant had previously been convicted of a felony involving violence to the person, and all of the evidence must be taken into

account by the court, not just that which the court has ruled admissible for other purposes. N.C.G.S. § 15A-2000(b); N.C.G.S. § 15A-2000(f)(1).

Am Jur 2d, Homicide §§ 513, 514.

15. Criminal Law § 1344 (NCI4th)— first degree murder—sentencing—especially heinous, atrocious or cruel aggravating factor

The trial court did not err during the sentencing portion of a first degree murder prosecution by submitting to the jury the aggravating circumstance that the murder was especially heinous, atrocious or cruel where, considered in the light most favorable to the State, the evidence was sufficient to support a reasonable inference that the victim remained conscious during her ordeal and suffered great physical pain as, already bloodied and bruised from the beatings, she was raped with sufficient violence to draw blood from her vagina and strangled so forcefully that her neck was repeatedly scratched. A murder taking place during the perpetration of a violent sexual assault on the victim is unusually humiliating and debasing, and there was psychological torture in that the State's evidence, viewed in its most favorable light, tended to show that the victim, immobilized by several blows to the head and pinned to the ground by defendant's weight, remained conscious as defendant violated her sexually and began the slow process of choking the life out of her with his bare hands. N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law §§ 598, 599, 628.

16. Criminal Law § 1337 (NCI4th)— first degree murder—sentencing—previous felony involving violence—assaulting a female with intent to rape

The trial court did not err in the sentencing portion of a first degree murder prosecution where defendant had been convicted of assault on a female with intent to commit rape in a previous prosecution by charging that such a crime was a felony involving the use or threat of violence to the person. It is not necessary to show that the use or threat of violence is an element of a prior felony; it is enough to cite a prior felony in which the commission of the felony involved use or threat of violence. An assault on a woman with intent to

rape is an act exhibiting violence together with the intent to commit a subsequent act of violence and as such is, as a matter of law, an offense involving the use or threat of violence to the person.

Am Jur 2d, Homicide § 513.

17. Criminal Law § 1339 (NCI4th)— first degree murder—sentencing—aggravating factor—consideration of felony underlying felony murder

The trial court did not err in a sentencing portion of a first degree murder prosecution by allowing the jury to consider as an aggravating circumstance the felony underlying defendant's conviction for felony murder where there was ample evidence supporting the submission of first degree murder based on premeditation and deliberation and the jury found defendant guilty based upon both premeditation and deliberation and felony murder.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

18. Criminal Law § 454 (NCI4th)— first degree murder—sentencing—argument of prosecutor—no error

The trial court did not err in the sentencing portion of a first degree murder prosecution where the victim had been strangled by allowing the prosecutor to tell the jurors that he would clock a four-minute pause in which he wished the jurors to hold their breath as long as they could. Rhetoric that may be prejudicially improper in the guilt phase is acceptable in the sentencing phase.

Am Jur 2d, Homicide §§ 463, 464.

19. Criminal Law § 452 (NCI4th)— first degree murder—sentencing—prosecutor's argument

The trial court did not err in the sentencing portion of a first degree murder prosecution by overruling defendant's objection to the prosecutor's argument that defendant's son, daughter and aunt had been put on the stand to provoke the jury's sympathy. The State is permitted to characterize and to contest the weight of proffered nonstatutory mitigating circumstances.

Am Jur 2d, Trial §§ 296-299.

20. Criminal Law § 442 (NCI4th)— first degree murder—sentencing—jury urged to try case without sympathy

The prosecutor's remark in the sentencing portion of a first degree murder prosecution urging the jury to try the case without prejudice and without sympathy was not improper. Mitigating circumstances are to be supported by the evidence, not emotion; moreover, if it was error for the trial court to exercise restraint in interrupting the prosecutor's argument, this was rectified by the court's subsequent instructions.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

21. Criminal Law § 447 (NCI4th)— first degree murder—sentencing—prosecutor's argument—loss by victim's family

There was no plain error in the sentencing portion of a first degree murder prosecution where the prosecutor remarked on the loss the victim's family suffered by her death. Given the overwhelming evidence against defendant, including the supporting aggravating circumstances, any possible error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b).

Am Jur 2d, Trial §§ 296-299.

22. Criminal Law § 436 (NCI4th)— first degree murder—sentencing—prosecutor's comment—defendant's lack of remorse

There was no error in a first degree murder prosecution in which defendant had testified that he had not committed the crime where the prosecutor called the jury's attention during his closing argument in the sentencing proceeding to defendant's demeanor, suggesting that they perceived a man without visible signs of remorse. Remarks related to the demeanor displayed by defendant throughout the trial remain rooted in observable evidence and are not improper.

Am Jur 2d, Homicide §§ 463, 464.

23. Criminal Law § 451 (NCI4th)— murder—sentencing— prosecutor's argument—defendant the master of his fate

The trial court did not abuse its discretion during sentencing for a first degree murder by denying defendant's objection to the prosecutor stressing to the jurors that it was not they who were responsible for the judgment they would recommend, but defendant. Reviewed in context, the prosecutor's

comment was not calculated to relieve the jury of its responsibility, but to indicate to the jury that it was defendant who chose to take the life of another and defendant was the master of his own fate.

Am Jur 2d, Homicide §§ 463, 464.

24. Criminal Law § 454 (NCI4th)— murder—sentencing—prosecutor's arguments—jury as conscience of community

The trial court did not err during the sentencing portion of a first degree murder prosecution by allowing the prosecutor to urge the jury to consider community responses to their sentencing recommendation. It is not objectionable to tell the jury that its verdict will send a message to the community about what may befall a person convicted of murder in a court of justice or to remind the jury that its voice is the conscience of the community.

Am Jur 2d, Homicide §§ 463, 464.

25. Criminal Law § 454 (NCI4th)— first degree murder—sentencing—prosecutor's biblical argument—no plain error

A prosecutor's amalgam of biblical and statutory language when arguing for the death penalty, though misguided and misleading, was not so improper as to require intervention ex mero motu.

Am Jur 2d, Homicide §§ 463, 464.

26. Criminal Law § 971 (NCI4th)— murder—motion for appropriate relief denied—no error

The trial court correctly denied defendant's motion for appropriate relief in a murder prosecution based on the failure of the prosecutor to disclose the second of two pages of the medical examiner's report, which contained a one-paragraph summary of the circumstances surrounding the victim's death. The summary paragraph was not material insofar as there was no reasonable probability that its disclosure to the defense would have caused the outcome of defendant's trial to be any different.

Am Jur 2d, Criminal Law § 291.

27. Constitutional Law § 80 (NCI3d); Criminal Law § 1325 (NCI4th)— murder—preservation issues—unanimity for mitigating factors—constitutionality of death penalty

North Carolina's death penalty statute is constitutional and the requirement that mitigating factors must be found unanimously to exist in a capital case does not violate the Eighth Amendment to the U. S. Constitution.

Am Jur 2d, Homicide § 548.

28. Jury §§ 6, 7.11, 7.14 (NCI3d); Criminal Law § 1306 (NCI4th)— murder—preservation issues—selection of jury

The trial court did not err in a first degree murder prosecution by denying defendant's motion for individual voir dire and sequestration of jurors, or by permitting the excusal for cause of jurors who indicated that they would be unable to recommend a sentence of death regardless of circumstances, and there was no substantiation in the record of defendant's contention that the prosecutor used peremptory challenges to remove jurors hesitant about the death penalty. Moreover, it is not improper to use peremptory challenges to strike veniremen who have voiced some questions about imposing the death penalty.

Am Jur 2d, Homicide § 466.

29. Criminal Law §§ 1327, 1326 (NCI4th)— murder—preservation issues—instructions—burden of proof on sentencing—duty to impose death penalty

Defendant is not deprived of due process of law because he bears the burden of proving a mitigating circumstance by a preponderance of the evidence, and the trial court's instruction in a murder prosecution on the jury's duty to impose the death penalty in certain circumstances was constitutionally sound.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 513, 514.

30. Criminal Law § 1373 (NCI4th)— first degree murder—death sentence—not disproportionate

There was no indication in a first degree murder prosecution that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary or impermissible factor, and the sentence was not disproportionate within

the meaning of N.C.G.S. § 15A-2000(d)(2) where the evidence depicted a vicious, lust-driven, dehumanizing crime perpetrated by a defendant with a history of violent conduct toward teenaged girls; after he rendered the victim helpless by striking her repeatedly with a stick as thick as his wrist, defendant wrapped his hands around her throat and slowly choked her life out of her as he violently raped her; the attack was brutal and relentless; and defendant displayed no remorse or contrition for his act and attempted to conceal the body before casually strolling home for a nap.

Am Jur 2d, Criminal Law §§ 598, 599, 628.

Chief Justice EXUM dissenting.

Justice FRYE dissenting as to sentencing phase only.

APPEAL by defendant from judgment sentencing him to death for conviction of murder in the first degree, said judgment imposed by *Pope, J.*, at the 20 August 1984 session of Superior Court, ROBESON County. Heard in the Supreme Court 10 May 1989.

Lacy H. Thornburg, Attorney General, by Joan H. Byers, Special Deputy Attorney General, and Debra C. Graves, Associate Attorney General, for the state.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

Defendant was convicted of murder in the first degree of Joann Brockman and sentenced to death. Our review of the guilt and penalty phases of his trial reveals no prejudicial error.

Evidence adduced by both defendant and the state at defendant's trial tended to show the following events occurring in Red Springs on 22 October 1983:

On that day at about 9:30 a.m., the victim's aunt, Alice McLaughlin, observed defendant walking up the road towards Joann's home. Mrs. McLaughlin watched defendant knock on Joann's door and subsequently enter. About an hour later, Mrs. McLaughlin saw defendant and Joann leave the latter's house and walk past her own house in the direction of a shopping center. Shortly thereafter, Mrs. McLaughlin saw her brother, Curtis McKinnon,

tracing the same route towards the shopping center. He testified that he walked past defendant and Joann, who were sitting under a pear tree, arguing. Mr. McKinnon testified that he ran into his brother-in-law, Johnny Haywood, at the shopping center. Mr. Haywood drove back towards the pear tree around 11:30 but saw no one. Shortly after she saw McKinnon walk past her house, Mrs. McLaughlin heard Joann call "help" three times. But because she had known Joann to "cut the fool" a lot, Mrs. McLaughlin did not respond to the cries.

Sometime later, Mrs. McLaughlin saw defendant walking back towards Joann's house. He stopped to ask Mrs. McLaughlin if she had seen Joann. She answered that the last time she had seen her niece was when she was with defendant. Defendant continued towards Joann's house and approached the door, but neither knocked nor entered. He turned around and headed back the way he had come. Mr. McKinnon, who by now had returned home by way of the pear tree, where he had neither seen nor heard anyone, also witnessed defendant's approach to and departure from Joann's door.

Joann's fiance, David Moore, returned from work around 3:00 p.m. He was concerned about Joann's absence and went looking for her with Curtis McKinnon. The two found Joann's wig and shoes near some buildings not far from the pear tree. They called Joann's mother and contacted the police to report that Joann was missing.

In the early evening, Joann's mother, Johnny Haywood, and Deputy Sheriff McLean searched the area near the pear tree and eventually came upon Joann's body partially covered with dirt and brush. Except for a sweater and bra pushed up above her breasts, Joann's body was naked. There was blood on her nose and mouth, on her sweater, and a film of blood on her hands.

An autopsy revealed that although there was a large bruise on Joann's forehead, this had not resulted in a skull fracture nor had it been fatal. Abrasions on her neck, hemorrhaging in the connective tissue around the windpipe, and lungs full of fluid indicated that the cause of death had been asphyxia due to manual strangulation. In addition, the vagina was dilated, consistent with Joann's having died during sexual intercourse.

At defendant's trial, the state offered three statements made by defendant the night and early morning following the discovery

of Joann's body. The first of these statements, which had been preceded by defendant's being read Miranda warnings and signing a waiver of rights form, was exculpatory. Defendant later testified that he had not made the subsequent, inculpatory statements, and he denied their truth.

The first statement was transcribed at around 10:00 p.m. In this statement defendant said he had come back to his sister's house at dawn from an all-night spree in South Carolina. He had gone to sleep at 6:00 a.m., awakened at 8:30, and walked up to the store with his sister and her boyfriend around 9:00 a.m. At 9:30 he bought some peppermint schnapps and drank it all, pitching the bottle into a field behind a grocery store. (The officers' search for the bottle proved fruitless.) Defendant had then walked to Joann's house, meeting her aunt on the way, but had found the door chained. He neither knocked nor entered, but turned around and walked back to his sister's house, where he slept from 10:30 till 4:00 p.m., when the police came and picked him up.

Defendant was questioned again near midnight regarding blood on his shirt. This, defendant initially said, was chicken blood. He offered his shirt to officers for testing, then admitted that it was not chicken blood, but Joann's. He told officers where they could find Joann's pants and agreed to accompany officers to the scene where he had last been with her. He indicated how she had been lying when he left her, which coincided exactly with the position of her body when found that afternoon, and located her pants under a piece of tin where he had left them. When defendant returned with the officers to the police station at approximately 1:00 a.m., he was interviewed once more, resulting in the following inculpatory statement, the transcription of which was completed by 3:00 a.m.:

> I went to the liquor store in Red Springs about 9:30 a.m., 10-22-83. I was walking. I bought a pint of Peppermint Schnapps for $3.45 from the black dude at the liquor store. I walked over behind the Food Lion Store and I drank about two thirds of the pint. I took the rest of the liquor and stuck it in my belt.
>
> I walked down the dirt road after that, towards Joanne's house. I think her last name is Brockman, or something like that. I first went by Joanne's aunt's house. I saw her aunt standing in the yard. I hollered and asked her aunt if Joanne

was home. Her aunt said she didn't know, that Joanne had gone out but she didn't know if she had come home or not.

I went to Joanne's house and knocked on the door. Joanne came to the door. Joanne had told me to come in, long time no see. We sit down and started talking. Joanne wanted a drink of that liquor I had. Joanne drank the rest of the liquor that I had. Joanne said, "I want you to be my main man." I have been messing around with Joanne for some time.

Joanne wanted me to go outside and get some old shingles to burn on the fire. I went outside and got an old tire and put it on the fire. I asked Joanne if we were going to do anything. Joanne asked me if I wanted to and I told her yeah. I got in the bed and I had sex with Joanne. Joanne got up afterwards and she took a bath.

After that, Joanne asked me to give her ten dollars, because there was some stuff at the store she wanted. I gave Joanne a ten-dollar bill and she put it in her bra.

After that, me and Joanne left the house, walking towards the store. We walked passed [sic] her aunt's house on the way. We were talking and Joanne said something about this man she was seeing in Lumberton. I asked Joanne who he was and she told me it weren't none of my business. I told her I had give her my money. She said, "Yeah, and you going to give me some more of your money." Joanne called me a few words and she made me mad, because I was pretty high at the time.

I grabbed Joanne by the arm and told her to let's go over there near the barn, on the right side of the road, and sit down and talk. I wanted to whip her, but I didn't want to hurt her. Joanne said, "I ain't going no damn where with you."

I grabbed Joanne by her arm and drug her over to the back of the barn to the corner. We sit down at the back of the barn and we talked a while. Joanne started talking about this guy in Lumberton again, and it made me mad. Joanne said she was going out with him tonight. We stood up and I reached down on the ground and picked up a big stick and I hit her side of the head. The stick was about as big around as my wrist. The stick was about three or four feet long.

After I hit her, she said I didn't love her. I grabbed Joanne by the arm and snatched her. I was going to take her over to where she was found and beat her again. Joanne was pulling away from me, and I was dragging her. She lost a wig she had on and her shoes. I drug Joanne over to where she was found at, and I still had the stick in my hand.

When me and Joanne were arguing about the man in Lumberton, on the dirt road, she took out something and told me she would cut my ass. I don't know if it was a knife or a fingernail file. I didn't take Joanne to be serious because I didn't believe she would cut me. After that, I never did see the knife or fingernail file again. Joanne had the knife or finger file inside a small, round black bag with a shoulder strap.

When I drug Joanne over to where she was found, I asked her if she was going to give me a little bit. She told me no, she was going to give it to that guy in Lumberton. I got mad and I took the stick and hit her in the head real hard. When I hit Joanne, she fell to the ground on her side. I asked Joanne again if she was going to give me some. Joanne said no again. Joanne was still laying on her left side, and I was standing to the left of her. I hit Joanne again with the stick and I hit her pretty hard. After that, Joanne didn't move any more.

Before I hit her at the second place I took her, I told Joanne to take her clothes off. I guess she took them off because she was scared of me. Joanne was wearing jeans and she took them off. She was wearing a white sweater, but I don't know if she took it off or not. She didn't have any panties on.

After I hit Joanne the last time with the stick, she was still laying on her side. I turned her over on her back. I dropped my pants down around my knees. I took my penis and put it inside Joanne, between her legs. I had sex with Joanne for about five minutes. I didn't feel right, so I got up. I didn't come inside or outside of her.

Joanne had not said anything since I hit her the last time, and she was breathing kind of hard. I pulled my pants back up. I thought Joanne was dying. I called Joanne a couple

of times after I pulled my pants up, but she wouldn't say anything.

I took the stick I had and threw it away, toward the old white looking house, in the bushes. After that, I tried to cover Joanne up. I threw leaves and dirt on top of her, but I didn't put that much on her. After that, I took her jeans and hid them under a piece of tin, back towards the hold barn. That is the same pair of jeans that I showed to you and Detective Garth Locklear under the piece of tin.

After I hid the jeans, I walked to my house and went to bed and went to sleep. I woke up about something after 4:00. I stayed there at the house until James McLean came there.

Defendant completed a third, briefer statement at 3:10 a.m. in which he admitted that he had killed Joann Brockman, that he had been advised of and understood his rights, and that he had voluntarily assisted officers in finding Joann's body and pants. Despite these statements, defendant testified that he had not volunteered either inculpatory statement, explaining that the officers had answered their own questions and that his signatures on the waiver of rights form and on the 3:00 a.m. statement had been affixed to blank papers or to receipts for his clothes.

Defendant's testimony, like his first statement, was exculpatory. He related that after buying a pint of peppermint schnapps shortly after 9:00 a.m., he had gone to Joann's house. Another man was already there sitting on the foot of the bed. While defendant went to find fuel and made up the fire, the other man left. Defendant testified that he had then had intercourse with Joann, that he had given her fifteen dollars and left. She followed him and walked with him to a barn where she stopped to fix her clothes. Defendant came around the barn to find her in partial undress. He laid her pants under a piece of tin at her request. When he stood up, his head was spinning and he saw faces. He took a swing and hit Joann by accident, causing her nose to bleed. He hugged her, apologized, and as he prepared to leave, he was hit in the back by someone from behind. He turned around but saw no one, then ran in the direction of the road. When he looked back at Joann, she was walking from the pear tree towards the barn. His head spinning again, defendant walked to the grocery store and eventually found himself at his sister's house. Defendant testified that he

was certain his last swig of schnapps had been drugged, but that he knew neither how, with what, nor by whom this had occurred.

The jury was instructed that it could find defendant guilty of murder in the first degree on the basis of either the felony murder rule or malice, premeditation, and deliberation, or both; guilty of murder in the second degree on the basis of malice, without premeditation and deliberation; or not guilty. The jury returned a verdict of guilty of murder in the first degree on both bases and, following a sentencing hearing, recommended a sentence of death.

GUILT PHASE

[1] Defendant first contends that the trial court's refusal prior to and throughout jury selection to substitute defendant's proffered jury instructions for the preliminary pattern jury instructions, N.C.P.I. Crim. 106.10, deprived him of the opportunity to select a fair, impartial jury. On two occasions during the jury selection process, the trial court charged the jurors that in a capital case there are two proceedings, and that in the first they must determine only whether the defendant is guilty of the offense charged or of any lesser included offenses. The trial court admonished the jury that its only concern in the first part of the trial was to resolve the question of guilt, and that the sentencing proceeding, which would follow if the defendant was convicted, might use another jury and would be preceded by separate jury instructions.

Defendant requested that the trial court instruct the jury more specifically regarding the procedures of a capital trial, including an explanation that aggravating circumstances must be proved by the state beyond a reasonable doubt, that mitigating circumstances may be shown by defendant, and that the aggravating circumstances must be weighed against mitigating circumstances to determine whether the former were sufficiently substantial, beyond a reasonable doubt, to impose the death penalty.

Defendant now contends it was error for the trial court to refuse this request, reasoning that his proffered instructions were critical to the selection of an impartial jury because of two misstatements of the law made by the prosecutor and because at least one juror changed his mind about his ability to consider imposing the death penalty based, defendant surmises, upon imperfect information. Defendant suggests that the members of the

venire were compelled to consider their attitudes towards the death penalty in a vacuum—without information as to sentencing procedures that would enable them to answer accurately inquiries about those attitudes. As a result, defendant contends, those jurors who might hesitate before imposing a sentence of death were those who, in their ignorance of the sentencing process, expressed misgivings about their ability to impose the death penalty and who, for that reason, were excused for cause. He argues that this produced "a jury uncommonly willing to condemn a man to die" in violation of defendant's constitutional right to a fair and impartial jury. *Witherspoon v. Illinois*, 391 U.S. 510, 521, 20 L.Ed.2d 776, 784, *reh'g denied*, 393 U.S. 898, 21 L.Ed.2d 186 (1968).

The purpose of the pattern jury instruction, N.C.P.I. Crim. 106.10, is to explain the bifurcated nature of first-degree murder trials and to limit the jury's attention to consideration of issues concerned with the guilt phase of the trial. *State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988). To instruct the jurors, in addition, about the sentencing process of weighing aggravating circumstances against mitigating circumstances would have invited the following dangers: it might be fruitless, as the sentencing jury is not always composed of the same individuals as the guilt-phase jury; it might be distracting, as the function of the jury during the guilt phase is to determine the guilt or innocence of the defendant, not to be concerned about his penalty; and it could have a prejudicial effect, suggesting to the jury that the second stage in the trial will assuredly be reached, presupposing defendant's guilt.

Furthermore, the trial judge has broad discretion in supervising jury selection to the end that both the state and the defendant may receive a fair trial. *State v. Nelson*, 298 N.C. 573, 260 S.E.2d 629 (1979), *cert. denied sub nom., Jolly v. North Carolina*, 446 U.S. 929, 64 L.Ed.2d 282 (1980). Reversible error can be shown only where the defendant establishes both that the trial judge abused her discretion and that he suffered prejudice as a result of such abuse. *State v. Banks*, 295 N.C. 399, 245 S.E.2d 743 (1978). Given the danger of distraction and prejudice and the desirability of uniform jury instructions for all trials, despite the unique features of each, we find no abuse of the trial court's discretion in relying upon the appropriate pattern jury instructions to inform the jury on voir dire. In addition, as we have noted, the trial court's refusal to exercise defendant's modification to the pattern jury instructions

was at least as likely to avoid prejudice to defendant as it was to enhance it.

Ironically, although the trial court refused to instruct the jury as to the mechanics of the sentencing procedure, the prosecutor asked a question of one potential juror substantially paralleling the instruction defendant had requested the trial court to give. To this question defendant objected, and the trial court responded with a brief reiteration of the pattern jury instruction, reminding the jury of its more focused responsibility in the guilt-innocence phase of the trial. This was not error. Although defendant accurately notes two other instances in which the prosecutor incorrectly stated the law, indicating at one point, for example, that an imbalance of aggravating over mitigating circumstances might "mandate" the death penalty, defendant failed to object to these misstatements, and his failure to do so constitutes waiver of such error on appeal. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). Moreover, the form and extent of counsels' inquiries in the voir dire examination of jurors is within the sound discretion of the trial court. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986). We perceive no abuse of that discretion in permitting the state the wide latitude ordinarily accorded counsel in voir dire examination of jurors. *Id.*

[2] Defendant also contends that the jury selected was slanted in favor of the death penalty not only because of the trial court's refusal to charge the venire with defendant's proffered instruction, but also because of questions the court permitted the prosecutor to ask the venire without allowing similar latitude to questions posed by defendant's counsel. In so contending, defendant unjustifiably "seeks to invade the discretionary power of the trial judge's duty to supervise and control the course of the trial." *State v. Adcock*, 310 N.C. 1, 11, 310 S.E.2d 587, 593-94 (1984). The record reflects no gross imbalance in the trial court's responses to defendant's inquiries as opposed to those of the prosecutor. More notable is the fact that the prosecutor objected more frequently to defendant's inquiries, drawing rulings from the bench, whereas defendant seized fewer opportunities to object, failing to alert the trial court to errors of which he now complains. *See State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983). Again, there was no abuse of the broad discretion allowed the trial court in supervising jury selection, *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), including that governing the inquiries of counsel. *Johnson*, 317 N.C. 343, 346 S.E.2d 596.

[3] Defendant also assigns error in the process of jury selection to a private conversation between the trial court and a juror. The juror responded to the trial court's question whether any problems had developed with any of the jurors, and she was consequently invited to the court's chambers. The trial court later conducted an in camera hearing in the presence of counsel and the court reporter. Defendant contends that his absence from this "reopened voir dire" entitles him to a new trial because of his right to be present at every stage of his trial, as guaranteed by article I, section 23 of the Constitution of North Carolina and the sixth amendment to the Constitution of the United States. *See State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987).

Although defendant failed to object at the hearing, excepting only to the ultimate removal of the juror from the panel, this Court has held that the right of an accused to be present at every stage of his trial upon an indictment charging him with a capital felony is not waivable. *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969).

It is clearly error for the trial court to communicate with a juror in chambers and in the absence of the defendant, counsel, or a court reporter. *Payne*, 320 N.C. 138, 357 S.E.2d 612. However, not every violation of a constitutional right is prejudicial, and in this case the error was harmless beyond a reasonable doubt. The record of the in camera hearing reflects the benign substance of the conversation—the juror's growing unease with her ability to impose the death penalty. There being "no indication of record to the contrary, we must assume that the trial court caused the record to speak the complete truth in this regard." *Payne*, 320 N.C. at 139, 357 S.E.2d at 612. Moreover, the juror was thereafter promptly and properly removed for cause, obviating the possibility that anything said to her privately by the trial court might infect the jury as a whole. This action was proper under North Carolina law, which authorizes the trial court to remove an impaneled juror "before final submission of the case to the jury" if that juror "becomes incapacitated or disqualified, or is discharged for any other reason." N.C.G.S. § 15A-1215(a)(1988). Such decisions relating to the competency and service of jurors are within the broad discretion of the trial court and are not reviewable on appeal absent a showing of abuse of discretion or legal error. *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988). It is within the trial court's discretion to reopen examination of a juror previously accepted by both par-

ties. *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985). In *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986), this Court specifically found no abuse of the trial court's discretion nor any impropriety in excusing for cause a juror who, like the juror here, belatedly discovered she would be unable or unwilling to follow the law and her oath with regard to imposing the death penalty. Likewise, we find no abuse of discretion or impropriety in the trial court's action in this case.

[4] Defendant next assigns error to the admission of testimony from Billie Ann Woods, who was called by the state to describe defendant's conduct towards her the night of 13 December 1974, nearly ten years before this trial. This incident led to a conviction for assault on a female, a fact that defendant's own counsel later raised on direct examination of defendant himself. By doing so defendant cannot be heard to complain about the admission of the testimony recounting the events leading to that conviction. *See State v. Wright*, 282 N.C. 364, 192 S.E.2d 818 (1972). We elect nonetheless to appraise the merits of the assigned error because of our practice to review death cases scrupulously in order to show affirmatively that all proper safeguards have been afforded the defendant. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L.Ed.2d 180 (1989).

The trial court prefaced the bulk of Ms. Woods' testimony with a warning to the jury that the witness' testimony was to be received and considered only for the purpose of showing motive, intent, and scienter on the part of defendant.

Ms. Woods testified that at the time of the incident she was sixteen years old. She related that on the way from her parents' apartment to the store she was approached by defendant, that he grabbed her from behind by the arm and told her she was "going to the woods" with him. She responded, "No, I ain't." Defendant insisted, "You're going to give me some," and threw her onto the ground, straddled her, put his hands around her throat, and started choking her. Ms. Woods testified that she started saying "I will, I'll go," but defendant continued to choke her, saying, "No, I'm just going to kill you, now." As long as she could breathe, Ms. Woods recounted, she told defendant she would accompany him to the woods, hoping that he would believe her to be sincere and let go of her. The choking continued, however, and she started to lose her breath and was convinced she was dying. Fortuitously,

a friend of her sister's walked by and spoke to defendant, prompting him to jump up and say to Ms. Woods, "What's wrong with you, girl, are you crazy?" As she ran towards the store, Ms. Woods heard defendant yell after her, "Give me my money back!" She testified that she had not that night or any other time received money from defendant.

Evidence of prior offenses by a defendant is "inadmissible on the issue of guilt if its *only* relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged." *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986). This rule is codified as N.C.R. Evid. 404(b). Such evidence is admissible, however, if it tends to prove any other relevant fact, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b)(1988). The exception is grounded in the logic of inferring from the sequence of events comprising an offense or from its particular features that the same person committed the offense more than once, aware on at least the latter occasion of its consequences. When the state seeks to introduce evidence of prior, similar sex offenses by a defendant, this Court has been markedly liberal in admitting such evidence for the purposes cited in Rule 404(b). *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987).

The use of evidence as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity. When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

> Evidence of other crimes must be connected by point of time and circumstance. Through this commonality, proof of one act may reasonably prove a second. However, the passage of time between the commission of the two acts slowly erodes the commonality between them. . . . Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

State v. Jones, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). Attenuated by time, the pertinence of evidence of prior offenses attaches to the defendant's character rather than to the offense for which he is on trial. In other words, remoteness in time tends to diminish the probative value of the evidence and enhance its tendency to prejudice.

Defendant's attack on Ms. Woods ten years before his trial for the murder of Joann Brockman was characterized by an apparent attempted rape, the initiation of manual strangulation, and defendant's stated intent to kill Ms. Woods. Medical evidence established that Joann Brockman had been raped and killed by manual strangulation. These similarities support the relevancy of Ms. Woods' testimony as to the prior offense.

Whether ten years' remoteness so erodes the commonalities between the two offenses that the probative value of Ms. Woods' testimony is outweighed by its tendency to prejudice is arguable. Assuming without deciding that it was error to admit that testimony, there is no reasonable possibility that, had the error not been committed, a different result would have been reached at defendant's trial. N.C.G.S. § 15A-1443(a)(1988). Defendant's statement to police officers that he hit Joann with a stick, felling her, and that he had intercourse with her while her breathing was labored and although she was no longer moving is overwhelming evidence of his guilt. Any prejudicial impact of Ms. Woods' testimony concerning defendant's attempt at a similar assault upon her would have been wholly eclipsed by the damning nature of defendant's own words.

[5] Defendant also takes issue with that portion of the trial court's final instructions in which the jury was charged that Billie Ann Woods' testimony could be considered to show defendant's motive for the murder of Joann Brockman, his intent to commit that murder, and his scienter regarding the consequences of his attack on her. Because defendant failed to object to this alleged error, this Court's review is guided by the "plain error" analysis, whereby the burden on defendant to show prejudice is even greater than that imposed by N.C.G.S. § 15A-1443. *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986). Again, assuming error arguendo, defendant's failure to show a reasonable possibility that, had Ms. Woods' testimony not been admitted, a different result would have been reached at his

trial implies, a fortiori, that he failed to bear the even heavier burden imposed by the test for plain error.

[6] Defendant also assigns error to the trial court's failure to sustain his objections to portions of the prosecutor's closing argument concerning Ms. Woods' testimony. Defendant contends that, despite the prosecutor's repeated emphasis on similar motive, intent, and *modus operandi* exhibited in the assault on Ms. Woods and in the evidence concerning the circumstances of Joann Brockman's death, the "tenor" of the prosecutor's argument suggested an emphasis on character.

We decline defendant's invitation to read between the lines of the prosecutor's argument and so to indulge in speculative analysis of its stylistic subtleties. Our scrutiny of the passages to which defendant objected reveals no such excesses as arguing facts not in evidence or uttering remarks calculated to mislead or prejudice the jury. *See, e.g., State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). The record reveals that the prosecutor took no liberties falling improperly outside the wide latitude allowed parties in closing argument. *State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980). Defendant's assignments of error regarding this issue are thus overruled.

[7] Defendant next asserts it was error for the trial court to deny his motion to dismiss the charge of murder in the first degree because the evidence was insufficient to prove a premeditated and deliberate killing. In ruling on a motion to dismiss, both the trial court and the reviewing court must consider the evidence 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. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Stephens*, 244 N.C. 380, 93 S.E.2d 431 (1956). If there is any evidence that tends to prove the fact in issue or that reasonably supports a logical and legitimate deduction as to the existence of that fact and does not merely raise a suspicion or conjecture regarding it, then it is proper to submit the case to the jury. *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930). For purposes of appellate review, if the record discloses substantial evidence of all material elements constituting the offense for which the accused was tried, then the trial court's ruling is to be affirmed. " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *State v. Corn*, 303 N.C. 293, 296, 278 S.E.2d 221, 223 (1981).

In the case of murder in the first degree based upon premeditation and deliberation, there must be substantial evidence before the jury from which it could determine that the defendant killed his victim with malice, premeditation, and deliberation. *Id.* Premeditation and deliberation ordinarily must be proved by circumstantial evidence, such as the absence of provocation by the victim, the conduct of the defendant before and after the killing, ill will or other difficulties between the parties, or evidence that the killing was done in a brutal manner. *Bullard*, 312 N.C. 129, 322 S.E.2d 370.

Defendant argues that no such circumstantial evidence of premeditation and deliberation existed, suggesting that he "simply acted violently during the passions of sexual activity in a sudden turn of events." Defendant tenders the viewpoint that: 1) Joann's calling for help was insufficient circumstantial evidence of ill will, and Curtis McKinnon's testimony regarding defendant's and Joann's raised voices did not prove argument or bad feeling; 2) the force used, while lethal, was not grossly excessive, it being somehow less brutal to die during the act of intercourse than pursuant to some other murderous scheme; 3) being strangled while engaged in intercourse does not establish premeditation; 4) deliberation is lacking if the victim is killed in the midst of intercourse, a passion-filled event; and 5) neither the opportunity nor the ability to reflect or deliberate was present under the circumstances of this amorous encounter.

Defendant's perception of the evidence strains its facts. Together, defendant's own statements and the testimony of Curtis McKinnon amply established the fact that defendant and Joann were arguing vehemently shortly before her death. Defendant admitted striking her with a stick as thick as his wrist bringing her to the ground, then dragging her so forcefully to another spot that she lost her shoes and her wig. Defendant admitted that he told Joann to take her clothes off and that she complied out of fear. He admitted he then hit her in the head with the stick so hard that she no longer moved. He positioned her body in order to force intercourse with her, heard her labored breathing, and stopped only when it "didn't feel right," and it occurred to him that she was dying. Medical evidence established that Joann died of manual strangulation in the midst of sexual intercourse. Although defendant's first statement did not indicate that it was his own hands that were causing Joann to be "breathing kind of hard," there is ample evidence from which the jury could infer not only

that fact but the specific intent to kill that accompanied it. If these acts of brutality were not enough circumstantially tending to prove a premeditated and deliberate killing, then defendant's callous and calculating acts of scattering dirt and leaves on Joann's body, of hiding Joann's jeans, and of going home to bed rather than seeking medical assistance, surely do. This and other substantial evidence was before the jury showing the elements of murder in the first degree and that defendant committed that murder, and the trial court emphatically did not err in denying defendant's motion to dismiss the underlying charge.

[8] Defendant next contends that after a voir dire the trial court erred in refusing to admit certain documentary and testimonial evidence. This included a letter received by defendant's sister and testimony by defendant that when he first met Joann Brockman in May 1983 he heard her say to her mother that she was going to get killed if "the people" ever caught up with her. This testimony was uncorroborated, either by Joann's mother or by her aunt, who, according to defendant, was present when the remark was made. The trial court disallowed this testimony as irrelevant. The contents of the letter were not admitted into evidence. The letter was sealed and preserved for purposes of this appeal.

Evidence having "*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is considered relevant. *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988); N.C.G.S. § 8C-1, Rule 401 (1988). However, hearsay evidence, even if relevant, is inadmissible unless it is covered by statutory exception, *see* N.C.G.S. § 8C-1, Rule 802 (1988), or unless its exclusion deprives a defendant of "a trial in accord with fundamental standards of due process." *State v. Barts*, 321 N.C. 170, 180, 362 S.E.2d 235, 240 (1987).

The letter's anonymous author stated that defendant was not responsible for Joann Brockman's death, but that her death had been the result of a "contract" being placed on her life because she had not paid declarant a $5.00 debt. Both the victim's statement to her mother and the letter received by defendant's sister were hearsay, offered by a person other than the declarant to prove the truth of the matter asserted—to wit, that it was not defendant but another who killed Joann Brockman. N.C.G.S. § 8C-1, Rule 801 (1988). Neither the statement nor the letter fits into any category

of exception under Rule 803 or Rule 804(b). Although defendant suggests that Joann's May remark is admissible under the Rule 803(3) exception as a "then existing state of mind, emotion, sensation, or physical condition," such a remark, if uttered, is plainly a "statement of . . . belief to prove the fact . . . believed," which is specifically excluded from that exception. *Id.* Furthermore, five months' remoteness from the time of her death significantly erodes the relevance of any remark concerning the declarant's state of mind.

The letter does not come within the exception of Rule 804. The writer of the anonymous letter does not come within the statutory definition of being "unavailable as a witness." There is no evidence in the record to support a finding that the writer ("declarant") was exempted from testifying; or refused to testify; or had a lack of memory; or was dead or physically or mentally unable to testify; or was absent from the hearing and defendant was unable to procure his attendance or testimony by process or other reasonable means. N.C.G.S. § 8C-1, Rule 804(a) (1988). This is true because the writer is unknown, and therefore there is no evidence as to his or her availability as a witness. The defendant, as the proponent of the evidence, bears the burden of satisfying the requirements of unavailability under the rule. *See State v. Highsmith*, 74 N.C. App. 96, 327 S.E.2d 628, *disc. rev. denied*, 314 N.C. 119, 332 S.E.2d 486 (1985).

Further, the anonymous letter is not a declaration against interest because the declarant is unknown. In order for a statement to be a declaration against interest, the statement must expose the declarant to criminal liability. Rule 804(b)(3) (1988). Where the declarant conceals or hides his identity the statement does not tend to expose him to criminal liability because he is unknown. Under circumstances where the declarant is unknown, the circumstantial guarantee of reliability is absent because persons may make untrue statements that would be damaging to themselves where they conceal their identity. It is only where the identity of the declarant is revealed in the statement that the guarantee of reliability arises. The statement must actually subject the declarant to criminal liability. *State v. Haywood*, 295 N.C. 709, 249 S.E.2d 429 (1978); *State v. Singleton*, 85 N.C. App. 123, 354 S.E.2d 259, *cert. denied*, 320 N.C. 516, 358 S.E.2d 530 (1987). Without knowledge of the identity of the declarant, the statement does not subject declarant to criminal liability.

The rule in North Carolina also requires that the declarant must have understood the damaging potential of his statement. *State v. Haywood*, 295 N.C. 709, 249 S.E.2d 429 (1978). Here, it is plain that the declarant actually believed that the anonymity of the statement shielded him or her from criminal liability. This is evidenced by this excerpt from the statement: ". . . I can not leave no name and if I do it will mess me up . . . ." Thus, this requirement of the hearsay exception has not been fulfilled, and the statement is inadmissible for this reason.

Even though a written statement may be otherwise admissible as a declaration against interest, it cannot be admitted as evidence until it has been properly authenticated. *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 354 S.E.2d 767 (1987); *see also Guynn v. Corpus Christi Bank and Trust*, 589 S.W.2d 764 (Tex. Civ. App. 1979) (telexes were not authenticated, so not admissible as declaration against interest). Here, there is no showing that the letter was properly authenticated, and indeed, could not be so long as the declarant remained unknown. To authenticate a document as a declaration against interest, it must be shown that the person who executed it was the alleged declarant. 5 Wigmore, *Evidence* § 1472 (Chadbourn rev. 1974). Without proper authentication, the letter cannot be admitted under Rule 804.

This letter, a statement theoretically tending to expose its anonymous declarant to criminal liability, is not admissible unless corroborating circumstances clearly indicate its trustworthiness. N.C.G.S. § 8C-1, Rule 804(b)(3) (1988). Such indicia must include, for example, "the potential of actually jeopardizing the personal liberty of the declarant at the time it was made and [the declarant's comprehending] the damaging potential of his statement," evidence of voluntariness, and "facts and circumstances surrounding the commission of the crime and the making of the declaration . . . corroborat[ing] the declaration and indicat[ing] the probability of trustworthiness." *State v. Haywood*, 295 N.C. 709, 730, 249 S.E.2d 429, 442 (1978). These are absent.

Mention of the victim's May remark occurred only in defendant's testimony. The letter similarly stands isolated from any other evidence that might vouch for its trustworthiness. Only the letter tends to corroborate the remark and vice versa. Such bootstrapping does not provide an adequate guarantee of the trustworthiness of either piece of evidence. Without some other independent, nonhear-

say indication of the trustworthiness of either the remark or the letter, each was properly barred as inadmissible hearsay. The trial court's proper application of the hearsay rule bore no affront to the "ends of justice" under these circumstances. *Cf. Barts*, 321 N.C. 170, 180, 362 S.E.2d 235, 240 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L.Ed.2d 297, 313 (1973)).

[9] Defendant complains in addition that the testimony of a clinical psychologist concerning the results of an I.Q. test he had administered to defendant was erroneously excluded, although this testimony was in fact belatedly admitted. The objective of introducing this testimony was "to show that as [defendant] is talked to and he makes responses [as] he is questioned, that his intellectual capacity would need to be considered to gauge his responses by." Defendant explains on appeal that evidence as to his I.Q. would have affected the jury's understanding of his responses to interrogation leading to his inculpatory statements. Further, he urges, such testimony was admissible under *State v. Shank*, 322 N.C. 243, 367 S.E.2d 639 (1988), as evidence relevant to the jury's determination of whether defendant was capable of premeditation and deliberation.

Although the psychologist's testimony was excluded when first proffered, it was admitted in its entirety subsequent to defendant's own testimony. Under such circumstances defendant's assignment of error is baseless. Even if it had been error initially to exclude the psychiatrist's testimony, this was subsequently cured by its admission, and defendant makes no argument that he was in the least prejudiced by the delay. *See* N.C.G.S. § 15A-1443(a) (1988).

[10] Defendant's next assignments of error concern the interpretation and application of North Carolina Rule of Evidence 609, which governs the use of evidence of a criminal conviction for purposes of impeachment. The rule provides, *inter alia*, that evidence that the witness has been convicted of a crime punishable by more than sixty days confinement is admissible for purposes of attacking his credibility unless a period of more than ten years has elapsed since the date of the conviction or of the release from incarceration whichever occurs later. The use of evidence of convictions of more than ten years is permitted, but only when "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." N.C.G.S. § 8C-1, Rule 609(b) (1988). An analysis of the legislative history behind the identical Federal Rule 609(b)

reveals that it rests upon a rebuttable presumption that prior convictions more than ten years old tend to be more prejudicial to a defendant's defense than probative of his general character for truthfulness, and that they should therefore not be admitted into evidence. *State v. Blankenship*, 89 N.C. App. 465, 366 S.E.2d 509 (1988).

When the state asked defendant on cross-examination about having been tried and convicted of assault on a female with intent to commit rape in 1957, the trial court dismissed the jury and conducted a hearing *ex mero motu*. The court analyzed a number of convictions antedating the time of defendant's trial by a period exceeding ten years and found, in accord with N.C.R. Evid. Rule 609(b),[1] that the state had properly notified defendant of its intent to cross-examine him about these offenses. The court disallowed cross-examination regarding a larceny and an escape in 1961, but, expressing its conclusion in the language of Rule 609, it permitted the state to proceed with questions concerning the two other convictions:

> I do find that the assault on a female with intent to commit rape in 1957, and the assault on a female, 1967, have a sufficient connection, supported by facts and circumstances, to outweigh any prejudicial effect.

The trial court consequently permitted the state to cross-examine defendant regarding these two dated assaults, as well as regarding a number of more recent convictions.

The trial court's determination that defendant's convictions for assault on a female and assault on a female with intent to commit rape were admissible was erroneous. Specific facts and circumstances supporting the probative value of this evidence are neither apparent from the record nor recounted by the trial court. The trial court failed to comply with Rule 609 by identifying any fact or circumstance indicating that this evidence was probative of defendant's credibility.

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1. The state does not argue this evidence might have been admissible under Rule 404(b). In *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), this Court analyzed similar evidence under both 608(b) and 404(b) because it was not apparent under which rule the trial court had admitted the evidence of prior convictions, and because the state argued both in the alternative. This case is distinguishable because the trial court's analysis of the admissibility of the convictions clearly tracks Rule 609 and because the state fails to argue admissibility under 404(b).

Defendant failed to object either to the trial court's conclusion or to the introduction of this evidence in the context of the state's cross-examination. Failure to object as required by N.C.R. App. P. 10(b)(1) constitutes waiver of the right to assert error on appeal. *E.g., State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304. Even under appellate review under this Court's duty to see justice done, *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (Martin, J., concurring), or reviewed as "plain error," *Black*, 308 N.C. 736, 303 S.E.2d 804, the evidence introduced precludes any possibility of prejudice. Given the evidentiary weight of guilt borne in defendant's statement alone, there is no possibility the improper admission of the two convictions of assaults on females could have prejudiced defendant in any way, least of all in the jury's verdict. *See* N.C.G.S. § 15A-1443(b) (1988); *Black*, 308 N.C. 736, 303 S.E.2d 804. Defendant's assignments of error with regard to this issue are without merit.

Three issues raised by defendant with regard to the guilt-innocence phase of his trial concern alleged errors in the trial court's final charge to the jury. Since defendant objected to none of these instances at trial, this Court must consequently review the alleged errors under the "plain error" standard of *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378-79 (1983), by which defendant must convince the appellate court that absent the error, the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80.

[11] The first of these alleged errors in the jury charge was the trial court's singling out the testimony of defendant and his sister when it delivered its charge on prior inconsistent statements. Defendant admits the accuracy of applying this charge to these two witnesses, but asserts that the trial court's omitting similar mention of two witnesses for the prosecution constituted an impermissible expression of judicial opinion in violation of N.C.G.S. §§ 15A-1222 and 1232 (1988). Defendant perceives an inconsistency worthy of instruction in the testimony of Alice McLaughlin, who testified that she heard Joann Brockman screaming for help, but who failed to tell this to the officer who later testified in corroboration of her testimony. Defendant also contends that variations in David Moore's estimations of the time he left for work on the day Joann Brockman was killed required the trial court to signal an inconsistency in his prior statement to officers.

The trial court instructed the jury that prior statements of certain named witnesses had been received as corroboration tending to show that the statements were consistent with their testimony at trial. The court directed the jury to assess these prior statements not for their truth but for their bearing on the witness' credibility. The court then gave a similar instruction regarding prior inconsistent statements:

> Evidence has been received tending to show that at an earlier time the witness, Roscoe Artis, and the witness Pauline Smith, respectively, each made a statement which conflicts with his or her respective testimony at this trial.
>
> You must not consider such earlier statement as evidence of the truth of what was said at that earlier time, because it was not made under oath in this trial. If you believe that such earlier statement was made and that it does conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve his or her testimony at this trial.

Although the trial court is not required to state, recapitulate, or summarize the evidence or to explain the application of law to the evidence, N.C.G.S. § 15A-1232 (1988), the court is free to do so in its discretion. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986). However, in so doing, the trial court must be vigilant not to express an opinion as to the quality of the evidence or as to the credibility of a witness: "No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility." *State v. Auston*, 223 N.C. 203, 205, 25 S.E.2d 613, 614 (1943).

The words of the trial court's charge reveal clearly that, rather than expressing an opinion regarding whether the prior statements of defendant or Pauline Smith conflicted with their testimony, the court admonished the jury to determine whether the prior statement had been made at all and, if so, whether it conflicted with the testimony presented at trial. This was neither a violation of N.C.G.S. § 15A-1232 nor otherwise error.

Moreover, the trial court properly chose not to include mention of these alleged inconsistencies in its charge to the jury on prior inconsistent statements. First, the officer's testimony corroborating

that of Alice McLaughlin did not purport to be comprehensive: he reiterated no excerpt from Ms. McLaughlin's prior statement that impeached her testimony, and made no reference whatsoever to her having heard or not heard cries for help. *Cf. State v. Mack*, 282 N.C. 334, 193 S.E.2d 71 (1972) (officer testified that witness' earlier statement failed to include salient fact to which witness testified). Second, except for a forty-five minute discrepancy concerning his estimated time of departure, David Moore's prior statement and his testimony about the hours of his waking, departure, and return were stated as approximations. Such variations were *de minimus* and immaterial, and the trial court's omission of them from its cited examples of prior inconsistent statements was proper.

[12] Finally, defendant contends that the trial court erred in instructing the jury that premeditation and deliberation could be inferred from proof of such circumstances as lack of provocation by the victim, the defendant's conduct before and after the killing, the use of grossly excessive force, the infliction of lethal wounds after the victim is felled, cruel or vicious circumstances of the killing, or the means by which the killing was done. Defendant asserts that no evidence was presented at trial supporting these circumstances, and that the instructions were unsupported by facts presented by a reasonable view of the evidence. *See State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975); *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973). Defendant contends that, despite his failure to object, such instructions were prejudicial and constitute reversible error.

We emphatically disagree. The trial court's statement of the law was an accurate reiteration of circumstances identified by this Court in, *e.g.*, *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L.Ed.2d 117, *reh'g denied*, 464 U.S. 1004, 78 L.Ed.2d 704 (1983); *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484 (1969). There was evidence supporting not one, but all of these circumstances from which the jury could have inferred that Joann Brockman's murder was premeditated and deliberated. First, although defendant testified that he and Joann had argued about a rival in Lumberton, the words defendant testified had passed between them can by no means be said to have been adequate to provoke a killing in the heat of passion or one motivated by any other mens rea less inculpatory than premeditation and deliberation. *See, e.g., State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988). Second, defendant's own description of his conduct before

the killing indicated an assault, a rape, and, after Joann's death, an attempt to camouflage the body and an unconcerned walk back to his sister's house for a nap. Third, death by strangulation has been characterized by this Court in *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986), as vicious and brutal, and it is ample evidence of the use of grossly excessive force, as a matter of law. Defendant testified in addition that Joann had been felled by three blows from a broad stick, dragged into the woods and positioned for a rape. The evidence tends to show—and inferences from defendant's confession indicate—that the lethal act, strangulation, occurred not only after she had been felled, but while she was being raped.

We conclude that substantial evidence supports all the circumstances submitted by the trial court to the jury indicating a killing effected after premeditation and deliberation. In the guilt-innocence phase of his trial, defendant received a fair trial free from prejudicial error.

SENTENCING PHASE

Defendant asserts that the trial court also committed numerous errors in the sentencing phase of his trial, among them that the court failed to instruct the jury as to two statutory mitigating circumstances. Defendant correctly notes the mandate of N.C.G.S. § 15A-2000(b) that the trial judge presiding over a capital case submit a statutory mitigating circumstance to the jury for its consideration when evidence has been presented which "would support a reasonable finding" of that circumstance. *State v. Lloyd*, 321 N.C. 301, 312, 364 S.E.2d 316, 323 (1988). Even though a defendant fails to offer evidence to support the existence of a mitigating circumstance, "when the State offers or elicits evidence from which the jury could reasonably infer that the circumstance exists[,]" it must be offered to the jury for its consideration. *State v. Stokes*, 308 N.C. 634, 652, 304 S.E.2d 184, 195-96 (1983).

[13] Defendant first contends that evidence of his mental retardation supported the impaired capacity statutory mitigating circumstance of N.C.G.S. § 15A-2000(f)(6). Defendant presented evidence during the sentencing phase proceedings that he is borderline mentally retarded, with a full scale I.Q. of 67. Based upon this evidence, and upon evidence of intoxication at the time of the murder, he requested an instruction directing the jury to consider whether defendant's capacity to appreciate the criminality of his conduct

or to conform his conduct to the requirements of the law was impaired.

The trial judge gave a portion of the requested instruction, limiting consideration of the statutory circumstance to the evidence of intoxication:

> You would find this mitigating circumstance if you find that Roscoe Artis, on the evening of October 21, 1983, drank three beers and on the morning of October 22, 1983, before the killing, drank two swallows of Peppermint Schnapps, and that given Roscoe Artis' reaction to the Peppermint Schnapps that he drank, someone must have put something in it, and that this impaired his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law.

The trial judge did not instruct the jury to consider defendant's mental retardation with respect to the statutory mitigating circumstance. Instead she submitted a separate, nonstatutory circumstance, instructing the jury to "consider whether Roscoe Artis' bordering on mild mental retardation, with a full scale intelligence quotient of sixty-seven, is a mitigating factor."

Defendant argues that the trial judge's failure to relate his mental retardation specifically to the statutory mitigating circumstance precluded the jury from adequate consideration of the mitigating evidence, thereby violating his rights to due process of law and to freedom from cruel and unusual punishment. We find no merit to this assertion.

Dan Jordan, clinical psychologist at the Southeastern Regional Mental Health Center, testified on direct examination that defendant had a full scale I.Q. score of 67, indicating upper-range mild retardation. He noted that defendant had no brain damage and could read at a fifth-grade level, add and subtract, and make simple change. He further testified that under normal circumstances individuals at defendant's level of intellectual functioning are capable of "social and vocational adequacies" and are generally considered to be responsible for their behavior.

On cross-examination Mr. Jordan stated that defendant could hold a job, be issued a driver's license, and generally "cope with life." He reiterated his earlier evaluation of defendant's capabilities as follows:

Q. . . . Now, you are not saying that because of his I.Q., he did not know the difference between right and wrong; are you?

A. I didn't make any statement about that.

Q. But you are not saying that, are you? I'm just trying to clarify it, now.

A. No. I said he was generally responsible for his behavior.

Q. Okay. Did you say that—you may have already testified to this—persons functioning at this level are capable of social and vocational adequacies under normal life's circumstances?

A. Yes, sir.

Q. Okay. And that unless other wise impaired, they are generally considered to be responsible for their behavior. That is what you're talking about; isn't it?

A. That's right.

Although Mr. Jordan's testimony presented some evidence of defendant's mild retardation, it failed to suggest any link between this condition and defendant's inability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. To the contrary, all of the evidence tended to show that persons suffering from upper-range mild retardation are generally responsible for their own actions. While bare evidence of a low I.Q. can justify the submission of a properly worded nonstatutory mitigating circumstance, *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), *cert. denied*, 459 U.S. 1056, 74 L.Ed.2d 622, *reh'g denied*, 459 U.S. 1189, 74 L.Ed.2d 1031 (1983), it is simply insufficient, without more, to require an instruction relating this evidence to the "impaired capacity" statutory mitigating circumstance.

For this reason, defendant's reliance on *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184, is misplaced. In *Stokes* we awarded the defendant a new sentencing hearing based on the trial court's failure to submit certain mitigating circumstances, including the impaired capacity circumstance of N.C.G.S. § 15A-2000(f)(6). In *Stokes*, however, the evidence presented in support of the impaired capacity circumstance went beyond mere evidence of the defendant's I.Q. Testimony tended to show not only that Stokes had an I.Q. of

63 and was mildly retarded, but also that he had a long history of treatment for mental problems and had been diagnosed as suffering from an antisocial disorder. Such evidence was far more substantial than that presented here. This assignment of error is overruled.

[14] Defendant also assigns error in the sentencing phase of his trial to the court's failure to instruct the jury on the statutory mitigating circumstance that defendant had no significant prior criminal activity.

In *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988), this Court noted that it is the trial court's duty "to determine whether a rational jury could conclude that defendant had no *significant* history of prior criminal activity." Then, once the court has so decided, the mitigating circumstance is submitted to the jury, which must decide for itself whether the evidence is sufficient to constitute a significant history of criminal activity and thus preclude a finding of that circumstance. *Id.* In the context of N.C.G.S. § 15A-2000(f)(1),

> "[S]ignificant" means that the activity is likely to have influence or effect upon the determination by the jury of its recommended sentence. . . . In other words, the prior criminal activity could be found by the jury to be completely irrelevant to the issue of sentencing. The prior activity of the defendant could be found by the jury to be completely unworthy of consideration in arriving at its decision. There could be evidence of prior criminal activity in one case that would have no influence or effect on the jury's verdict, which, in another case, could be the pivotal evidence.

Wilson, 322 N.C. 117, 147, 367 S.E.2d 589, 609 (Martin, J., concurring). Thus, it is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists. *See, e.g., Wilson*, 322 N.C. 117, 367 S.E.2d 589 (error not to submit mitigating circumstance where prior criminal activity in evidence was felony conviction for kidnapping of defendant's former wife when defendant was twenty years old and involvement in theft and drugs); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (two twenty-year-old felonies properly submitted under N.C.G.S. § 15A-2000(f)(1)); *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) (submission of this mitigating cir-

cumstance to the jury proper, notwithstanding a record showing eighteen felony convictions, all acquired during defendant's youth).

Defendant presented no evidence of his own supporting this mitigating circumstance, but his voir dire examination by the prosecutor revealed a number of past convictions. These included assault on a female with intent to commit rape in 1957, assault on a female in 1967, assault on a female in 1974, escape and larceny of an automobile in 1961, misdemeanor larceny in 1974, driving while license revoked in 1974, 1975, and 1979, driving while under the influence in 1974 and 1979, driving with no operator's license in 1981, and assault with a deadly weapon in 1975. Before the jury, defendant admitted that he had been convicted only of the 1957 and 1967 assaults. He denied the assault on Billie Ann Woods leading to the 1974 conviction and denied any memory of the other convictions. The trial court had barred the state's proof of all but the 1957 and 1967 assault convictions. Defendant suggests that these latter convictions would never have come to the attention of the jury, and that the two assault convictions, standing alone, would have supported a jury's finding in mitigation that defendant had no significant prior criminal activity. (This argument does not include mention of the third, most recent assault on a female, about which the victim, Billie Ann Woods, testified.)

Defendant's position is untenable for three reasons. First, the trial court was aware of the plethora of defendant's past convictions—including that arising from the assault on Billie Ann Woods—in making the initial determination whether "a rational jury could conclude that defendant had no *significant* history of prior criminal activity." *Wilson*, 322 N.C. at 143, 367 S.E.2d at 604. The court properly determined that a rational jury would conclude otherwise not only because it was aware that the state held proof of all these convictions, but also because of the nature of the two assault convictions which defendant had acknowledged.

Second, the propriety of the trial court's determination that a rational jury would not have found that defendant lacked a significant prior history of criminal activity is revealed by hindsight; in other words, defendant suffered no prejudice by virtue of the trial court's action. *See* N.C.G.S. § 15A-1443(a)(1988). In considering its recommendation for punishment the jury found three aggravating circumstances. Among these was the finding that defendant had been previously convicted of a felony involving violence to the

person. Given the fact that evidence in the record reflected not one but three assaults on females, it is unimaginable that, despite this finding and the evidence underlying it, the same jury might simultaneously have found that aggravating circumstance to be so irrelevant that it could reasonably infer the existence of the mitigating circumstance in N.C.G.S. § 15A-2000(f)(1).

Third, the statute mandates that a mitigating circumstance be submitted to the jury for its consideration when it "may be supported by the evidence." N.C.G.S. § 15A-2000(b)(1988). All the evidence must be taken into account by the trial court—not just that which the court has ruled admissible for other purposes. However, a defendant cannot hold his breath throughout the trial in hopes that prior convictions never emerge into evidentiary light, then point to the deceptively incomplete record as support for the trial court's ostensible duty to submit this mitigating circumstance for the jury's consideration. The right to engage in such subterfuge is required neither by defendant's right to due process nor by his right to be free from cruel and unusual punishment. *Cf. Wilson*, 322 N.C. 117, 367 S.E.2d 589. "[T]he legislature did not intend that the State or the defendant be allowed to limit in any way the jury's consideration of . . . statutorily established aggravating and mitigating circumstances." *Lloyd*, 321 N.C. at 312, 364 S.E.2d at 324. This means not only that the trial court must offer for the jury's consideration any mitigating circumstance that the jury might reasonably find supported by the evidence, *id.*, but also that, when the evidence educed at trial appears to support the mitigating circumstance that defendant had no prior significant history of criminal activity, both parties must be given the opportunity to introduce additional evidence supporting or rebutting that circumstance. *See State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989).

[15] Defendant next contends that the trial court erred in submitting to the jury the aggravating circumstance that the murder was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9). We find no merit to this assertion.

We have stated that this aggravating circumstance is appropriate when the level of brutality involved exceeds that normally found in first-degree murders or when the murder in question is conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984); *State v.*

Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). It also arises when the killing demonstrates an unusual depravity of mind on the part of the defendant. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984). We have identified two of the types of murders which meet the above criteria: (1) those that are physically agonizing or otherwise dehumanizing to the victim, and (2) those that are less violent but involve the infliction of psychological torture. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304.

Defendant insists that his crime falls into neither of these categories. He first argues that the evidence was insufficient to support a reasonable conclusion that the murder was physically agonizing or in some other way dehumanizing within the meaning of *Oliver*. He hypothesizes that the victim lost consciousness sometime before her death and therefore would not have felt "whatever pain might have been caused by continued choking."

Defendant clearly misapprehends the applicable standard. In determining if there is sufficient evidence to submit a particular aggravating circumstance to the jury, the judge must consider the evidence in the light most favorable to the *state*. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316. Here the state's evidence tended to show that Joann Brockman was dragged through the woods, beaten repeatedly with a large stick, then strangled during an act of forcible intercourse. When discovered, she had blood on her nose, mouth, clothing, and hands. An autopsy showed that she had suffered a large bruise on the left side of the forehead which was insufficient to cause death. She had a bruise on the middle of her neck and eleven scratches and abrasions on both sides of the neck, ranging from one-quarter of an inch to an inch and a quarter in length. There was bruising and hemorrhaging in the connective tissue surrounding the windpipe, and her lungs were so filled with fluid that they were twice their normal weight. There was blood smeared around the opening to the victim's vagina and blood deep within the vaginal canal.

The pathologist testified that death by manual strangulation is caused by compression of the windpipe and constriction of the blood vessels in the neck which carry blood to the brain so that both the air to the lungs and the blood supply to the brain are shut off. As the heart fails from lack of air, the fluid that is normally pumped through the lungs by the heart accumulates in the air spaces. It takes four to five minutes for a victim of manual strangula-

tion to die. The victim would not necessarily lose consciousness immediately and would suffer pain, particularly in the neck area where the pressure is exerted, during that period of time. Ultimately, the victim would actually drown in his or her own blood and fluids.

We hold that this evidence, when viewed in the light most favorable to the state, was sufficient to support a reasonable inference that the victim remained conscious during her ordeal and suffered great physical pain as, already bloodied and bruised from the beatings, she was raped with sufficient violence to draw blood from her vagina and strangled so forcefully that her neck was repeatedly scratched.

The physical evidence also supports an inference that the murder was especially dehumanizing. The pathologist testified that the victim's dilated vagina was consistent with death during the act of intercourse. When a murder takes place during the perpetration of a violent sexual assault upon the victim, it is unusually humiliating and debasing. We note that in other sexual assault-strangulation cases we have found that the evidence supported submission of the circumstance in N.C.G.S. § 15A-2000(e)(9). *E.g.*, *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979) (defendant strangled his ten-year-old victim with a fish stringer, sexually assaulting him either during or after the killing); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979) (defendant strangled his victim until she lost consciousness, then raped her).

Defendant also argues that the facts of this case do not support a finding that the murder involved the infliction of psychological torture. In this vein, he contends that his case is governed by *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984), and *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393, two gunshot murders in which we deemed the evidence of psychological torture insufficient for submission of the heinous, atrocious or cruel aggravating circumstance. Defendant characterizes the evidence of psychological torture in these cases as much stronger than that in the case at bar. We disagree, and find these authorities to be readily distinguishable.

In *Stanley*, defendant drove back and forth in front of his estranged wife's home, then shot her nine times in rapid succession when she emerged from the house to take a walk. Just before the shooting the victim uttered the words "Please Stan." We noted that the victim, cognizant of defendant's behavior, had not felt

so threatened by his presence in the neighborhood as to remain in the house. She was apparently unaware of any danger up until the moment of the shooting. We held that this evidence did not support an inference that the defendant had psychologically tortured his wife by stalking her prior to the shooting.

In *Moose*, the defendant followed the victim for over a mile, sounding his horn and bumping the victim's car with his pickup truck. When the victim pulled off the road, the defendant pointed a shotgun through the window of the truck for a period of about five seconds before shooting and killing him. Just before the shooting, the victim exclaimed "Oh God, what are they going to do?" We noted that although the evidence showed some amount of apprehension on the part of the victim, there was no evidence that he believed that the ultimate result of the defendant's pursuit would be death. Therefore, an inference that he had suffered psychological torture was unsupported.

Thus, in each case our analysis of the psychological torture issue centered upon the question of whether, prior to the actual killing, the victim was in fear that death was likely to result from the defendant's actions.

Defendant, seeking to equate his case with *Stanley* and *Moose*, opines that there was no evidence to suggest that Joann Brockman experienced fear or suspected that her life was in danger "until the killing was well underway."[2] Defendant's argument misses the mark because he fails to perceive an essential difference between the shooting deaths in *Moose* and *Stanley* and the death by strangulation here. Manual strangulation, by its very nature, may require a continued murderous effort on the part of the assailant for a period of up to four to five minutes. The process is a prolonged one during which the victim's life is quite literally in the hands of the assailant. In the murderer's grasp, the victim is rendered helpless, aware of impending death, but utterly incapable of pre-

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2. We recognize in passing that the state did in fact present evidence of the victim's fear prior to the strangulation. A witness testified that she heard Joann cry for help three times, and defendant's own statement admitted that after he hit her twice with a stick, she obeyed his order to remove her clothes because she was afraid of him. However, for the purposes of this opinion, we assume that defendant's actions *prior* to the strangulation, like the actions of the defendants in *Moose* and *Stanley*, were insufficient to support a reasonable inference that the victim feared imminent death.

venting it. The intimate proximity of the murderer surely adds to the victim's torment, as all possibility of escape appears foreclosed.

Here, the state's evidence, viewed in its most favorable light, tended to show that the victim, though immobilized by several blows to the head and pinned to the ground by defendant's weight, remained conscious as defendant violated her sexually and began the slow process of choking the life out of her with his bare hands. While five minutes may be a short time under most circumstances, when struggling for the breath of life it can be an eternity. A reasonable jury could infer that the victim experienced tremendous anguish and terror during this period of strangulation.

This is not, as defendant suggests, tantamount to a holding that lingering death in itself supports a finding of the aggravating circumstance. "That death is not instantaneous, however, does not alone make a murder especially heinous, atrocious or cruel." *Stanley*, 310 N.C. at 337, 312 S.E.2d at 396. *See, e.g., State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981) (victim of shotgun wound lingered for twelve days; circumstance improperly submitted). Rather, the propriety of submitting this aggravating circumstance must turn upon "the peculiar surrounding facts of the capital offense under consideration." *State v. Pinch*, 306 N.C. at 35, 292 S.E.2d at 228.

Our holding in this case is based upon the unique combination of factors demonstrated by the evidence. When taken as a whole, the evidence of the dehumanizing nature of the crime and of the victim's physical and psychological suffering was sufficient to support submission of this aggravating circumstance to the jury. Under the facts of this case a jury would be permitted, but not compelled, to find that the murder was especially heinous, atrocious or cruel.

[16] Defendant next assigns error to the trial court's instructing the jury with regard to the aggravating circumstance whether 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). The trial court charged that assault on a female with intent to commit rape is by definition such a crime. Defendant asserts that this instruction created an irrebuttable presumption and relieved the state of its burden of proving every essential element of the offense, thus violating defendant's right to due process of law. *See State v. Torain*, 316 N.C. 111, 340 S.E.2d 465, *cert. denied*, 479 U.S. 836, 93 L.Ed.2d 77 (1986); *Francis v. Franklin*, 471 U.S. 307, 85 L.Ed.2d 344 (1985). In addition, defendant perceives this

instruction as an impermissible expression of the trial court's opinion on a question of fact or its proof in violation of N.C.G.S. §§ 15A-1222 and 1232.

Defendant failed to object at trial. We conclude that the challenged instruction did not constitute error. *See Torain*, 316 N.C. 111, 340 S.E.2d 465.

We note preliminarily that it is not necessary to show that the use or threat of violence is an *element* of a prior felony in order for a prior felony to be used in support of this aggravating circumstance. As this Court remarked in *State v. McDougall*, 308 N.C. 1, 18, 301 S.E.2d 308, 319, *cert. denied*, 464 U.S. 865, 78 L.Ed.2d 173 (1983), the legislature's selection of the word " 'involving' . . . indicate[d] an interpretation much more expansive than one restricting the jury to consider only felonies having the use or threat of violence to the person as an element." Hence, in order to substantiate this aggravating circumstance, it is enough to cite a prior felony in which the commission of the felony simply *involved* use or threat of violence.

There can be no question, however, that the use or threat of violence is among the elements of assault on a female with intent to commit rape. This Court has flatly stated that "rape is a felony which has as an element the 'use or threat of violence to the person.' " *Id.* Rape, vaginal intercourse with another person by force and against the victim's will, N.C.G.S. § 14-27.2 (1986), is an act of violence by any definition, and it is a crime of violence as a matter of law.

Furthermore, assault also has as an element the use or threat of violence to the person. "[T]here are two rules under which a person may be prosecuted for assault in North Carolina," *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967), and violence is an element of the offense under either rule. The common law offense of assault is "an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm." *Id.* Alternatively, assault may be proved without reference to the intent of the perpetrator where there is a "show of violence accompanied by reasonable apprehension of immediate bodily harm or injury

on the part of the person assailed which causes him to engage in a course of conduct he would not otherwise have followed." *Id.*

An assault on a woman with intent to commit rape is an act exhibiting violence together with the intent to commit a subsequent act of violence. As such, it is, as a matter of law, an offense "involving the use or threat of violence to the person." The trial court did not err in so instructing the jury.

Parenthetically, it is patent that the issue of whether it is error to instruct the jury that assault on a female with intent to commit rape is a violent crime as a matter of law is a question of law, not one of fact. The pertinent question of fact with regard to this aggravating circumstance—whether defendant had been convicted of this offense—remained within the province of the sentencing jury. Questions of fact regarding the elements of the offense itself had already been determined by a prior jury or fact-finder, and their existence was implied simply in the determination by the sentencing jury that defendant had indeed been convicted of that offense. This finding was untainted by any opinion from the bench. Defendant's contention that this instruction offended statutory proscriptions concerning the expression of judicial opinion on matters of fact or their proof is plainly without merit.

[17] Defendant next contends that it was error for the trial court to submit the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a rape without instructing the jury that this offense could be considered in aggravation of murder in the first degree only if its basis was premeditation and deliberation, but not if it was based upon the felony murder rule. Defendant argues that the evidence was insufficient to support submission to the jury of murder based upon premeditation and deliberation, and that it was thus reversible error under the *Cherry* rule to submit the underlying felony in aggravation of his sentence. *See, e.g., State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981); *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981); *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).

As we have concluded heretofore, there was ample evidence supporting the submission to the jury of murder in the first degree based upon premeditation and deliberation. In cases where the jury has found the defendant guilty of murder based upon both premeditation and deliberation and felony murder, we have held

unequivocally that because the commission of the felony is not an essential element of a premeditated and deliberated murder, it may properly be submitted to the jury as an aggravating circumstance. *E.g., State v. Williams*, 308 N.C. 47, 301 S.E.2d 335; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732. This case is no different, and we hold once again that the trial court did not err in allowing the jury to consider as an aggravating circumstance the felony underlying defendant's conviction for felony murder.

[18] Defendant next assigns error to the trial court's failure to intervene at several points in the prosecutor's sentencing argument where defendant contends the prosecutor's fervor prejudicially exceeded the bounds of propriety. In defendant's view, the prosecutor's rhetoric was at times so lurid and melodramatic that it went beyond fair, impartial argument, being calculated to inflame the passions and prejudices of the jury. *See generally* 1 ABA Bar Standards for Criminal Justice, The Prosecution Function, § 3-5.8(c)(1986).

This Court has repeatedly noted that counsel are allowed wide latitude in arguing hotly contested cases. *E.g., State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L.Ed.2d 406 (1987); *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). "Counsel for each side 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 or her side of the case." *Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123. Whether an advocate has abused this privilege is left largely to the sound discretion of the trial court. *Id.* Where the defendant has failed to object to an alleged impropriety in the state's argument and so flag the error for the trial court, an appellate court may review the argument notwithstanding. But "the impropriety . . . 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.

Defendant did object to the first instance of alleged prosecutorial impropriety, a tactic defendant contends was calculated to excite the jurors' sentiment at the expense of their reason. The prosecutor forewarned the jurors that he would clock a four-minute pause in which he wished each to "hold your breath just as long as

you can. I'm not asking you to place yourself in the position of Joanne Brockman. . . . [B]ut I want you to understand . . . the dynamics of manual strangulation, and I want you to understand just how long four minutes is in that context." Despite the caveat that he did not expect the jurors to put themselves in the shoes of the victim, the prosecutor continued in words that urged the jurors to do just that:

> [W]hile we are counting all four minutes, I want you to analyze in your mind the evidence that you have seen in this case. I want you to think about it. I want you to think about the helplessness of Joanne Brockman there in those woods, confronted with this large man. I want you to think about the fear that she must have experienced. I want you to think about the brutal strength that he brought to bear on her body as he knocked her around and got her on the ground and choked her and raped her. And I want you to think about the surroundings she was in. I want you to think about the beauty of that place as she lie [sic] there dying, helpless, because this man, sitting at the next table, was determined to vent his lust on her body at any cost and any hazard to her. I want you to think about the loneliness of death. Her [sic] alone in the woods, hit in the head once, hit in the head twice, hit in the head three times; her cries going across those tree tops, "Help, help, help," and no one came. And I want you to think about, Ladies and Gentlemen of the Jury, as your air starts to run out, the testimony that she (indicating) tried to bring that most precious thing into her body and was unable to do it, because this man, sitting here, had her by the throat and was slowly murdering her. And I want you to think, also, Ladies and Gentlemen of the Jury, about the pain as described by the doctor; pain in the neck, the fluid filling the lungs.

It is to be noted that this argument by the state occurred during the sentencing phase of this trial, and we find it neither improper nor prejudicial. Wide latitude is allowed the arguments of counsel in both the guilt and sentencing phases of a trial, *see, e.g., State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203. However, the foci of the arguments in the two phases are significantly different, and rhetoric that might be prejudicially improper in the guilt phase is acceptable in the sentencing phase.

> During the guilt phase of a trial, the focus is on guilt versus innocence. Mercy is not a consideration, just as preju-

> dice, pity for the victim, or fear may be an inappropriate basis for a jury decision as to guilt or innocence. Arguments which emphasize these factors are properly deemed prejudicial. However, during sentencing, considerations are different. The emphasis is on the circumstances of the crime and the character of the criminal.

State v. Oliver, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (citations omitted). Urging the jurors to appreciate the "circumstances of the crime" by asking them voluntarily to suffer oxygen deprivation may inappropriately stress an emotional over a rational appreciation of those circumstances, and certainly "may have strained the rational connection between evidence and inference." *Brown*, 320 N.C. at 206, 358 S.E.2d at 19. But it cannot be said that an argument utilizing such tactics was improper in the context of the penalty phase of a trial. "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," *id.* at 202-3, 358 S.E.2d at 17, then the prosecutor's tactic here was within the bounds of propriety.

[19] Defendant also objected to a portion of the prosecutor's sentencing argument in which he remarked that the reason defendant's son, daughter, and aunt had been put on the stand to testify as to defendant's character and personal history was to evoke the jury's sympathy. Defendant's objection was overruled. This was proper, for the state is permitted to characterize and to contest the weight of proffered nonstatutory mitigating circumstances. *See 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).

[20] Defendant failed to object to the prosecutor's next remark, however, in which the jury was urged "to try this case without . . . prejudice and without sympathy; strictly on the facts of this lawsuit." Defendant contends that this interpretation of the law was not only erroneous, but that it contravened defendant's constitutional rights under the eighth amendment as delineated in *California v. Brown*, 479 U.S. 538, 93 L.Ed.2d 934 (1987). In *Brown*, the United States Supreme Court held that a jury instruction that jurors "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" did not unconstitutionally preclude a fair consideration of the full range of possible mitigation, for its meaning was not necessarily to

disregard those impulses altogether, but to do so only where they were divorced from the evidence. *Id.* at 540, 93 L.Ed.2d at 939.

Mitigating circumstances are to be supported by the evidence, not by emotion. This seems to have been the import of the prosecutor's statement, and as such, was not improper. The trial court's final charge to the jury accurately articulated how the evidence was to be viewed for purposes of mitigating punishment:

> A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing, or making it less deserving of extreme punishment than other first degree murders.

This was a correct statement of the law, paraphrasing this Court's language in *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. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed.2d 642 (1982). If it was error for the trial court to exercise restraint in interrupting the prosecutor's argument, this was rectified by the court's subsequent instructions. *See, e.g., State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982).

[21] Defendant also excepts to that portion of the prosecutor's sentencing argument in which he remarked on the loss the victim's family suffered by her death:

> It was so brutal. It was without mercy. It was absolutely unnecessary. He not only took her life, he took a loved one from those who have testified here, the uncle, the aunt, the man that she was going to marry. So, he not only took something from Joanne Brockman, he took something from these folks. And in doing that, he took something from all of society, because Joanne Brockman belonged to society just as much as you do or I do.

Although defendant failed to object to these remarks, he now urges this Court to recognize their impropriety to be so "glaring or grossly egregious" that it could be said the trial court erred in failing to take corrective action *sua sponte*. *State v. Pinch*, 306 N.C. 1, 18, 292 S.E.2d 203, 218.

We perceive no error of such magnitude. Defendant asserts that these remarks are comprehended in the disapproval of victim

impact statements in *Booth v. Maryland*, 482 U.S. 496, 96 L.Ed.2d 440, *reh'g denied*, 483 U.S. 1056, 97 L.Ed.2d 820 (1987). But there are no objectionable references herein to "the personal characteristics" of the victim, to the emotional impact of the crime on the family, or to family members' opinions and characterizations of the crime and of the defendant. *Id.* at 502, 96 L.Ed.2d at 448. *See also State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989). The prosecutor's mere allusion to the loss the victim's family feels does not threaten to sweep juror ruminations into the realm of the arbitrary and capricious. Although remarks concerning the effects of a crime on those the victim leaves behind are arguably irrelevant insofar as they concern neither the character of the criminal nor the nature of the crime, *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, the prosecutor's reference to the loss felt by Joann's family, if error at all, was *de minimus*. Given the overwhelming evidence against defendant, including the supporting aggravating circumstances, such possible error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b)(1988); *Brown*, 320 N.C. 179, 358 S.E.2d 1.

[22] Defendant also failed to object when the prosecutor called the jury's attention to defendant's demeanor, suggesting that they perceived a man without visible signs of remorse:

> Look at Roscoe Artis over there, Ladies and Gentlemen of the Jury. You watched him throughout the trial. Is this a man of remorse? Is this a man of contrition? You have observed him on the stand. You have observed him sitting here in the Courtroom, now for almost two weeks. Have you seen the first sign of contrition about him? Have you seen the first sign of remorse about him to show there's a conscience somewhere in that head or body working on him?

Defendant contends that "exploiting" his silence at trial or his unwillingness to admit guilt by dubbing these rights a failure to express remorse violates his right to plead not guilty and to stand by this plea throughout the proceedings. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L.Ed.2d 672 (1986). At the very least the prosecutor's remarks place defendant in the incongruous position of appearing unremorseful about a crime that he swears he did not commit.

The defendant in *Brown*, 320 N.C. 179, 358 S.E.2d 1, pressed the same argument on appeal, contending that since remorselessness cannot be offered by the state as an aggravating circumstance

and where remorsefulness is not offered as a mitigating circumstance, this trait is irrelevant and its mention by the prosecutor improper. In *Brown*, however, this Court noted that "[u]rging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom." 320 N.C. at 199, 358 S.E.2d at 15. Remarks related to the demeanor displayed by the defendant throughout the trial remain "rooted in" observable evidence and, as such, are not improper. *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980).

[23] Finally, defendant contends that certain other remarks of the prosecutor diluted the jury's sense of its own responsibility in recommending the death sentence in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L.Ed.2d 231 (1985), and thus constituted reversible error. Defendant objects to remarks invoking public sentiment and to remarks relying inappropriately on the Bible, which he contends were so grossly improper as to have called for the intervention of the trial court *ex mero motu*.

The prosecutor stressed to the jurors that it was not they who were responsible for the judgment they would recommend, but defendant:

> Today is judgment day. Who wrote that judgment, Ladies and Gentlemen of the Jury? Are you going to write it? You don't write anything. This man sitting right here wrote his own judgment in this case.

Defendant's objection at this point was overruled, and the prosecutor continued:

> He wrote his own judgment in this case when he broke the law, when he killed and murdered Joanne Brockman on the 22d of October, 1983. He passed judgment on himself. He wrote his own death warrant, which is now for you to sign and, therefore, make it lawful.

Viewed in context, it is plain these words were calculated not to relieve the jury of its responsibility, such as where it is suggested to a jury that any error it might make in sentencing would be checked on appeal, *e.g.*, *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979), but to indicate to the jury the fact that it was defendant, not they, who chose to take the life of another,

and that it was defendant, not they, who was master of his own fate. We held in *McNeil*, 324 N.C. 33, 375 S.E.2d 909, that the identical argument was not so grossly improper as to require the trial court to intervene *ex mero motu*. We hold here that, even where defendant seizes the opportunity to object, the propriety of this argument is within the sound discretion of the trial court.

[24] The prosecutor also urged the jury to consider community responses to their sentencing recommendation:

> When you hear of such acts, Ladies and Gentlemen of the Jury, you think, "Well, somebody ought to do something about that." Well, you know who that somebody is? You are the somebody. You are the somebody that everybody talks about out there, and your duty may be uncomfortable, but it's necessary, an absolutely necessary duty.
>
> The officers can do no more. The State can do no more. The Judge can do no more. Now, it's entirely up to you. The eyes of Robeson County are on you. You speak for Robeson County, and you say by your verdict how you feel about such vile acts there in the community. You send a message. You send a message to Roscoe Artis. You send a message to anyone out there in the community who would follow in his foot steps with a deed such as this.

Defendant's objection to the last remark was sustained and the jury instructed to disregard it. Nevertheless, defendant observes that the preceding words delivered the same substantive message. He avers that these were statements that could be "construed as telling the jury that the citizens of the community sought and demanded conviction and punishment of the defendant," which this Court held in *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985), to be improper as "an invitation to ignore the evidence and to hark to a pack already hot on the trail and in full cry."

Defendant accurately notes that striking only the last of the prosecutor's remarks was ineffectual insofar as the preceding remarks contain the same subject matter. Nevertheless, it is not objectionable to tell the jury that its verdict will "send a message to the community" about what may befall a person convicted of murder in a court of justice. What is objectionable and improper is to intimate to the jury community preferences regarding capital punishment, for these are neither evidence nor otherwise proper con-

siderations for the sentencing jury. The state must not ask the jury "to lend an ear to the community rather than a voice." *Id.* (quoting *Prado v. State*, 626 S.W.2d 775, 776 (Tex. Crim. App. 1982)). However, it is not improper to remind the jury, as the prosecutor did here, that its voice is the conscience of the community. *See, e.g., McNeil*, 324 N.C. 33, 375 S.E.2d 909; *Brown*, 320 N.C. 179, 358 S.E.2d 1; *Scott*, 314 N.C. 309, 333 S.E.2d 296. The trial court did not err in permitting these remarks to stand uncorrected.

[25] In arguing that the appropriate punishment for one convicted of murder is death, the prosecutor read copiously from the Bible, occasionally interspersing biblical passages with reference to North Carolina law:

> Listen to this: "And if he smite him with an instrument of iron, so that he die, he is a murderer. The murderer shall surely be put to death. And if he smite him with throwing a stone wherewith he may die, and he die, he is a murderer. The murderer shall surely be put to death. Or if he smite him with a hand weapon or wood, wherewith he may die, and he die, he is a murderer. The murderer shall surely be put to death. If he thrust him of hatred, or hurl at him by laying in wait, that he die, or in enmity smite him with his hand, that he die, he that smote him shall surely be put to death, for he is a murderer."
>
> Now, listen to this: "So these things shall be for a statute of judgment . . ." Ladies and Gentlemen of the Jury, what is North Carolina Statute 15A-2000? It's simply a statute of judgment. ". . . a statute of judgment unto you through your generations in all your dwellings. Whoso killeth any person, the murderer shall be put to death by the mouth of witnesses . . . [.] Moreover, ye shall take no satisfaction for the life of a murderer, which is guilty of death, but he shall be surely put to death."

Anticipating the argument by defendant's counsel that the New Testament teaches forgiveness, the prosecutor also assured the jury that these biblical laws regarding capital punishment remain unaffected by the New Testament.

Defendant failed to object to this portion of the prosecutor's discourse but now argues vigorously that for a prosecutor, an of-

ficer of the state, to serve as an apologist and proponent for a particular religious orientation violates the principle of the separation of church and state, *see* U.S. Const. amends. I, XIV, and the prohibition against cruel and unusual punishment, U.S. Const. amend. VIII; N.C. Const. art. I, §§ 13, 19. Defendant urges that these passages suggest that "the responsibility for any ultimate determination of death will rest with others," *Caldwell v. Mississippi*, 472 U.S. 320, 333, 86 L.Ed.2d 231, 242, and that they detract from the proper bases for sentencing—the character of the criminal and the nature of the crime. *E.g., Brown*, 320 N.C. 179, 358 S.E.2d 1.

In their arguments before the jury, counsel for both sides are entitled to argue the law and the facts in evidence and all reasonable inferences that may be drawn therefrom. *E.g., Brown; State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110. Neither the "law" nor the "facts in evidence" include biblical passages, and, strictly speaking, it is improper for a party either to base or to color his arguments with such extraneous material. *See State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551. However, this Court has repeatedly noted the wide latitude allowed counsel in arguing hotly contested cases, *e.g., State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, and it has found biblical arguments to fall within permissible margins more often than not. *See, e.g., State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988); *Brown*, 320 N.C. 179, 358 S.E.2d 1; *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304. This Court has distinguished as improper remarks that state law is divinely inspired, *Oliver*, or that law officers are "ordained" by God. *State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519-20.

The prosecutor's amalgam of biblical language and the precise statutory citation for North Carolina's "statute of judgment" swing inappropriately close to this Court's indication in *Oliver* of the impropriety in saying the law of this State codifies divine law. Such remarks are not only misguided, they are misleading, particularly in the context of the prosecutor's argument here, where the lack of audible punctuation would contribute to the jury's confusion as to which words were statutory and which inspirational.

Assuming error arguendo, however, it is plain in this case, as it has been in others, that these arguments were not so improper as to require intervention by the trial court *ex mero motu. E.g., Hunt*, 323 N.C. 407, 373 S.E.2d 400; *Brown*, 320 N.C. 179, 358 S.E.2d 1; *Oliver*, 309 N.C. 326, 307 S.E.2d 304.

[26] Defendant next contends that the trial court committed reversible error in denying defendant's motion for appropriate relief, which concerned the failure of the prosecutor to disclose the second of two pages of the medical examiner's report. The nondisclosed page was a one-paragraph summary of the circumstances surrounding Joann Brockman's death:

> Pt. apparently left home at about 11:00 a.m. with Roscoe Artis. Was heard screaming later, but family members say they saw her at that time and she was alright. Did not return home. Was later found lying in the woods dead. Had some blood from her nose and some bruises on her neck.

Defendant avers that this paragraph constitutes suppressed evidence "material to guilt or punishment," *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed.2d 215, 218 (1963), and favorable to his defense, and that its nondisclosure amounts to a violation of his rights of due process under *Brady*.

In reviewing orders entered pursuant to N.C.G.S. § 15A-1415, which dictates the grounds for post-conviction relief, this Court is bound by the findings of fact of the trial court where they are supported by competent evidence. *State v. Stevens*, 305 N.C. 712, 291 S.E.2d 585 (1982). Among the trial court's findings underlying its denial of defendant's motion for appropriate relief were the following facts:

> 10. That Dr. Kile [the medical examiner who had compiled the medical report and its summary] obtained his information for the narrative summary through Leveda Brown, who relayed information from the dispatcher and through Delois Patterson, mother of the deceased.
>
> 11. That Detective Maynor [from whom Dr. Kile testified he had obtained his information] never stated to Dr. Kile that family members had heard Ms. Brockman scream but that she was alright; that Detective Maynor nor any other law enforcement officer had information to that effect and during the entire course of the investigation no family member ever told Detective Maynor or any other law enforcement officer that Brockman was seen alive after she was seen with the defendant.
>
> 12. That Detective Maynor did not confirm the second sentence of the narrative summary with Dr. Kile.

Based upon these and other findings of fact the trial court concluded, *inter alia*,[3] that insofar as the state's case relied most heavily on defendant's statements, the remainder of the testimony of its witnesses was merely corroborative, and that of Alice McLaughlin, the only witness who had testified as to Joann's cries for help, expendable. Citing *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984), *vac. on other grounds sub nom., McDowell v. Dixon*, 858 F.2d 945 (1988), the trial court concluded that "there has been no showing that this information contained in the narrative summary . . . would have created in the jury's mind a reasonable doubt which did not otherwise exist as to defendant's guilt," nor as to the jury's consideration of aggravating circumstances and its subsequent recommendation of the death penalty.

Our review of the record of the hearing on defendant's motion for appropriate relief reveals that the evidence strongly supports these findings and the conclusions of law that they underlie.

The information contained in the summary paragraph of the medical report was not of sufficient significance that its omission from defendant's arsenal of evidence would result in the denial of defendant's right to a fair trial. *See United States v. Agurs*, 427 U.S. 97, 108, 49 L.Ed.2d 342, 352 (1976). Nondisclosed information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed.2d 481, 494 (1985). This Court has stated that the issue of materiality "hinges on two factors: (1) the strength of the evidence itself vis-a-vis the issue of guilt and (2) the magnitude of the evidence of guilt which the convicting jury heard." *McDowell*, 310 N.C. 61, 71, 310 S.E.2d 301, 308.

Defendant argues energetically that the summary paragraph impeaches the testimony of Alice McLaughlin and Curtis McKin-

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3. The trial court analyzed the question, argued energetically by the parties in their briefs before this Court, whether the prosecutor is chargeable with information obtained by the office of the chief medical examiner, as, for example, it is chargeable with information in the hands of investigating officers. *See Brady*, 373 U.S. 83, 10 L.Ed.2d 215. We see no need to reach this question. Nor need we speculate as to how the medical examiner might have misconstrued information available to both parties to arrive at his version of the events leading to Joann Brockman's death.

non, if they were the "family members" mentioned in the summary paragraph. Not only does the paragraph so weaken the state's case, defendant argues, but it strengthens his own, bolstering his contention that someone else approached and strangled Joann Brockman after he hugged and left her. However, it is the burden of the moving party to prove by a preponderance of the evidence every fact essential to support his motion. N.C.G.S. § 15A-1420(c)(5) (1988). Giving imaginative reign to what the summary paragraph might imply is far from bearing this burden.

In the light of other evidence of defendant's guilt, including his inculpatory statements and his knowledge of the murder scene and of the location of Joann Brockman's body, the arguable exculpatory strength of this paragraph pales; any exculpatory significance it might otherwise have is dwarfed by comparison to inculpatory evidence. Furthermore, the record indicates that piecemeal and entirely derivative sources supplied the information in the medical examiner's summary paragraph. That these sources include an interview with the victim's mother, who was neither a witness nor present at any relevant time the morning of her daughter's murder, casts considerable doubt on the reliability of the facts the paragraph relates. That the officer who had actually interviewed family members who had been present denied that the details contained in the summary paragraph had come from him further erodes its reliability. Such evidence strongly sustains the trial court's order.

We conclude that the summary paragraph was not material evidence insofar as there is no reasonable probability that its disclosure to the defense would have caused the outcome of defendant's trial to be any different.

PRESERVATION ISSUES

[27] Defendant raises anew several issues upon which this Court has recently ruled. In most instances, defendant failed to object at pertinent points in his trial. Although defendant is procedurally barred from asserting these issues as error on appeal, N.C. Rules App. Proc. 10(b)(1), we have elected nonetheless to review even those errors to which defendant failed to object because this case involves a sentence of death. *See State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304. Defendant does not argue that the facts of the case *sub judice* distinguish it from precedent; rather, he argues

that this Court's posture regarding these issues should be reversed. In each case we disagree and decline to do so.

First, defendant takes issue with the requirement that mitigating circumstances must be found unanimously to exist. The result, he avers, is that circumstances found to be mitigating by some jurors may not be considered in the process of weighing circumstances in aggravation against circumstances in mitigation preliminary to deciding the appropriateness of a sentence of death. This, defendant continues, violates his right under the eighth amendment of the United States Constitution to have all mitigating evidence considered by the jury. *See Mills v. Maryland*, 486 U.S. 367, 100 L.Ed.2d 384 (1988). This Court held in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, that North Carolina's sentencing scheme is distinguishable from that found to be constitutionally infirm in *Mills*, as it allows for individualized sentencing and guards against an arbitrary and capricious infliction of the death penalty. Defendant has presented no reason to deviate from that conclusion.

[28] Defendant next complains that the trial court's denial of his motion for individual voir dire and sequestration of the jurors was error. This Court has repeatedly held that the trial court "has broad discretion to see that a competent, fair and impartial jury is impaneled." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757. *See also State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987); *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). Such rulings of the trial court will not be reversed absent a showing that it has abused its discretion. *Johnson*, 298 N.C. 355, 259 S.E.2d 752. Defendant's speculation that the "quick answers" of the jurors opposing capital punishment in this case were an effort to avoid service does not suffice as such a showing. This assignment of error is therefore overruled.

[27] Defendant next urges this Court to overrule its holding that North Carolina's death penalty statute violates the eighth and fourteenth amendments to the United States Constitution and article I, sections 19 and 27 of the Constitution of this state. We have previously considered all grounds asserted by defendant upon which the death penalty statute of this state might violate constitutional rights and found them to be without merit. *See, e.g., State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed.2d 935 (1988) (death penalty not cruel and unusual punishment because jury has discretion whether to impose it); *State*

v. Robbins, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L.Ed.2d 226 (1987) (death penalty statute neither vague, overbroad, imposed in a discriminatory manner, nor involves subjective discretion). We do not now waver in the conviction that N.C.G.S. § 15A-2000 *et seq.* passes constitutional muster.

[29] Defendant next argues that his constitutional right under the eighth amendment to have mitigating circumstances fairly considered was impaired when the trial court instructed the jury that its "duty" was to impose the death penalty if it determined that the aggravating circumstances sufficiently outweighed circumstances found to be in mitigation and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, this Court specifically concluded that instructions substantially similar to those given by the trial court in the case *sub judice* satisfied both the requirements of N.C.G.S. § 15A-2000 and the holding in *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973 (1978). Although this Court phrased a preferable, alternative order and form for these instructions, we have approved similar instructions before and since our holding in *McDougall*. *See, e.g., Robbins*, 319 N.C. 465, 356 S.E.2d 279; *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203. We here reiterate that approval and reaffirm the constitutional soundness of such instructions.

[28] Defendant next contends without argument or analysis that several prospective jurors were improperly excused for cause in violation of the standards set out in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, and *Wainwright v. Witt*, 469 U.S. 412, 83 L.Ed.2d 841 (1985). Our review of the record of voir dire reveals that each juror excused for cause indicated that she or he would be unable to recommend a sentence of death regardless of circumstances. The trial court did not err in permitting excusal of each for cause.

Defendant's next assignment of error likewise lacks merit. He argues, again with scant examples from the record, that the prosecutor exercised seven peremptory challenges to excuse potential jurors who expressed some hesitancy about their ability to return a sentence of death. Again, our careful review of the record reveals no hint of substantiation to defendant's contention that these jurors were at all hesitant about the death penalty or their ability to impose it under appropriate circumstances. Furthermore, in *State*

v. Allen, 323 N.C. 208, 372 S.E.2d 855, this Court recently restated the view that it is neither constitutionally nor otherwise improper to use peremptory challenges to strike veniremen who have voiced some qualms about imposing the death penalty. *See also Robbins*, 319 N.C. 465, 356 S.E.2d 279.

[29] Finally, defendant requests this Court to reexamine its holdings that a defendant is not deprived of due process of law because he bears the burden of proving a mitigating circumstance by a preponderance of the evidence. *See, e.g., 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); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597. This position has been recently reaffirmed in, *e.g., State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, and defendant offers no new reason for this Court to consider that position to have been in error.

Our review of the record and transcript of the penalty phase of the proceedings below leads us to conclude that, as in the guilt-innocence phase, defendant has received a fair trial free from prejudicial error.

PROPORTIONALITY REVIEW

[30] Having determined that the guilt and sentencing phases of defendant's trial were free from 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.

We consider the responsibility placed upon us by subdivision (d)(2) to be as serious as any responsibility placed upon an appellate court. *Jackson*, 309 N.C. 26, 305 S.E.2d 703; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732. 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 circumstances 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.

Finally, we undertake the solemn task of proportionality review, whereby we compare this case to cases in the proportionality pool which are "roughly similar with regard to the crime and the defendant." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L.Ed.2d 267 (1985). 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. *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. *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; *Lawson*, 310 N.C. 632, 314 S.E.2d 493. In so doing, we do not feel bound to give a citation to every case used for comparison. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335.

In this case the jury found the following three aggravating circumstances:

> 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).
>
> The murder was committed while defendant was engaged in the commission of a rape. N.C.G.S. § 15A-2000(e)(5).

The murder was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9).

The jury found one or more of the seven mitigating circumstances submitted[4] but did not specify which ones. Therefore, for purposes of proportionality review, we must assume that all seven of the mitigating circumstances were found. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653.

Defendant characterizes this case as typical of those in which the perpetrator killed his victim during or after the commission of a sexual assault. He then argues that a "sheer numerical breakdown" of the cases in the proportionality pool involving a sexual assault demonstrates that more than half of such cases yielded a jury recommendation of a life sentence.

Initially we note that defendant's statistics are slightly inaccurate. Our research reveals that in murders involving sexual assaults, juries have actually recommended sentences of death in seven cases[5] while recommending sentences of life imprisonment in six.[6] Thus, as we recognized in *State v. Holden*, 321 N.C. 125,

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4. The mitigating circumstances submitted were the following:

(1) The capacity of Roscoe Artis 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).

(2) The defendant, Roscoe Artis, is bordering on mild mental retardation with a full scale intelligence quotient of 67.

(3) Roscoe Artis is an illegitimate child and experienced less than normal relationships with his mother and father.

(4) Roscoe Artis was gainfully employed on October 22, 1983.

(5) Roscoe Artis has done prior good works.

(6) Roscoe Artis in his formative years was subjected to abuse by his family.

(7) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value. N.C.G.S. § 15A-2000(f)(9).

5. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513; *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898; *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250, *cert. denied*, 471 U.S. 1094, 85 L.Ed.2d 526 (1985); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335; *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308; *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264; *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732.

6. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159; *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983); *State v. Temple*, 302 N.C. 1, 273 S.E.2d 273 (1981); *State v. Clark*, 301 N.C. 176,

167, 362 S.E.2d 513, 538, "juries have tended to return death sentences in murder cases where the defendant also sexually assaulted his victim."

In so noting, we do not by any means advocate a strictly mathematical approach to our analysis. Numerical disparity, whether in favor of the state or in favor of the defendant, is not dispositive on proportionality review. *State v. Greene*, 324 N.C. 1, 376 S.E.2d 430 (1989); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985). Although we compare this case to similar cases in the pool, our ultimate responsibility is to evaluate each case independently, considering the individual defendant and the nature of the crime or crimes he has committed. *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989). We therefore do not rely on statistics alone and find it more instructive to proceed with factual comparisons within the category of murders accompanied by sexual assault.

Defendant contends that this case closely resembles the sexual assault murders in which the jury has recommended a life sentence. We disagree. Our review of the record reveals that each such case is readily distinguishable from the case at bar. Two of the cases, involving strong mitigation not present here, differ with respect to the character and condition of the defendant. In *State v. Temple*, 302 N.C. 1, 273 S.E.2d 273, the defendant was only eighteen years old at the time of the offense and had no significant history of prior criminal conduct. Here, by contrast, defendant was forty-three at the time of the offense and had an extensive criminal record which included a number of convictions for violent crimes, among them assault on a female with intent to commit rape in 1957, assault on a female in 1967, assault on a female in 1974, and assault with a deadly weapon in 1975. In the 1974 incident, defendant attempted to strangle a sixteen-year-old girl who had refused his sexual advances. In *State v. Clark*, 301 N.C. 176, 270 S.E.2d 425, there was considerable evidence that the defendant suffered from schizophrenia. Here, although defendant presented a modicum of evidence concerning his borderline mental retardation, there was absolutely no evidence that he suffered from a

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270 S.E.2d 425 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). We do not include *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982), cited by defendant, because our review of the record on appeal in that case reveals that there was no evidence of a sexual assault.

serious mental illness or emotional disorder when he committed the murder.

The remaining four life cases differ significantly from this case with respect to the nature of the crime, as reflected by specific jury findings. In *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685, *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579, and *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114, the defendants were convicted solely upon the felony murder theory. Here defendant was convicted on theories of both felony murder *and* murder by premeditation and deliberation. The finding of premeditation and deliberation indicates a more cold-blooded and calculated crime. In *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159, the jury specifically rejected the aggravating circumstance that the murder was especially heinous, atrocious or cruel. Here, the jury found that circumstance, indicating a more brutal and torturous crime.

We note also that this case is not even remotely similar to those in which we have found the death sentence to be disproportionate.[7] None of those cases involved the perpetration of a sexual assault in conjunction with the murder.

We now turn to a comparison with affirmed death penalty cases for the purpose of determining whether defendant's crime "rise[s] to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Brown*, 320 N.C. 179, 220, 358 S.E.2d 1, 28. We have upheld the death sentence in a number of cases in which the jury has found that the murder was especially heinous, atrocious or cruel.[8] The pool also includes numerous affirmed death penalty cases in which the jury found that the defendant had previously been convicted of

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7. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653; *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; *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; *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703.

8. The jury found the heinous, atrocious or cruel circumstance in twenty-one of the forty-one death-affirmed cases in the pool. See list in *State v. Greene*, 324 N.C. 1, 28, 376 S.E.2d 430, 446-47, fn 3. *See also State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988).

a felony involving the use of violence.[9] Although the presence of two of the aggravating circumstances which are most prevalent in death-affirmed cases is not in itself conclusive, it is one indication that the sentence was neither excessive nor arbitrarily imposed. The heinous, atrocious or cruel circumstance reflects upon the brutality of the crime and the suffering of the victim, while the prior violent felony circumstance reflects upon the defendant's character as a recidivist, two important factors in our consideration of the nature of the defendant and the crime.

Again we consider as most appropriate for case by case comparison those murders which also involved sexual assaults. The facts in this case, although brutal, do not demonstrate the level of extreme savagery present in some of the death-affirmed cases, most notably *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335; *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264; and *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732. Nor did this case involve the murder of more than one person or the infliction of serious injuries upon more than one victim as in *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250; and *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308. For these reasons, we cannot draw meaningful comparisons with those six cases. However, this case has much in common with the two remaining death-affirmed cases, *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513, and *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898.

In *Holden* the victim, who was extremely intoxicated, rode in the defendant's car as he drove some acquaintances home from a nightclub. During the car ride, the defendant intimated to another passenger that he intended to have sexual relations with the victim. He further commented that he might have to kill her in order to do so. Some hours later, the victim was discovered on a dirt

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9. In thirteen of the cases, the jury found that the defendant had been previously convicted of a prior violent felony under N.C.G.S. § 15A-2000(e)(3). See list in *State v. Greene*, 324 N.C. 1, 28, 376 S.E.2d 430, 446, fn 3; *see also State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (defendant Hunt); *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49; *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12. In two cases, the jury found that the defendant had been previously convicted of a prior capital felony under N.C.G.S. § 15A-2000(e)(2). *Hunt*, 323 N.C. 407, 373 S.E.2d 400 (defendant Barnes); *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541. We consider the aggravating circumstance of section (e)(2) sufficiently analogous to section (e)(3) for purposes of this review. *Greene*, 324 N.C. at 29, 376 S.E.2d at 447, fn 5.

path near a rural road, partially undressed, with her throat slit and a gunshot wound to the neck.

The jury found three aggravating circumstances: that the murder was committed to avoid lawful arrest, that the murder was committed during the perpetration of an attempted rape, and that the defendant had previously been convicted of a violent felony. Although it found five mitigating circumstances, the jury recommended a sentence of death.

We find this case to be strikingly similar to *Holden* with respect to the number and nature of the aggravating and mitigating circumstances found. In spite of these similarities, defendant argues that his case is not comparable to *Holden* because his crime was not as cold and calculating. While we agree that defendant's crime displayed a far lesser degree of planning and calculation, we nonetheless conclude that it rises to the level of the crime in *Holden*. This defendant's crime was significantly more torturous to the victim both physically and psychologically, given the nature of the prolonged attack and the fact that the victim was alert and aware at the time of the attack rather than intoxicated and semi-conscious as was the victim in *Holden*.

This case is also similar in many respects to *Zuniga*. In *Zuniga*, the evidence tended to show that the defendant isolated his seven-year-old victim in the woods near her grandfather's farm. He raped the child and stabbed her twice in the neck, then left her to die hidden in an area of thick undergrowth. An autopsy revealed some scratches on the child's neck and a number of petechial pinpoint injuries, indicating pressure on the neck or chest caused by strangulation. Death was not immediate and the child would have suffered for a period of "some minutes." The jury found as the sole aggravating circumstance that the murder was committed while the defendant was engaged in the commission of a rape. It found seven of the twelve mitigating circumstances submitted but concluded that they were insufficient to outweigh the aggravating circumstance.

We find the circumstances of *Zuniga*, including the type and extent of the injuries inflicted and the duration of the victim's suffering, to be roughly comparable to those in the present case. Here defendant attacked the victim in an isolated area, forcibly dragged her into the woods, and beat (rather than stabbed) her into submission. He then raped and strangled her, abandoning her body in the woods after an attempt to conceal it with dirt, leaves and

vines. The victim suffered for up to five minutes as she drowned in her own blood.

While the murder of a young child particularly shocks the conscience and was a heavy factor to be weighed against the defendant in *Zuniga*, the fact that this case involved a teenaged victim instead of a child does not alter our conclusion. Other factors in this case weigh just as heavily against this defendant, in particular the jury's finding of two aggravating circumstances not present in *Zuniga*.

We cannot say that defendant is any less deserving of the death penalty than the defendants in *Holden* and *Zuniga*. As a general rule, the decision of the jury in recommending a sentence of death should be accorded great deference. *State v. Quesinberry*, 325 N.C. 125, 381 S.E.2d 681 (1989); *State v. Greene*, 324 N.C. 1, 376 S.E.2d 430; *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569. The purpose of our review is merely to eliminate the possibility that a defendant will be sentenced to death by an *aberrant* jury. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513.

The evidence in this case depicts a vicious, lust-driven, dehumanizing crime perpetrated by a defendant with a history of violent conduct toward teenaged girls. After he rendered the victim helpless by striking her repeatedly with a stick as thick as his wrist, defendant wrapped his hands around her throat and slowly choked the life out of her as he violently raped her. The attack was brutal and relentless. Defendant displayed no remorse or contrition for his act and attempted to conceal the body before casually strolling home for a nap.

The nature of this crime and this defendant are such that we cannot conclude that the jury's recommendation was aberrant. We hold as a matter of law that the death sentence imposed against defendant is not disproportionate within the meaning 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. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987).

In all phases of the trial below, we find

No error.

Chief Justice EXUM dissenting.

Believing that there is reversible error in both the guilt and sentencing phases of this capital case, I dissent and vote for a new trial.

Guilt Phase

The majority assumes without deciding that it was error to admit the testimony of Billie Ann Woods that defendant had attempted to assault her sexually approximately nine years before the event for which defendant was being tried. I believe the admission of the evidence was error because of the remoteness in time of the earlier offense. *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988) (evidence of prior sexual assault improperly admitted in rape prosecution when prior assault occurred seven years before the rape); *State v. Scott*, 318 N.C. 237, 347 S.E.2d 414 (1986) (evidence of prior sexual conduct improperly admitted in first degree sex offense prosecution when prior conduct occurred nine years before the first degree sex offense). The majority holds that it was error to permit defendant to be cross-examined regarding his convictions for assault on a female in 1957 and in 1967. Yet, because it characterizes the case against defendant as overwhelming, the majority concludes there is no reasonable possibility that these errors affected the outcome of the trial. I cannot concur with the majority's assessment that the case against defendant is so overwhelming that there is no reasonable possibility these errors would have affected the outcome of the trial. I would hold these errors entitle defendant to a new trial.

I do not view the case against defendant as overwhelming. The evidence leaves some room for doubt as to whether defendant perpetrated the murder. As the majority says, the State relied primarily on an inculpatory statement purportedly made before trial by defendant to investigating officers; defendant's statements and actions tending to indicate that he was familiar with the crime scene; and bloodstains on defendant's shirt which matched the blood of the victim.

Defendant, though, offered considerable evidence in support of his innocence. Defendant testified in his own behalf and denied his guilt of the crime. He also offered evidence tending to corroborate his testimony. One of defendant's witnesses, Curtis Blackmon, testified that on the morning the deceased was killed

he observed the deceased and defendant come from behind a building. Defendant walked toward the ABC store, where a car picked him up and drove away. Blackmon then saw the victim and another man, whom he had earlier observed with the victim at a club, go together behind a barn in the area. Defendant's testimony as recited in the majority opinion, if believed, explains how the victim's blood on his shirt and his knowledge of the crime scene could be consistent with his innocence.

In light of these conflicts in the evidence and the evidence tending to support defendant's innocence, there is to me a reasonable possibility that had evidence of defendant's prior crimes not been admitted there might have been a different outcome at his trial. This kind of evidence has a powerfully negative impact on the jury vis-a-vis the defendant as the jury contemplates the question of whether defendant is guilty.

> Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.

State v. Thomas, 310 N.C. 369, 372, 312 S.E.2d 458, 460 (1984), quoting *State v. McClain*, 240 N.C. 171, 174, 81 S.E.2d 364, 366 (1954), in turn quoting *State v. Gregory*, 191 S.C. 212, 220-21, 4 S.E.2d 1, 4 (1939).

Sentencing Phase

In my view it was wrong for the prosecutor to argue to the jury that it should decide the question of sentence "without sympathy." The danger is that such an argument may violate the eighth amendment as it was interpreted in *California v. Brown*, 479 U.S. 538, 93 L.Ed.2d 934 (1987). Under consideration in *Brown* was a California penalty phase jury instruction for capital trials which admonished the jury not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.* at 539, 93 L.Ed.2d at 938. In a five to four decision the United States Supreme Court found that the instruction was not objectionable insofar as it admonished the jury not to consider "mere . . . sympathy" largely because the word "mere" distinguished groundless sympathy from the sympathy arising from defendant's

evidence of mitigating factors. The Court concluded that reasonable jurors would construe the instruction as a directive "to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Id.* at 542, 93 L.Ed.2d at 940. Justice O'Connor in her concurring opinion in *Brown*, 479 U.S. at 545-46, 93 L.Ed.2d at 942-43, noted:

> [O]ne difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue . . . is that juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored. . . . On remand, the California Supreme Court should determine whether the jury instructions, taken as a whole, *and considered in combination with the prosecutor's closing argument*, adequately informed the jury of its responsibility to consider all of the mitigating evidence introduced by the respondent.

(Emphasis supplied.)

The teaching of *Brown* is that it is proper for a jury to base its sentencing decision in a capital case upon sympathy which is derived from the evidence in the case regarding defendant's background, character or the crime itself, but it is improper for a jury to base its decision upon *mere* sympathy or emotion which has no grounding in the evidence. As one federal court of appeals, sitting *en banc*, has put it:

> Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms.

Parks v. Brown, 860 F.2d 1545, 1555 (10th Cir. 1988). *Brown* teaches that if what is said to a jury about avoiding considerations of sympathy could reasonably cause the jury to ignore appropriate mitigating circumstances, then the defendant's eighth amendment right to have all such circumstances considered by the sentencer is violated. *See State v. Ramseur*, 106 N.J. 123, 524 A.2d 188 (1987).

While sympathy for a criminal defendant has no place in the jury's determination of defendant's guilt, it does have a proper

place, if grounded in the mitigating evidence, in the jury's determination of whether defendant shall suffer life imprisonment or die for his crime.[1] In the instant case, for example, I think it would have been appropriate for the jury to base its sentencing decision in part on whatever sympathy, if any, it might have felt toward defendant arising from the evidence regarding his impaired capacity, mental retardation, abnormal parental relationship and abuse by his family during his formative years. The jury, of course, is not required to feel (and may not have felt in this case) any sympathy at all simply because this kind of evidence is introduced. But the jury ought not to be told either in closing argument by counsel or in instructions by the court that such sympathy as it might feel, grounded in this kind of evidence, can have no bearing on its sentence determination.

Before *Brown*, state courts were divided on the "sympathy instruction" issue, *see Ramseur*, 106 N.J. 123, 298, 524 A.2d 188, 277, at n.71; but the better reasoned decisions, particularly in light of *Brown*, held that jury instructions which precluded the jury from basing their sentencing decision on sympathy were error entitling defendant to a new sentencing hearing. *Legare v. State*, 250 Ga. 875, 302 S.E.2d 351 (1983); *State v. Quinlivan*, 81 Wash.2d 124, 499 P.2d 1268 (1972). The Georgia Supreme Court said:

> Thus this jury was charged to consider in mitigation all circumstances which in fairness or mercy offer a basis for not imposing the death penalty, a charge the substance of which is constitutionally required. But the jury was also charged not to base their verdict on sympathy for the defendant. Since the evidence in mitigation might well evoke sympathy, we find these charges in irreconcilable conflict. Because the charge complained of might well confuse the jury and limit their con-

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1. This Court acknowledged as much when it said in *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983):

> During the guilt phase of a trial, the focus is on guilt versus innocence. Mercy is not a consideration, just as prejudice, pity for the victim, or fear may be an inappropriate basis for a jury decision as to guilt or innocence. Arguments which emphasize these factors are properly deemed prejudicial. However, during sentencing, considerations are different. The emphasis is on the circumstances of the crime and the character of the criminal.

(Citations omitted.)

> stitutionally required consideration of evidence in mitigation, we hereby disapprove it.

250 Ga. at 878, 302 S.E.2d at 354. The Washington Court said:

> Contrary to this implication in the instructions, sympathy is an appropriate factor in the jury's consideration of the penalty issue. On remand it should be made clear to the jury (1) that considerations of sympathy are to be excluded only from that portion of the verdict relating to guilt or innocence; and (2) that sympathy may properly be considered as a factor in the determination of the penalty issue.

81 Wash. 2d at 130, 499 P.2d at 1272 (citations omitted).

Since the prosecutor's argument on this point was an isolated, single incident, not objected to by defendant, and since appropriate jury instructions were given by the trial court on the duty of the jury to consider appropriate mitigating circumstances, I agree with the majority that this error in the prosecutor's argument does not warrant a new sentencing hearing. *See Ramseur*, 106 N.J. 123, 524 A.2d 188.

I do think it was reversible error for the prosecutor to be permitted to argue:

> Look at Roscoe Artis over there, Ladies and Gentlemen of the Jury. You watched him throughout the trial. Is this a man of remorse? Is this a man of contrition? You have observed him on the stand. You have observed him sitting here in the courtroom, now for almost two weeks. Have you seen the first sign of contrition about him? Have you seen the first sign of remorse about him to show there's a conscience somewhere in that head or body working on him?

I believe this argument was so egregiously wrong as to require the trial court to intervene on its own motion. As defendant correctly contends, "at the very least the prosecutor's remarks place defendant in the incongruous position of appearing unremorseful about a crime that he swears that he did not commit." For this reason other courts have held similar arguments to be reversible error. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987); *Owen v. State*, 656 S.W.2d 458 (Tex. Crim. App. 1983). In *Johnson* the prosecutor argued during the guilt phase of a capital trial that defendant had shown no remorse for his crime. In granting a new trial, the South Carolina Supreme Court said:

> We hold the solicitor's improper reference to appellant's lack of remorse was error because it was a comment upon his constitutional right to plead not guilty and put the state to its burden of proof. It would be an irreconcilable equivocation for the accused to plead not guilty, present a defense, and simultaneously express remorse for acts he denied committing . . . . Comments by the prosecution upon an accused's failure to express remorse invite the jury to draw an adverse inference merely because the defendant did not appear penitent.

293 S.C. at 324, 360 S.E.2d at 319. In *Owen* the prosecutor argued during the punishment stage of a noncapital trial, "I would submit to you that the first step in rehabilitating somebody, the first step in granting somebody probation, is for him to at least say that he is sorry for what happened." In reversing and remanding (presumably for a new sentencing proceeding), the Texas Court of Criminal Appeals said:

> The State urges that it was not error for the prosecutor to comment on appellant's failure to express remorse or sorrow . . . . Acceptance of the State's argument would place an accused in the paradoxical position of saying I am sorry for a crime of which I am not guilty.

656 S.W.2d at 459.

In concluding that no error was committed, the majority relies on *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1 (1987). In *Brown* defendant's counsel had argued to the jury that defendant sympathized with the deceased's widow. The State's argument was in answer to the argument by defendant's counsel. Further, in *Brown* defendant's only argument was that lack of remorse is an irrelevant factor and to permit it to be argued as a reason for imposing the death sentence is tantamount to permitting the State to use an aggravating factor not authorized by our capital sentencing statute. The Court answered this argument by saying: "Here, however, the State made no attempt to submit this characteristic as an aggravating circumstance." 320 N.C. at 199, 358 S.E.2d at 15. The Court did not address in *Brown*, nor does the majority here answer, defendant's contention that such argument impermissibly compromises defendant's right to plead not guilty and to stand by this plea throughout the proceedings and, thereby, denies him due process.

Finally, if in the sentencing phase the Court were addressing for the first time the mitigating circumstance unanimity instruction issue, 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. 367, 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), *cert. granted*, --- U.S. ---, 103 L.Ed.2d 180 (1989), 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 sentencing phase only.

I concur in the result reached by the Court as to the guilt phase of defendant's trial. I dissent only as to the sentencing phase of the trial.

One of the preservation issues raised by defendant relates to the applicability of the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367, 100 L.Ed. 2d 384 (1988), to the unanimity requirement for mitigating circumstances in determining whether death is the appropriate punishment in a given case. This issue is now pending before the Supreme Court of the United States. *See State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, --- U.S. ---, 103 L.Ed. 2d 180 (1989). I continue to believe that *Mills* is applicable to North Carolina. *See State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on other grounds*, 486 U.S. ---, 102 L.Ed. 2d 18, *reinstated*, 323 N.C. 622, 374 S.E.2d 277 (1988) (Exum, C. J., and Frye, J., dissenting). Based on *Mills*, I therefore dissent from that portion of the Court's opinion which rejects defendant's request for a new sentencing hearing.

VERNON FINCH, JUATINA FINCH, DANIEL J. BULLARD AND CHRISTINE BULLARD v. THE CITY OF DURHAM, NORTH CAROLINA

No. 85PA89

(Filed 5 October 1989)

1. **Eminent Domain § 1.3 (NCI3d)— taking private property for public use—just compensation—law of the land clause**

Although the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, the Supreme Court has inferred such a provision as a fundamental right integral to the "law of the land" clause in Art. I, § 19 of the N. C. Constitution.

Am Jur 2d, Eminent Domain §§ 13, 19.

2. **Municipal Corporations § 30.5 (NCI3d)— whether rezoning is taking—practical use and reasonable value**

The test for determining whether a taking has occurred in the context of a rezoning is whether the property as rezoned has a practical use and a reasonable value.

Am Jur 2d, Zoning and Planning § 13.

3. **Municipal Corporations § 30.5 (NCI3d)— rezoning—practical use and reasonable value—owner's investment not determinative**

The property owner's actual investment in the property prior to a rezoning is not determinative of "practical use" and "reasonable value" of the property after rezoning.

Am Jur 2d, Zoning and Planning § 21.

4. **Municipal Corporations § 30.5 (NCI3d)— rezoning—depriving owner of previous property rights**

A taking does not occur simply because government action deprives an owner of previously available property rights.

Am Jur 2d, Zoning and Planning § 21.

5. **Municipal Corporations § 30.7 (NCI3d)— rezoning—expenditures in reliance upon prior ordinance**

When a property owner makes expenditures in the absence of zoning or under the authority of a building permit, subse-

quent changes in the zoning of the property may not prohibit the resulting nonconforming use. However, where an investor knows of a pending ordinance change proposed by a city planning board to the city council, the investor has no valid claim that he relied upon the prior ordinance in guiding his investment decision.

Am Jur 2d, Zoning and Planning §§ 72, 287.

6. **Municipal Corporations § 30.7 (NCI3d)— investment expectations in zoned property—purchase with knowledge of rezoning recommendation**

Plaintiffs did not have a reasonable expectation of an investment return untroubled by zoning changes on a 2.6-acre tract which they planned to use as a motel site where they chose to exercise their option to purchase the property some twenty-seven days after they knew of a recommendation by a city planning and zoning commission to rezone the property from an office-institutional to a residential classification.

Am Jur 2d, Zoning and Planning § 72.

7. **Municipal Corporations § 30.7 (NCI3d)— rezoning not an unconstitutional taking**

The rezoning of plaintiffs' 2.6-acre tract from O-I to R-10 did not amount to a taking under the N. C. Constitution or the U. S. Constitution because (1) the ordinance has sufficient foundation in reason and bears a substantial relation to the public welfare, and (2) the property as rezoned retains both practical use and reasonable value, where the public purpose of protecting an existing neighborhood from commercial encroachment was substantially advanced by the rezoning ordinance; the gravamen of plaintiffs' claim is that the available uses and value of their property under the R-10 zoning are not comparable to its value for plaintiffs' proposed motel use under O-I in either market appeal or market price; plaintiffs' own evidence showed that several uses permitted under R-10 zoning could be made of the property, such as residential, day care, or church use, and even though the market for these uses would not be strong, certain of these uses could command a substantial sales price for the property; and plaintiffs' evidence showed that the property could have been sold undeveloped for between $20,000 and $25,000 at the time of trial.

Am Jur 2d, Zoning and Planning §§ 13, 21.

8. **Municipal Corporations § 30.7 (NCI3d)— taking by rezoning— federal civil rights claim—insufficient forecast of evidence**

Plaintiffs' forecast of evidence was insufficient for submission of an issue of a taking by rezoning to the jury in an action brought under 42 U.S.C. § 1983.

Am Jur 2d, Civil Rights § 16.

9. **Municipal Corporations § 30.7 (NCI3d)— rezoning not arbitrary or capricious**

The 1985 rezoning of plaintiffs' 2.6-acre tract from O-I to R-10 was not arbitrary, capricious or unreasonable as applied to plaintiffs so as to render the rezoning ordinance invalid where the evidence showed that a 1979 rezoning of plaintiffs' property from R-10 to O-I removed the property from residential zoning and made it a virtual island of commercially or institutionally zoned land in a large and stable residential area and contravened defendant city's policy of preserving residential neighborhoods; the 1985 ordinance returned the property to its prior zone in conformity with the remainder of the neighborhood; and plaintiffs had acquired no vested right to proceed with their proposed development of the property because they had neither obtained a building permit nor begun actual construction in good faith reliance on the existing zone.

Am Jur 2d, Zoning and Planning § 15.

Justice MARTIN concurring.

Chief Justice EXUM dissenting.

Justices FRYE and WEBB concur in the dissenting opinion of the Chief Justice.

Justice FRYE dissenting.

ON discretionary review prior to determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2) of the Rules of Appellate Procedure of a judgment upon (1) a jury verdict that a taking had occurred; (2) a judicial determination that the taking was not arbitrary or capricious; and (3) an alternative judicial determination that a taking had occurred, which invalidated one city ordinance and waived another, awarded damages and granted attorney's fees and costs to plaintiffs, entered by *Bowen*,

J., at the 14 March 1987 Civil Session of Superior Court, DURHAM County. Heard in the Supreme Court 9 May 1989.

Mount White Hutson & Carden, P.A., by Richard M. Hutson, II, and Stephanie C. Powell, and Maxwell, Martin, Freeman and Beason, P.A., by James B. Maxwell, for plaintiff-appellees and cross-appellants.

Office of the City Attorney, by Karen A. Sindelar, Assistant City Attorney, for defendant-appellant and cross-appellee.

North Carolina League of Municipalities, by S. Ellis Hankins, General Counsel, and Andrew L. Romanet, Jr., Assistant General Counsel, amicus curiae.

City of Charlotte, by Henry W. Underhill, Jr., City Attorney, and City of Greensboro, by Jesse L. Warren, City Attorney, amici curiae.

City of Wilmington, by Thomas C. Pollard, City Attorney, and Robert W. Oast, Jr., Assistant City Attorney, amicus curiae.

Erdman, Boggs & Harkins, by Harry H. Harkins, Jr., for Watts Hospital-Hillandale Neighborhood Association, Inc., amicus curiae.

MEYER, Justice.

This is a dispute over the Durham City Council's rezoning of a 2.6-acre, vacant, undeveloped tract ("the property") near the southeastern quadrant of the intersection of Interstate 85 ("I-85") and Hillandale Road in Durham. The evidence at trial tended to show that until 1979 all the land south of I-85 in this area was zoned R-10 (residential, minimum 10,000 square foot lot). However, from 1979 to 1985, the property in question was zoned O-I (office-institutional). On 6 May 1985, the Durham City Council zoned the property and an adjacent one-acre tract back to R-10.

The property is on the edge of the Watts-Hillandale neighborhood. It is in the shape of a reverse "L," when viewed with its northern boundary abutting I-85 and its western boundary facing Hillandale Road. Across I-85 to the north, there is office-institutional and commercial zoning, including hotels. South of I-85 and surrounding the property to the east, south, and west, there is residential R-10 zoning, in which single-family houses have been built. A church is located across the street from the property, and a Mobil gas station, previously zoned C-1 (neighborhood com-

mercial) but now abandoned and rezoned to R-10, is situated immediately adjacent to the west.

In 1972, an attempt was made to rezone the property from R-10 to O-I, but it failed. In 1979, plaintiffs, who had a contract for an option to lease with the lease to contain an option to purchase the property, initiated a request to rezone it to O-I in order to build a 100-room motel on the site. The Durham City Council approved plaintiffs' rezoning request, and the property was rezoned to O-I. Immediately thereafter, plaintiffs entered into a seven-year lease with the property owner with an option to purchase the property in the final year. Under a subsequent amendment to the lease, plaintiffs paid $15,000 each year from 1 March 1979 through 1 March 1984. The lease ran through 30 June 1985. Plaintiffs had to give notice of their intent to exercise their option by 1 May 1985 and had to close by 30 June 1985 if they wished to purchase the property. The purchase price was $165,000.

Plaintiffs planned to build a motel on the property immediately following the 1979 rezoning to O-I. Although plaintiffs paid for architectural plans and a cash flow study, high interest rates and a lack of partners prevented them from building the motel. No physical developments or improvements were made on the land.

In late 1984, Red Roof Inns expressed an interest in leasing or buying the property for motel use. Plaintiffs and Red Roof Inns executed an agreement whereby once plaintiffs had purchased the property, Red Roof Inns would construct a motel and then lease the property from plaintiffs. Red Roof Inns submitted some informal schematic sketches to the Durham City Planning Department. The motel could not be built, however, unless the Durham City Council closed the unimproved (and, in fact, never actually opened) Chesterfield Street adjacent to the east side of the property. Plaintiffs submitted a petition to close Chesterfield Street. On 1 March 1985, before the street closing was presented to the Durham City Council, the Watts-Hillandale Neighborhood Association and other individuals living in the general area of the property petitioned to rezone the property and the adjacent gas station tract back to R-10. The street closing was delayed until the rezoning could be acted upon, and plaintiffs withdrew their request to close Chesterfield Street in April 1985.

Rezoning requests in Durham are processed by the planning staff, which prepares an advisory report for the Planning and Zon-

ing Commission. The Commission then holds a public hearing and makes an official recommendation to the City Council. The advisory report and the Commission recommendation then go to the City Council, which holds another public hearing before voting. The report in this instance noted that the existing O-I zoning for the property and C-1 zoning for the Mobil tract were undesirable because of excessive traffic, noise, and light that could be generated. The report recommended two "intermediate" uses—limited office institutional (O-I-L) and medium-density clustered residential development—which would help to buffer the existing neighborhood and at the same time allow for more intense use of the property than R-10. The report noted, however, that these uses would be appropriate only if the property owners were to submit a development plan, which under the Durham City Code and the relevant ordinance would commit the developer to a specific site plan for development. Such a development plan can only be submitted by the property owner. The report noted that despite the planning staff's belief that the two intermediate zones were most appropriate for the property, the staff nevertheless recommended that the zoning of the property that plaintiffs were leasing should remain O-I because a development proposal had already been initiated by the submission of the Chesterfield Street closing petition. The report recommended that the Mobil tract be rezoned to O-I.

On 2 April 1985, after presentation of the report and a public hearing, the Planning and Zoning Commission recommended by a 5 to 2 vote that the property be rezoned to R-10. A hearing before the Durham City Council was scheduled for 6 May 1985.

On 26 April 1985, plaintiffs' agreement with Red Roof Inns expired, without the latter having exercised its option to lease the property. On 29 April 1985, plaintiffs notified the owner of the property that they were exercising their option to purchase the property. On 6 May 1985, after a hearing, the Durham City Council voted 11 to 2 to rezone both the property and the Mobil tract to R-10. It also voted 13 to 0 to deny a request to rezone a separate nearby tract from R-10 to O-I. On 26 June 1985, plaintiffs closed on the property at issue here, paying the purchase price of $165,000. In July 1985, plaintiffs entered into a contract with Red Roof Inns to sell the property for $500,000 if the property were again rezoned to O-I, thus allowing Red Roof Inns to construct a motel. However, no petition for a rezoning back to O-I was filed either by plaintiffs or Red Roof Inns. On 3 September 1985, the

Durham City Council passed a general ordinance requiring hotels locating in O-I or C-1 districts to seek a use permit from the Durham City Board of Adjustment.

R-10 zones are the most typical residential zones in the urban area of Durham. Uses permitted in an R-10 zone include single-family houses, athletic fields, cemeteries, mausoleums, child care centers, churches, clubs or private lodges, noncommercial community buildings, family care homes, parking lots, public buildings, libraries, museums, art galleries, parks, recreational facilities, public or private swimming pools, and schools, including nursery schools and kindergartens. Single-family homes are permitted as a matter of right, unless they are located on lots that are too small under the zoning code, in which case a use permit (in similar ordinances, sometimes referred to as a "variance") is required from the Board of Adjustment. The nonresidential uses permitted in an R-10 zone require a use permit, except for churches, which did not require a use permit until 1987.

On 8 November 1985, plaintiffs instituted this action against the City of Durham for a declaratory judgment and damages. Plaintiffs stated six claims: (1) that the zoning ordinance be invalidated as arbitrary, capricious, discriminatory and unreasonable; (2) that the zoning ordinance be invalidated as a "taking" under the state and federal Constitutions; (3) that the City of Durham be found liable for inverse condemnation under N.C.G.S. § 40A-51, and pay damages of $700,000; (4) that the City of Durham be estopped from enforcing the zoning ordinance and the subsequent general ordinance requiring a use permit; (5) that should the zoning ordinance be invalidated, the City of Durham be found liable for a "temporary taking" and plaintiffs be compensated under N.C.G.S. § 40A-51 in the amount of $100,000; and (6) that the City of Durham be found liable under 42 U.S.C. § 1983 for a taking and compensate plaintiffs in the amount of $700,000 and costs and attorney's fees.

The City of Durham moved for summary judgment on all claims except the first (zoning arbitrary and capricious). On 15 July 1986, the trial court granted the City's motion on the third (inverse condemnation), fourth (estoppel) and sixth (taking under 42 U.S.C. § 1983) claims. On 14 March 1987, the motion on the first claim (zoning arbitrary and capricious) was heard by the court and allowed, and the second (taking under state and federal Constitutions) and fifth (temporary taking) claims were tried before a jury.

Further evidence was presented as follows. The property purchased by plaintiffs could be developed into one single-family home without a use permit. An additional five lots could be created on the back portion of the property fronting on Chesterfield Street without a permit. With a permit, plaintiffs could build two houses instead of one fronting Hillandale Road and six houses instead of five fronting on Chesterfield Street, or apply for a permit for any of the nonresidential uses permitted in an R-10 zone fronting on Hillandale Road.

Two experts testified for plaintiffs. Ralph Cochran testified that the highest and best use for the property in 1985 and at the time of trial was O-I. With regard to uses for the property under R-10, Cochran testified that it was suitable for one to two rental houses fronting on Hillandale Road, but he questioned whether an investor would buy the property for such use. If the entire property were developed, six to eight houses could be built, but constructing a new road and utilities to the back portion of the property would cost a developer $121,500 above the cost of the land, so that each new lot would sell for $13,500. Cochran also testified that the site would work well for a church, though the number of buyers would be limited; that the site was topographically suited for a day care center or family care home, though noise and traffic would be a deterrent; and that there was not much market for community buildings. His ultimate opinion was that the property was not suitable for other R-10 development and that the rezoning had deprived plaintiffs of all reasonable, practical and beneficial use of the property. Finally, Cochran testified that the property's value for hotel use under O-I on 6 May 1985, the date of rezoning, was $520,000 and that at the time of trial the hotel market had appreciated by 20%, but that under the R-10 zoning, the property was worth only $20,000.

On cross-examination, Cochran testified that the property's value for a rest home would exceed $20,000; that its value for a church would be between $100,000 and $200,000; that other uses, such as for apartments and offices, would require a rezoning from R-10, but that these were suitable and practical since they would give the property greater value. He agreed that such uses existed nearby to the north of I-85.

Plaintiffs' second expert, Frank Ward, testified that the highest and best use of the property was for a hotel. He stated that it

was not economically feasible to develop the property into more than one single-family lot. Ward testified that the property's value for hotel use under O-I in 1985 was $550,000, but that its value for speculative use under R-10 was $25,000. With regard to church use, he stated that most churches wish to locate on three acres, but if the price of the property were sufficiently low, a church might find it attractive. The highest price that he had known a church to pay was $20,000 per acre. Ward testified that the property's location was not practical for a day care center under normal circumstances, but that such a center might "jump right in at $25,000." He considered the other uses available by permit under R-10 to be impractical or not much in demand.

Plaintiff Vernon Finch testified as to plaintiffs' efforts to develop a motel on the property from 1979 to 1985. Despite their knowledge of the Planning and Zoning Commission's recommendation that the property be rezoned to R-10, plaintiffs exercised their option to purchase because of their financial investment in the property. On cross-examination, Finch testified that since the rezoning to R-10, plaintiffs had not requested a rezoning or sought any use permits. Plaintiffs had put a sign on the property in late 1986 in an effort to sell it, but he did not think it necessary to list the property or advertise it or send letters or flyers to possible buyers. After the sign was put up, twenty-five to thirty persons had verbally contacted Finch, including people interested in a church and a child care facility. A price of between $100,000 and $150,000 was discussed for the latter, although plaintiffs' asking price for the property was $750,000. Plaintiffs received no formal offers to buy the property. The sign fell down in less than one year.

Plaintiffs presented general testimonial evidence that traffic conditions on Hillandale Road had worsened since 1979, rendering residential use there undesirable. A state employee testified that traffic counts on Hillandale Road and I-85 had increased from 1979 to 1986.

The City of Durham presented evidence that single-family homes and R-10 zones exist adjacent to other busy streets in Durham with traffic counts similar to or higher than those on Hillandale Road. The City presented a large map showing that the dominant zoning along I-85 is residential. Three of the four I-85 interchanges are zoned residential on one side and commercial on the other.

Elizabeth Rooks, Associate Director of Current Planning for the City, testified. She explained that the planning staff considered that the O-I and C-1 zones should never have been placed to the south of I-85 and that the City of Durham has a policy of preserving residential neighborhoods. Rooks testified that, given the surrounding zoning pattern, it would be practical and reasonable to build one or two houses on the part of the property fronting Hillandale Road. She further testified that the "ideal" zoning for the property would be an intermediate use such as clustered residential, but a development plan would have to be submitted by plaintiffs for such use. Finally, Rooks testified that the property could appropriately be used for a day care center or a church. Large day care centers exist on other major streets in Durham with higher traffic counts than on Hillandale Road. A church would not have required a use permit to locate on the property until 1987.

Paul Norby, the City's Director of Planning and Community Development, also testified. He stated that a key element in zoning is that clear dividing lines between zoning districts allowing for different land uses are necessary to prevent a "domino" effect from occurring. I-85 serves this purpose in Durham. In Norby's opinion, R-10 was an appropriate zone for the property because single-family neighborhoods can be preserved along major interstates and major roads. Norby testified that a day care center would be another appropriate use for the property because of its location on Hillandale Road, which is used by many commuters with young children in need of such a facility. Since 1984, the City of Durham has approved rezoning requests to multi-family or O-I-L with a development plan for properties comparable to plaintiffs' property. On cross-examination, Norby explained that the City Planning staff had recommended against rezoning the property to R-10, not because R-10 was an inappropriate land use, but because the staff considered a rezoning inappropriate since plaintiffs had already initiated the Chesterfield Street closing petition.

The City presented two experts who were not City employees. Tom Hay testified that the highest and best use for the property as zoned R-10 was for day care and that, based on property sales of comparable property in Durham for day care centers, the value of the property as of 6 May 1985 was $170,000. In his opinion, six months to a year would be needed to market the property for this use or other similar nonresidential uses. Wallace Kaufman testified that the property could be put to a variety of uses and

that it has significant value for many of the nonresidential uses allowed in an R-10 district. He testified that the property had a value of between $150,000 and $200,000 for day care use and could be sold in six months to a year.

At the close of plaintiffs' evidence, the City of Durham moved for a directed verdict, and both parties moved for a directed verdict at the close of all the evidence. The trial judge denied the motions. Two issues were submitted to the jury: (1) whether the rezoning ordinance was a taking and (2) the amount of damages, if any, that plaintiffs were entitled to recover. The trial judge reserved ruling on the issue of whether the rezoning ordinance was invalid as arbitrary, capricious, discriminatory and unreasonable.

The jury found that the rezoning ordinance was an invalid taking but that plaintiffs had suffered no damages. The trial judge then found that the rezoning ordinance should not be invalidated as arbitrary, capricious, discriminatory and unreasonable. Both parties filed post-trial motions for judgment notwithstanding the verdict or, alternatively, a new trial. The trial judge denied the City's motions and granted plaintiffs' motion for judgment notwithstanding the verdict as to damages. The trial judge also granted two additional motions by plaintiffs: that the use permit needed for building a motel be waived and that plaintiffs be awarded costs and attorney's fees under N.C.G.S. § 40A-8(c). The judgment invalidated the rezoning ordinance, awarded plaintiffs $150,937.50 in damages, waived the use permit, and granted costs and attorney's fees of $61,598.61. The judgment included findings and conclusions to support an alternative judicial determination that a taking had occurred.

The City of Durham appealed, and plaintiffs cross-appealed to the Court of Appeals. Discretionary review prior to a determination by the Court of Appeals was allowed by this Court *ex mero motu* on 10 February 1989.

The City of Durham contends that the trial court erred in not granting the City's motions for a directed verdict and judgment notwithstanding the verdict on plaintiffs' state constitutional taking claim because, as the City puts it, "the rezoned property has positive value and can be used for some of the uses permitted in an R-10 district."

[1] We note initially that although the North Carolina Constitution does not contain an express provision prohibiting the taking

of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the "law of the land" clause in article I, section 19 of our Constitution. *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982).

The test to determine whether a taking has occurred is set forth in *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204 (1983). There, a city ordinance imposed land-use regulations on property designated as a flood hazard district and required that new construction and substantial improvements made to properties in the flood hazard district be built so as to prevent or minimize flood damage. The plaintiffs owned commercial real property located in the flood hazard district. They brought a class action against the City of Asheville, claiming that the land-use regulations deprived them of the right to reasonable use of their property and caused it to depreciate to a fraction of its value. *Id.* at 256, 302 S.E.2d at 206. In essence, the plaintiffs challenged the enactment of the flood plain ordinance as an invalid exercise of the police power because it effected a taking of private property for public use.

This Court engaged in a two-part analysis to resolve the issue. We first applied an "ends-means" test to decide whether that particular exercise of the police power was legitimate, by determining whether "the ends sought, *i.e.*, the object of the legislation, is within the scope of the power," and then "whether the means chosen to regulate are reasonable." *Id.* at 261, 302 S.E.2d at 208. We concluded in *Responsible Citizens* that the ends sought under the ordinance fell well within the scope of the police power and that its enactment was reasonably necessary for the public health, safety and welfare. *Id.* at 263, 302 S.E.2d at 209. We then focused on whether the ordinance was invalid because the interference with the plaintiffs' use of the property amounted to a taking. We found guidance in *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961), a case involving the validity of a zoning ordinance, wherein the Court stated:

> "It is a general rule that zoning connot [sic] render private property valueless. The burdens of government must be equal. In other words, if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses or the

> only use to which it is reasonably adapted, the ordinance is invalid . . . . A zoning of land for residential purposes is unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question for residential purposes." McQuillin: Municipal Corporations, Vol. 8, s. 25.45, pp. 104, 105.

Id. at 653, 122 S.E.2d at 822. We noted that in *Helms*, the Court indicated that a zoning ordinance would be deemed unreasonable and confiscatory as applied to a particular piece of property if the owner "was deprived of *all 'practical' use* of the property and the property was rendered of *no 'reasonable value.'* " *Responsible Citizens*, 308 N.C. at 264, 302 S.E.2d at 210 (emphasis added). Although the plaintiffs could continue to use their commercial real estate in whatever way they were using it at the time it was rezoned to a flood hazard district, they argued that because they could not add to or change their current uses of the property except at prohibitive cost, and because the market value of the property had diminished, a taking had occurred. We rejected this argument.

> [A]ssuming that the cost of complying with the land-use regulations is prohibitive (and we do not decide that it is) and recognizing that the market value of plaintiffs' properties has diminished (a fact found by the trial court), these factors are of no consequence here. . . . "[T]he mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid."

Id. at 265, 302 S.E.2d at 210 (quoting *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 218, 258 S.E.2d 444, 451 (1979)).

[2] In short, the test for determining whether a taking has occurred in the context of a rezoning is whether the property as rezoned has a practical use and a reasonable value. *See Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (rezoning of two lots from industrial to residential could constitute a taking where topography and lot size imposed such severe restraints that only a house requiring foundation and roof variation for each room could be built; case remanded for findings as to whether market value of residence would be less than cost of constructing same); *Sherrill v. Town of Wrightsville Beach*, 81 N.C. App. 369, 344

S.E.2d 357 *disc. rev. denied*, 318 N.C. 417, 349 S.E.2d 600 (1986) (for a taking to occur, the restriction must deprive property owner of virtually all beneficial uses of land); *Beverages, Inc. v. City of New Bern*, 6 N.C. App. 632, 171 S.E.2d 4, *cert. denied*, 276 N.C. 183 (1970) (commercial lot and industrial building rezoned from business-commercial to residential and office-institutional; to determine if a taking has occurred, inquiry is whether property as rezoned has some positive value).

[3] The property owner's actual investment in the property prior to a rezoning is not determinative of "practical use" and "reasonable value" of the property after rezoning. A regulatory taking occurs if, in the words of Justice Holmes, the "regulation goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 326 (1922). The cases uniformly reject the proposition that a diminution in property value, even a severe one, necessarily goes too far. *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 131, 57 L. Ed. 2d 631, 652, *reh'g denied*, 439 U.S. 883, 58 L. Ed. 2d 198 (1978). *See generally Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L. Ed. 348 (1915) (87.5% diminution in value); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3rd Cir.), *cert. denied*, 482 U.S. 906, 96 L. Ed. 2d 375, *reh'g denied*, 483 U.S. 1040, 97 L. Ed. 2d 800 (1987) (alleged 89.5% diminution caused by rezoning); *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928, 63 L. Ed. 2d 761, *reh'g denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980) (95% diminution). "[L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. . . . [T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Andrus v. Allard*, 444 U.S. 51, 66, 62 L. Ed. 2d 210, 223 (1979).

Andrus involved a claim for an alleged "taking" of personal property. Congress had banned all sales of eagles or eagle parts. The ban completely destroyed the market value of North American Indian relics incorporating eagle feathers, even though the artifacts came into existence prior to the statutory ban. The United States Supreme Court held that no taking occurred, since the artifact owners retained the right to possess, transport, devise and donate their property. *Id. Compare Hodel v. Irving*, 481 U.S. 704, 95 L. Ed. 2d 668 (1987) (taking occurred where statute deprived claimants of

rights of descent and devise). Though *Andrus* involved personal rather than real property, it serves to demonstrate that even a one hundred percent diminution in property value does not necessarily constitute a taking.

While our North Carolina cases speak in terms of "practical use" and "reasonable value" following the rezoning, many state court decisions hold that a regulatory taking occurs in the zoning context only if the government action deprives the owner of *all* value or use. *E.g., Landmark Land Co. v. City of Denver*, 728 P.2d 1281 (Colo. 1986), *appeal dismissed sub nom., Harsh Inv. Corp. v. City of Denver*, 483 U.S. 1001, 97 L. Ed. 2d 729 (1987) (no taking occurs unless land use regulation deprives owner of all value). *See* Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 Notre Dame L. Rev. 1, 32 n.222 (1989); *see also* 1 E. Ziegler, *Rathkopf's The Law of Zoning and Planning* § 6.05[2] at 6-19, § 6.07 at 6-28 (1989).

[4] A taking does not occur simply because government action deprives an owner of previously available property rights. *Penn Central Transp. Co. v. New York*, 438 U.S. at 130, 57 L. Ed. 2d at 652 (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 560, 8 L. Ed. 2d 130 (1962) (proscribing excavation below water table); *Gorieb v. Fox*, 274 U.S. 603, 71 L. Ed. 1228 (1927) (property setbacks not taking); *Welch v. Swasey*, 214 U.S. 91, 53 L. Ed. 923 (1909) (height limitation not taking)). "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413, 67 L. Ed. at 325.

[5] The timing of the acquisition in respect to the regulatory action complained of is one relevant factor in an analysis of distinct investment-backed expectations. *Andrus*, 444 U.S. at 64 n.21, 62 L. Ed. 2d at 222 n.21. We have held that when a property owner makes expenditures in the absence of zoning or under the authority of a building permit, subsequent changes in the zoning of the property may not prohibit the resulting nonconforming use. *In re Campsites Unlimited, Inc.*, 287 N.C. 493, 215 S.E.2d 73 (1975); *Stowe v. Burke*, 255 N.C. 257, 122 S.E.2d 374 (1961). *See also A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, --- U.S. ---, 104 L. Ed. 2d 180 (1989). However, where an investor knows of a pending ordinance change proposed by a city planning board to the city council, the investor has no valid

claim that he relied upon the prior ordinance in guiding his investment decision. *In re Campsites Unlimited, Inc.*, 287 N.C. 493, 215 S.E.2d 73; *Stowe v. Burke*, 255 N.C. 257, 122 S.E.2d 374. An investor may speculate on regulatory changes, but "the purchase price is irrelevant to the reasonableness of the current restriction." 1 E. Ziegler, *Rathkopf's The Law of Zoning and Planning* § 6.07 at 6-37 and n.40 (1989) (citing cases). To hold otherwise would constitute a windfall to the investor at taxpayer expense.

[6] In analyzing the distinct investment-backed expectations of plaintiffs, we note the City Council enacted the zoning change on 6 May 1985, seven days after plaintiffs were under an equitable obligation to perform the purchase contract. *Knott v. Cutler*, 224 N.C. 427, 31 S.E.2d 359 (1944). However, the undisputed evidence shows that plaintiffs chose to exercise their option to purchase the property on 29 April 1985. This was some twenty-seven days after plaintiffs knew of the recommendation by the Durham Planning and Zoning Commission to rezone the property to R-10. Plaintiffs' expectations of investment return were in fact based on a speculative risk that the Durham City Council would not rezone the property to prohibit the proposed Red Roof Inn project.

Plaintiffs argue that exercise of the option was necessary to protect prior financial investment in the property. It is axiomatic, however, that the purpose of an option contract is to minimize investment exposure to adverse changes in the business environment by postponing for an extended period the decision to accept or reject an offer. When such changes threatened, plaintiffs chose to ignore the warning clouds. They cannot now say that they reasonably expected an investment return untroubled by zoning changes. *See Stowe v. Burke*, 255 N.C. 257, 122 S.E.2d 374.

[7] Pursuant to the test set forth above in *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E.2d 204, we first examine the goals of the rezoning ordinance and determine whether a nexus exists between those goals and the rezoning ordinance itself. "A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health . . . or the public welfare . . . ." *Graham v. City of Raleigh*, 55 N.C. App. 107, 110, 284 S.E.2d 742, 744 (1981), *disc. rev. denied*, 305 N.C. 299, 290 S.E.2d 702 (1982) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. at 395, 71 L. Ed. at 314). The burden of proof of establishing the invalidity

of a zoning ordinance is on the complaining party. *Schloss v. Jamison*, 262 N.C. 108, 136 S.E.2d 691 (1964).

The record reveals that the general goal of the rezoning ordinance is to protect an existing single-family residential neighborhood. Indeed, one of the goals of the City of Durham's comprehensive plan is to maintain the integrity of existing single-family residential neighborhoods. The Associate Director of Current Planning for the City testified that the planning staff considered that the O-I and C-1 zones should never have been placed to the south of I-85 because of the policy of preserving residential neighborhoods and that the development of plaintiffs' property and the Mobil tract as O-I and C-1 was a threat to the adjacent neighborhood. The City's Director of Planning and Community Development explained the nature of this threat—unless commercial and residential uses are separated by clear dividing lines such as highways or natural land features, a "domino effect" tends to occur in that commercial areas grow into strip areas which contribute to the degeneration of a residential neighborhood.

Plaintiffs offered no evidence to counter the City's evidence that a motel would have a commercializing impact on future land uses in the area south of I-85. Rather, one of plaintiffs' experts stated that further commercial development in the area would be desirable. Plaintiffs did offer evidence that the particular Red Roof Inn that they hoped to locate on the property would have limited lighting, sufficient for security purposes in the parking lot area, and would not serve truckers. There was also evidence that Red Roof Inn motels coexisted with residential neighborhoods in other cities. The City of Durham, however, cannot be expected to base zoning decisions on the promises of one potential developer. *See Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1971); *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1970). Moreover, the O-I zoning would have permitted *any* hotel to develop on the property. *See Hall v. City of Durham*, 323 N.C. 293, 372 S.E.2d 564, *reh'g denied*, 323 N.C. 629, 374 S.E.2d 586 (1988). We conclude from this evidence that a sufficient nexus exists between the goals of the rezoning ordinance and the ordinance itself; the record here demonstrates that the ordinance has sufficient foundation in reason and bears a substantial relation to the public welfare. It therefore meets the first part of the *Responsible Citizens* test.

The second part of the test, "whether the means chosen to regulate was reasonable," requires an analysis of whether the rezon-

ing ordinance deprives plaintiffs of all practical use of the property and renders it of no reasonable value. The burden is on plaintiffs to make such a showing. For the purposes of the City of Durham's motions for a directed verdict and judgment notwithstanding the verdict, plaintiffs' evidence must be accepted as true. *Williams v. Jones*, 322 N.C. 42, 366 S.E.2d 433, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 237 (1988).

Both of plaintiffs' experts testified that the rezoning of plaintiffs' property from O-I to R-10 deprived plaintiffs of all practical, beneficial, and reasonable use of the property, though neither expert defined these terms. A review of the experts' testimony shows that their opinions were based partly on the likelihood that plaintiffs would not recapture their investment in the property. One of plaintiffs' experts qualified his opinion by noting that it was based in part on "financial consideration" and the notion that "too many other places" exist in Durham where one might invest one's money and "have an opportunity to come out better" now that the property was rezoned to R-10. The experts testified that in its undeveloped state the property was worth $20,000 to $25,000 after rezoning; that it could be used for one or two houses fronting on Hillandale Road; and that even though there were site constraints that might render the property less desirable for churches or day care centers, it could nevertheless be used for these purposes, and buyers could be found if the price were right.

The only potential use for the property that plaintiffs evaluated in some detail in their evidence was the possibility of fully developing it residentially, with two houses fronting on Hillandale Road and six houses on the back portion of the property. One of plaintiffs' experts concluded that if a road were built to allow access to houses on the back portion of the property, the road and associated utilities would cost more than the extra value created by the new lots there. He testified that with use permits granted by the Durham City Board of Adjustment, a maximum of six lots could be created at a value of $13,500 for each lot for a total of $81,000. Since the road and associated utilities would cost $121,000, plaintiffs would sustain a loss. Although this evidence appears to show that fully developing the property for residential purposes as lots for single-family residences would not be economically viable, it does not go far enough. There are seven other landlocked lots across from plaintiffs' property on the unopened Chesterfield Street which would be benefited by this road. Plaintiffs presented no evidence that

the owners of these lots were approached with a view to negotiating a possible sharing of the cost of road construction. Plaintiffs failed, therefore, to carry their burden of proving that residential development of the back portion of their property is not economically viable.

In addition, and more importantly under the particular facts of this case, plaintiffs presented no evidence of the submission of a proposed development plan in an attempt to have the property rezoned for more dense residential use or other use. This is particularly pertinent in view of the fact that the advisory report of the Planning and Zoning Commission recommended to the City Council that the property in question be rezoned for two "intermediate" uses—limited office institutional (O-I-L) and medium-density clustered residential development—either of which, upon approval of a site plan for development, would allow more intense use of the property. Indeed, the City's Associate Director of Current Planning testified that the "ideal" zoning for the property would be an intermediate use such as clustered residential.

Furthermore, although both of plaintiffs' experts gave as their ultimate opinion that the rezoning had deprived plaintiffs of all practical, beneficial, and reasonable use of the property, their testimony was in fact equivocal. One expert testified on cross-examination that the property's value for a church would be between $100,000 and $200,000. Churches did not require a use permit until 1987. The other expert testified that he had known a church to pay a top price of $20,000 per acre of land, and that although most churches prefer a parcel of three acres, if the price of plaintiffs' 2.6-acre property were adjusted, a church might find it attractive. Finally, plaintiff Vernon Finch himself testified that twenty-five to thirty persons had contacted him after he erected the "for sale" sign on the property. A price of between $100,000 and $150,000 was discussed with regard to locating a child care facility on the property. This evidence signally fails to support the notion that plaintiffs' property had no practical use or reasonable value.

Our review of the testimony and other documents in the record demonstrates that the real gravamen of plaintiffs' claim is that the available uses and value of their property under the R-10 zoning are not comparable to its value for motel use under O-I, in either market appeal or market price. The argument that a use that does not guarantee a return on investment is thus neither practical nor reasonable fails in the face of the principle that the fact that

a rezoning ordinance results in some substantial depreciation of the value of plaintiffs' property or restricts their right to some degree to develop it as they wish is insufficient to render the ordinance invalid. *Responsible Citizens*, 308 N.C. 255, 265, 302 S.E.2d 204, 210.

Interpreted in the light most favorable to plaintiffs, the evidence shows that the public purpose of protecting an existing residential neighborhood from commercial encroachment is substantially advanced by the ordinance rezoning plaintiffs' property from O-I to R-10. As rezoned to R-10, the property could be used for single-family houses, athletic fields, cemeteries, mausoleums, child care centers, churches, clubs or private lodges, noncommercial community buildings, family care homes, parking lots, public buildings, libraries, museums, art galleries, parks, recreational facilities, public or private swimming pools, and schools, including nursery schools and kindergartens. Plaintiffs' own evidence shows that several uses permitted under R-10 zoning could be made of the property, such as residential, day care, or church use. Even though the market for these uses would not be strong, certain of these uses could command a substantial sales price for the property. Finally, plaintiffs' evidence showed that the property could have been sold undeveloped for between $20,000 and $25,000 at the time of trial. We conclude that the property as rezoned retains both practical use and reasonable value and therefore meets the second part of the *Responsible Citizens* test.

Recognizing that a motion for judgment notwithstanding the verdict must be cautiously and sparingly granted, *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E.2d 441 (1972), *rev'd on other grounds*, 283 N.C. 277, 196 S.E.2d 262 (1973), and that the trial court may grant such a motion only if the evidence is insufficient as a matter of law to justify a verdict for the nonmovant, *Williams v. Jones*, 322 N.C. 42, 366 S.E.2d 433, we hold that the rezoning of plaintiffs' property from O-I (office-institutional) to R-10 (residential) does not amount to a taking of that property under our state Constitution. Assuming, *arguendo*, that the taking claim under the United States Constitution is ripe for decision by this Court, we further hold, for the same reasons discussed above, that the rezoning of plaintiffs' property does not amount to a taking under the United States Constitution.

Since the rezoning of plaintiffs' property does not amount to a taking under the North Carolina Constitution or the United States

Constitution, the trial court erred in failing to grant the City of Durham's motions for a directed verdict and judgment notwithstanding the verdict on plaintiffs' state and federal constitutional taking claims. In view of our disposition of the case on this ground, we need not address the challenge to the adequacy of plaintiffs' evidence as to damages.[1]

This disposition requires consideration of two issues presented in plaintiffs' cross-appeal:

[8] First, plaintiffs argue that the trial court erred in granting defendant's motion for summary judgment on their 42 U.S.C. § 1983 claim of a taking. We disagree. Plaintiffs' forecast of evidence was insufficient to submit the issue of a taking to the jury. Our holding is buttressed by our conclusion that plaintiffs' evidence at trial was insufficient to sustain a taking claim.

[9] Second, plaintiffs argue that the trial court erred in failing to conclude that defendant acted arbitrarily, capriciously and unreasonably in removing plaintiffs' property from the O-I zone in 1985. It is settled law that landowners are not guaranteed that existing zones will remain unaltered. Zoning regulations "may be amended or changed when the action is authorized by the enabling statute and does not contravene constitutional limitations on the zoning power. Constitutional limitations, however, forbid arbitrary and unduly discriminatory interference with property rights in the exercise of such power." *Allgood v. Town of Tarboro*, 281 N.C. 430, 439, 189 S.E.2d 255, 261 (1972) (citations omitted).

The evidence here establishes that until 1979 plaintiffs' land had been in a residential zone, and that during the period between the 1979 and 1985 rezonings, plaintiffs' land and the adjacent Mobil tract comprised a virtual island of commercially or institutionally

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1. The trial judge assumed that the measure of damages was the value of the property immediately prior to the adoption of the rezoning ordinance, less the value of the property immediately after the adoption of the rezoning ordinance, multiplied by the market rate of return and the length of time of the taking in years. While there is authority for this method of computing damages in such a case as this, *see Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987), it is by no means the only method available, and this Court has not spoken to the issue in a zoning case. Methods other than the rate of return method which are available and have been employed by other courts include the rental value, option value, actual or out-of-pocket losses, and others. *See* 4 E. Ziegler, *Rathkopf's The Law of Zoning and Planning* § 46.03[2][d] at 46-60 (1989) ("Calculating Damages").

zoned land in a large and stable residential area on the south side of Interstate 85. Residentially zoned land used for homes, a church, and a day care center bordered the rezoned area on three sides. South of I-85, no other Watts-Hillandale area property in close proximity to the *locus in quo* was zoned for commercial or office-institutional use. The nearest property south of I-85 zoned for such use was some distance to the east on Guess Road. Property to the north was zoned similarly, but was separated from the tract in question by an interstate highway. Defendant's Associate Director of Current Planning testified that in the planning staff's view the commercial and institutional zones should not have been placed south of I-85 because of defendant's policy of preserving residential neighborhoods.

The foregoing shows that the initial 1979 rezoning of plaintiffs' property from R-10 to O-I removed the property from residential zoning, made it a virtual island of commercially or institutionally zoned land in a large and stable residential area, and contravened defendant's policy of preserving residential neighborhoods. Defendant's 1985 action to return the property to its prior zone in conformity with the remainder of the neighborhood, thus returning the property to conformity with defendant's policy of preserving residential neighborhoods, was not so arbitrary, capricious or unreasonable as to require its invalidation on that basis. Plaintiffs had neither obtained a building permit, *Stowe v. Burke*, 255 N.C. 527, 122 S.E.2d 374, nor begun actual construction in good faith reliance on the existing zone, *In re Campsites Unlimited*, 287 N.C. 493, 215 S.E.2d 73. Plaintiffs therefore had acquired no vested right to go forward with the proposed motel development. In view of the preliminary stage of the proposed development and the timing of plaintiffs' acquisition of the property, the action was not so arbitrary, capricious or unreasonable, as applied to them, as to require its invalidation on that basis.

> When the most that can be said against [zoning] ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

In Re Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938).

The judgment of the trial court is reversed, and the case is remanded to the Superior Court of Durham County for entry of judgment consistent with this opinion.

Reversed and remanded.

Justice MARTIN concurring.

I agree and concur with the well-reasoned majority opinion and write only to state additional reasons in support of the Court's decision.

Plaintiffs bought the subject property *after* it had been rezoned R-10. As they did not own the property at the time it was rezoned, they were not damaged by the zoning. Plaintiffs contend, however, that they were legally obligated to purchase the property after they notified the owner of the land that they intended to exercise their option. This occurred on 29 April 1985, three days after plaintiffs' agreement with Red Roof Inns expired and twenty-seven days after plaintiffs knew of the recommendation of the Durham Planning and Zoning Commission to rezone the property to R-10. On 6 May 1985, the Durham City Council so rezoned the property. It was not until 26 June 1985 that plaintiffs acquired title to the subject property then zoned R-10.

It is true that upon acceptance of an option to purchase the option becomes a binding contract to purchase the property. However, such contract is not subject to specific performance unless it is otherwise a proper subject for equitable relief. *Kidd v. Early*, 289 N.C. 343, 40 S.E.2d 367 (1976). Whether specific performance will be granted is determined on a case by case basis according to the equities as disclosed by a just consideration of all the circumstances of the particular case. *Byrd v. Freeman*, 252 N.C. 724, 114 S.E.2d 715 (1960).[1]

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1. Contrary to the dissent of Chief Justice Exum, I do not concede that plaintiffs were obligated by contract to purchase the property at the time it was rezoned. As set forth in this concurring opinion, the contract could not be specifically enforced against plaintiffs. Nor do I agree with the dissenter that plaintiffs were the "beneficial" owners of the property at the time of the rezoning. A beneficial owner of real property is either an owner entitled to the rents and profits or usufruct of the property, or the cestui que trust wherein the property is the trust corpus. Persons for whom a trustee holds title to property are the beneficial owners of property. Black's Law Dictionary 142 (rev. 5th ed. 1979). Such is not the status of an optionee.

When the subject matter of an executory contract is destroyed without fault of the party seeking to be excused from performance, impossibility of performance is recognized in this jurisdiction as grounds for rescission. *Brenner v. School House, Ltd.*, 302 N.C. 207, 274 S.E.2d 206 (1980); *Sechrest v. Forest Furniture Co.*, 246 N.C. 216, 141 S.E.2d 292 (1965); *Sale v. Highway Comm.*, 242 N.C. 612, 89 S.E.2d 290 (1955).

> In Black on Rescission and Cancellation, sec. 213, it is stated: "The true rule appears to be that rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted."

Jenkins v. Myers, 209 N.C. 312, 318, 183 S.E. 529, 533 (1936).

Obviously, it would not have been equitable to require plaintiffs to purchase this property when all the parties intended to buy and sell the property for use as a motel. This intent of the parties was set forth in both of the contracts between the parties. At the time of the sale, the property could not be used for the intended purpose.

This situation is analogous to the cases denying specific performance when the loss of the intended use of the property by fire occurs before the contract of sale is consummated. *See Sale v. Highway Comm.*, 242 N.C. 612, 89 S.E.2d 290 (1955); *Poole v. Scott*, 228 N.C. 464, 46 S.E.2d 145 (1948). In the case at bar, utilization of the property as a motel site was the principal and most material and substantial inducement for plaintiffs to enter into the contract to purchase the subject property. That use was destroyed before the contract was executed. Here, plaintiffs would not be equitably required to purchase the property.

However, knowing all this, plaintiffs proceeded to buy the property, being fully aware that it could not be used for motel purposes. Plaintiffs' contract with Red Roof Inns had *required* that the property be zoned for use as a motel. Plaintiffs exercised their option under the written contracts of the parties for the purchase and sale of a tract of land zoned for use as a motel; however,

they accepted instead a tract of land zoned for residential purposes and not usable as a motel. If plaintiffs had an equitable interest, it was in the tract of land usable for motel purposes as demonstrated in the written contracts of the parties. In this transaction, plaintiffs did not acquire such a tract. They suffered no compensable damages by reason of the rezoning.

Further, plaintiffs failed to offer any evidence of damages under the applicable rule for damages in this case. Here, the proper relief for a successful plaintiff is to have the ordinance declared unconstitutional as applied to the subject property together with damages for the temporary taking of the property by the city during the time that the property was unconstitutionally subjected to the ordinance.

The evidence in this case as to the value of the property before and after it was rezoned for residential use was competent only to prove that the ordinance was unconstitutional as applied to the subject property. It was not competent to prove the damages resulting from the temporary taking of the property. This is true because the plaintiffs did not lose, nor did the city acquire, title to the property as a result of the rezoning.

Where property is taken as the result of governmental action for a temporary period of time, rather than permanently, the measure of compensation is not the fair market value of the property, but what the property is fairly worth during the time for which it is held or encumbered: in other words, the fair rental value of the property for the period it was held or encumbered. 27 Am. Jur. 2d *Eminent Domain* § 351 (1966); 29A C.J.S. *Eminent Domain* § 142 (1965); *see* 7 A.L.R. 2d 1299 (1949).

Plaintiffs failed to produce any evidence of damages under the appropriate rule for the measurement of damages in this case. Having failed to do so, plaintiffs' action for damages was subject to dismissal.

Chief Justice EXUM dissenting.

First I think it important to set out the procedural posture in which this case reaches the Court. Plaintiffs filed this action in November 1985 for a declaratory judgment that Durham's ordinance rezoning the property in question from office institutional (O-I) to residential (R-10) was invalid because, among other reasons,

it was an unconstitutional taking without just compensation under the state and federal constitutions. Only plaintiffs' taking claims proceeded to trial. The jury was instructed by Judge Bowen in pertinent part as follows:

> The enactment of zoning ordinances is not a contract with the property owners of the City and confers upon them no vested rights to have the ordinances remain forever in force, or to demand that the boundaries of each zone or the uses to be made of the property in each zone remain as declared in the original ordinance. Such legislation may be repealed in its entirety or amended as the City's legislative body determines from time to time to be in the best interest of the public subject only to the limitations of the statutes and the limitations of the Constitution of North Carolina, and the Constitution of the United States.
>
> The City Council may lawfully and without payment to the landowners regulate land and thereby reduce the value of land.
>
> The mere fact that an ordinance resulted in depreciation of the value of individual property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid.
>
> A rezoning or a regulation constitutes a taking of the landowner's property and requires that the City pay just compensation to the landowner when the landowner is deprived of all practical uses of the property and the property is rendered of no reasonable value.
>
> . . . .
>
> Members of the Jury, both the North Carolina Constitution and the United States Constitution prohibits a governmental taking of property without just compensation.
>
> The R-10 zoning ordinance imposed by the City on the plaintiffs' property is invalid and therefore, void if it constitutes a taking of the plaintiffs' property.
>
> The R-10 ordinance is an invalid exercise of police power and void at the taking if the plaintiffs were deprived of all reasonable, beneficial or practical use of their property, con-

sidering the economic and physical feasibility of the use of the property as R-10.

In considering this issue you may from all of the evidence examine the uses to which the plaintiffs' property can be economically and practically put under the R-10 zoning classification.

So, Members of the Jury, if you find by the greater weight of the evidence that the plaintiffs were deprived of all reasonable, beneficial or practical use of the property, considering the economic and physical feasibility of the use of the property as R-10, then you should answer this issue, yes, that is, finding that the R-10 zoning is invalid.

If you fail to so find, then you should answer this issue, no.

The jury found there was a taking but found plaintiffs had suffered no damages.

Insofar as the jury found a taking, Judge Bowen entered judgment on the verdict and declared the ordinance invalid.[1] He then allowed plaintiffs' motion for judgment notwithstanding the verdict on the damages issue and awarded damages for a temporary taking of $150,937.50.[2] He also allowed plaintiffs' motion for costs of $600 and attorney's fees of $61,598.61.

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1. The remedy for a zoning ordinance which amounts to an unconstitutional taking is to declare the ordinance void insofar as it applies to the property taken. See *Helms v. Charlotte*, 255 N.C. 647, 653, 122 S.E.2d 817, 822 (1961), citing McQuillin on Municipal Corporations.

2. Damages based on a temporary taking were calculated as follows: value of the property immediately prior to the taking ($550,000), less the value of the property immediately after the taking ($25,000), multiplied by the market rate of return (10%), and by the length of time of the taking in years (from 6 May 1985 through 18 March 1988).

I believe (and there seems to be no dispute between the parties on this point) that, assuming there has been a temporary unconstitutional taking, *i.e.*, from the time of the ordinance's enactment to the time it was declared void, damages are properly allowed for it. The trial court instructed the jury to calculate these damages essentially as it did when determining them itself. It also instructed the jury that the damages thus derived "should be adjusted by any appreciation of the land that has occurred during the time the R-10 zone was in effect." Considering the post-verdict motions, the trial court presumably thought this "appreciation" instruction was responsible for the jury's not awarding any damages for a temporary taking and was error. It, therefore, awarded plaintiff's motion for judgment notwithstanding the verdict on the damages issue and proceeded to calculate these

In an apparent effort to guard against an appellate court holding that the taking question should be decided by the court and not a jury (as defendant contended) Judge Bowen noted in his judgment that "if the issue of a 'taking' had been tried by this Court, without a jury, this Court would have entered findings of fact and conclusions of law in accordance with the jury and as shown on judgment attached hereto as 'Exhibit A.' " The alternative judgment attached as Exhibit A included the following pertinent findings:

> 28. The R-10 zoning classification in the City of Durham permits the Property to be used for a single-family residence, child care facility, church, community building, government building, family care home, school, swimming pool and other miscellaneous uses.
>
> 29. Under the present R-10 zoning classification, the Property may only be used for the construction of one single-family residence due to its shape, access and width of lots without obtaining a use permit and a use of the Property as a child care facility, church, community building, government building, school, swimming pool, family care home (limited to 5 persons) or other miscellaneous uses, requires the issuance of a special use permit by the Board of Adjustment of the City of Durham.
>
> 30. If the Property were developed for residential purposes and subdivided into more than one lot, upon completion of curb, gutter and other city required improvements, the market value of the houses and lots would be less than the cost of constructing the houses with requisite streets and utilities.
>
> 31. There is no market for the sale of the Property for residential purposes or other permitted uses under the R-10

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damages itself, without any adjustment for appreciation, based on the plaintiff's evidence.

Without intending to express a firm opinion, I doubt that the trial court had authority to enter judgment notwithstanding the verdict in favor of plaintiffs on the damages issue. This is tantamount to a directed verdict in favor of the party with the burden of proof on an issue in the case on which the evidence was in sharp conflict. The better course would have been for the trial court simply to set aside the verdict on the damages issue as being against the greater weight of the evidence or because, as may have been the case here, the court thought it had committed error in its instructions on this issue. The court could then order a new trial in which the jury, on proper instructions, could assess the damages based on how it viewed the evidence.

zoning classification and the Property has no reasonable value for the permitted uses.

32. The downzoning of the Property rendered the development of the Property for the permitted uses under the R-10 zoning classification impractical and unsuitable.

33. The downzoning of the Property deprived the Plaintiffs of the beneficial use of the Property by precluding all practical uses and the only use to which it is reasonably adopted.

34. The City of Durham, by downzoning the Property, deprived the Plaintiffs of all practical, reasonable, and beneficial use of the Property and rendered the Property valueless.

35. The City of Durham, by downzoning the Property, deprived the Plaintiffs of all economically viable use of the Property and the Plaintiffs have lost their investment backed expectations.

First, I believe Judge Bowen correctly submitted the taking issue to the jury. The evidence on this issue was in conflict. Plaintiffs' evidence tended to support a taking and defendant's evidence tended to the contrary. It was for the jury to resolve the conflict and determine the issue under correct instructions. See *Helms v. Charlotte*, 255 N.C. 647, 657, 122 S.E.2d 817, 825 (1961) (jury trial waived and taking issue submitted to judge by agreement). I believe it did so, and I vote to affirm Judge Bowen's judgment entered on the verdict as to the taking issue.

I have no quarrel with the majority's exposition of the proper legal standard to be used in determining whether a zoning ordinance constitutes an unconstitutional taking of property without due process. My disagreement is with the majority's application of that standard to the evidence in this case.

The standard, as the jury was here instructed, is whether the zoning deprives owners (actual, or as here, beneficial) of all practical uses of their property so that it has no reasonable value. *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 263-64, 302 S.E.2d 204, 209-10 (1983); *Helms v. Charlotte*, 255 N.C. at 653, 122 S.E.2d at 822. The standard is essentially the same under the state and federal constitutions. Compare *Citizens* and *Helms* with *Agins v. Tiburon*, 447 U.S. 255, 260-61, 65 L.Ed.2d 106, 112 (1980), and *Penn Central Transp. Co. v. New York City*, 438 U.S.

104, 123-28, 57 L.Ed.2d 631, 647-51, *reh'g denied*, 439 U.S. 883, 58 L.Ed.2d 198 (1978). The standard does not require that the zoning prohibit all possible uses or that it render the property absolutely valueless. The key words in the standard are "reasonable" and "practical." In *Helms* the Court remanded the taking issue for further findings and conclusions because:

> The findings of fact and conclusions of law with respect to the indicated question do not support the judgment on this issue. The court found that a residence could be built, but it did not find that it would be practical, desirable and of reasonable value. In short, the court did not find that the lot had any reasonable value for residential use and that such use was practical.

Helms v. Charlotte, 255 N.C. at 657, 122 S.E.2d at 825.

The controlling issue before us is whether there is evidence in the case which, when viewed in the light most favorable to plaintiffs and when all conflicts, contradictions, and inconsistencies in the evidence are resolved in plaintiff's favor, is sufficient to support the jury's determination that the rezoning deprived plaintiffs of all practical use of their property so that it had no reasonable value. *See Williams v. Jones*, 322 N.C. 42, 47-48, 366 S.E.2d 433, 436, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 237 (1988).

I am confident there is such evidence. Much of it is summarized in the majority opinion. As the majority notes, both of plaintiffs' real estate experts testified ultimately that the rezoning had deprived plaintiffs of all reasonable, practical, and beneficial use of their property. These opinions were based on the experts' thorough familiarity with and their careful and well-documented study of the property. The experts did not overlook, but had carefully considered and were duly examined about, many of the uses of the property permitted by R-10 zoning.

The majority attempts to discredit this evidence. The majority states plaintiffs' experts' testimony was "in fact equivocal" and "[a] review of the experts' testimony shows their opinions seem to be based partly on the likelihood that plaintiffs would not recapture their investment in the property." The majority also states "that the only potential use for the property that plaintiffs evaluated in some detail in their evidence was the possibility of fully developing [the property] residentially" and "plaintiffs presented no evidence

of the submission of a proposed development plan in an attempt to have the property rezoned for more dense residential use or other use." The majority suggests the experts' testimony supports its conclusion that the property has "both practical use and reasonable value" because it "shows that several uses permitted under R-10 zoning could be made of the property" and "that the property could have been sold undeveloped for between $20,000 and $25,000 at the time of trial."

A careful review of the testimony makes plain, in my view, that the experts' opinions were not equivocal and were based not on whether plaintiffs could recapture their investment in the property, but rather on a thorough evaluation of the property as rezoned. In addition, their testimony cannot be fairly characterized as detailed only with respect to an evaluation of developing the property residentially; rather their evaluations included analyses of the feasibility and practicality of a number of potential R-10 uses including development as a church or a day care center. Both experts' evaluations of the site were based on topographic, environmental, and market considerations. While, as the majority correctly notes, plaintiffs' experts did testify that several uses permitted under R-10 zoning could possibly be made of the property, they both testified that none of these possible uses were reasonable, practical, or beneficial because there was very little, if any, market for these uses. This testimony was corroborated by defendant's witness Hay, who admitted on cross-examination that it could take "six months to a year" or even longer to find a purchaser for this property as zoned R-10. Witness Ward testified that he had "not seen any evidence on any information that has been produced that would indicate that the City Council would vote to change this zone to anything else" other than R-10, thereby demonstrating that any attempt to have the property rezoned for a more dense residential use would be fruitless. Moreover, an unsuccessful petition to rezone should not be a prerequisite to plaintiffs' challenge to the present zoning ordinance as an unconstitutional taking.[3]

3. A rezoning application prerequisite to a taking claim fails to take into account the nature of these claims and the remedies available. As to the landowner's primary remedy, the prerequisite is illusory and provides ultimately no real, additional protection for the zoning authorities. This is so because if the landowner succeeds in establishing a taking by the challenged zoning classification, the ordinance will simply be voided insofar as it applies to the landowner's property. At that point the zoning authorities must consider other possible zoning classifications. I believe zoning authorities would prefer to have their zoning classifications

Finally, both of plaintiffs' experts testified that the value of the property immediately before the rezoning was $550,000. Witness Cochran valued the property after the rezoning as an undevelopable tract at $20,000; and witness Ward, at $25,000.

Mr. Ralph Cochran, President of Allenton Development, Inc., testified that he was thoroughly familiar with the property in question, situated at the intersection of Interstate 85 and a busy, four-lane intercity connector known as Hillandale Road. Mr. Cochran was familiar with the property both before and after it was rezoned from O-I to R-10. He testified that in order to develop the property for single-family residential purposes, the only permitted use at time of trial not requiring a use permit to be issued by the Board of Adjustment, the owner would have to install a 32-foot wide street with curbing and asphalt paving and an eight-inch municipal sewer line with a fire hydrant as prescribed by municipal regulations. Installation of the street and sewer lines would permit as many as eight single-family residence building lots, provided the Board of Adjustment permitted size variances on two of the lots which would be slightly undersized. The cost of the improvements in Mr. Cochran's opinion would be approximately $121,500 after which the eight lots could be sold for an average price of $13,500. The result is that the property would have a negative value for development for single-family residential purposes. Without the street and sewer improvements the land would accommodate only one single-family residence lot.

Mr. Cochran testified that he also gave consideration to all other uses under R-10 zoning which required the issuance of a use permit by the Board of Adjustment. He said that while the site "physically would fit a church," there would be no market for the property for church use because churches "have to go where the people are . . . . [T]hey are going to the suburbs where the residential developments are going, where the young people are . . . ." Mr. Cochran testified that he had dealt professionally with approximately a dozen churches in an effort to locate sites for

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remain in effect until it has been judicially determined that they are invalid, rather than respond, short of such a determination, to an application for a change which they have already, by implication if not expressly, rejected. For a secondary remedy the landowner may also be entitled to damages for any temporary taking of his property during the time an invalid zoning classification remained in effect. A rezoning application prerequisite to a taking claim eliminates altogether this secondary remedy.

them. No church had ever chosen to locate on the quadrant of any intersection on Interstate 85, the Durham East-West Expressway or Interstate 40. In his opinion there would be "a very slim margin out there of buyers" for church purposes. Mr. Cochran testified that assuming the Board of Adjustment would issue a use permit for a day care center, nursery, preschool kindergarten, or retirement home, the property would be topographically suitable for such functions but there would be little if any market for a child care facility because of the heavy traffic and noise level and because people desire to locate them in the suburbs. He said the construction of private clubs in the Durham area in the last twenty years had been on the downswing and most private organizations were looking for land out in the county rather than in Durham.

Ultimately Mr. Cochran testified that based on his twelve years' experience in the Durham real estate market and his familiarity with the development of R-10 property in Durham, the subject property was "just not suitable for that kind of development." In his opinion the zoning change from O-I to R-10 deprived the plaintiffs "of the beneficial use of the property." He valued the property zoned O-I at $520,000 as developable land and, zoned R-10, at $20,000 as undevelopable land. On cross-examination Mr. Cochran did not retreat from any of the opinions he offered on direct. Regarding the property's use as a church, the following question and answer did occur on cross-examination:

> Q. This property for use for a church would also have a value in excess of One Hundred Thousand and in excess of Two Hundred Thousand, wouldn't it, sir?
>
> A. I think that's probably true. I don't have specific numbers on what churches are paid these days.

Earlier, however, during cross-examination, Mr. Cochran made it clear that there was little if any market for the property as a church because, "my opinion is that most churches that are buying sites today are buying those sites in the suburbs and not in the maturing neighborhoods."

On redirect examination Mr. Cochran testified that, under R-10 zoning, the property could not legally be developed for many of the uses he was asked about on cross-examination. He said it could not be developed for apartments, offices, or condominiums.

Mr. Frank Ward, President of Frank Ward Realty and Insurance Company, testified that he had had many years' experience in appraising, listing, selling and developing properties, advising and counseling people in the real estate business in Durham and around Durham. He was thoroughly familiar with the evolution of the subject property over the last thirty years, including the construction of Interstate 85 and the enlarging of Hillandale Road to a major, four-lane intercity connector and north-south artery. He recalled the first commercial development in the Hillandale I-85 quadrant to be a service station in the northwest corner. In the late 1960s or early 1970s, before the enlargement of Highway 70 to Interstate 85 and before Hillandale Road became a major four-lane artery, St. Luke's Episcopal Church was built at or near the intersection. Since the upgrading of Highway 70 to Interstate 85 and the enlarging of Hillandale Road, however, all of the development in and around this quadrant had been exclusively commercial. The traffic is such at this intersection, according to Mr. Ward, that to go through the intersection on Hillandale Road and negotiate all the traffic signals requires two to three minutes.

In Mr. Ward's opinion the property is too small for use as a church. Regarding the R-10 zoning of the property, Mr. Ward testified, "My opinion is from the point of practicality and financial consideration it is not a practical use for the piece of property." Mr. Ward further stated that in his opinion the plaintiffs have been deprived of "all reasonable, practical and beneficial use" of the property. He said "from practical financial consideration . . . to try . . . to use the property for single-family use would be foolhearted, and I think showing very poor judgment on the part of someone." In Mr. Ward's opinion the property zoned O-I had a value of $550,000 as developable land and, zoned R-10, $25,000 as undevelopable, vacant land.

Mr. Ward testified that he considered all other permitted uses in an R-10 zone "and I ended up rejecting these optional uses because of supply and demand situations that I've seen in the market place and because of competitive situations that I think exist in most of these situations where people have to make decisions about them." He testified, "As a practical matter I do not see it as a church location and I would not suggest to a church that they locate there . . . unless the consideration was the best that I could get for my money or I could do much better there for my money than I can do some other place." As for day care

centers Mr. Ward said, "They want to be in a location where they will be the most successful . . ., where they will have the greatest appeal, the greatest convenience to their customers, and I do not think this is that kind of location. . . . [T]he traffic in and out of there . . . would be horrendous. . . ." In Mr. Ward's opinion there was no practical use for the property for any type of child care institution; and there was no demand for the property for use as a community center, club or fraternal organization.

In Mr. Ward's opinion the property, zoned R-10, would be worth $25,000 "for speculative investment" only. Mr. Ward said, "Most property zoned R-10 is not on the quadrant of an interstate highway and most of it is zoned and sold for residential purposes." He said that in the last ten to fifteen-year period he could not recall the development of any property for any of the permitted uses within an R-10 zone on any quadrant of the various Durham street intersections with Interstate 85, the East-West Expressway, or Interstate 40.

Again, Mr. Ward did not retreat on cross-examination from any of the opinions he firmly expressed on direct.

Accepting plaintiffs' evidence as true and viewing it in the light most favorable to plaintiffs, as the majority concedes is required, I conclude there was sufficient evidence from which the jury could find that the rezoning had deprived plaintiffs all *practical* use of the property so that it had no *reasonable* value.

There can be cases in which the evidence is so one-sided that rezoned property can be said as a matter of law to have or not to have "practical use" and "reasonable value." This is not such a case. Here the evidence is conflicting, and even the plaintiffs' evidence considered alone would not be enough to conclude as a matter of law that a taking occurred. Rather it is for the jury first to decide what evidence it finds credible and second to apply the legal standard as given it by the trial court to that evidence to determine whether a taking has occurred. Plaintiffs' evidence, if believed, is enough for a jury to conclude under the standard that a taking occurred.

If plaintiffs' evidence is believed, the rezoned property is analogous to an automobile which has been completely destroyed, "totaled" in the vernacular, in a collision. Although the automobile has some value as junk, its owner has been deprived of all practical

use of the automobile so that it has no reasonable value as an automobile. Similarly, here plaintiffs' evidence tended to show that after rezoning the property had only minimal, residual value as undevelopable land. The rezoning deprived plaintiffs of all practical use of their property so that its minimal, residual value as undevelopable land was simply no longer reasonable. At least the evidence was such that a jury could so find.

I also disagree with the position taken by Justice Martin in his concurring opinion. First, the City of Durham does not rely on the fact that the contract between plaintiffs and the owners for the sale of the property had not been closed and title transferred at the time of rezoning. This point was neither briefed nor argued before us, except in response to questions directed to counsel by Justice Martin.

Second, at the time of rezoning plaintiffs were under a contractual obligation to purchase the property at the agreed-upon price. I am confident that the sellers of the property would have been entitled to specific performance of the contract at the agreed price had plaintiffs refused to comply with the contract.

> As to when specific performance [of a contract for conveyance of land] will be enforced in this jurisdiction the rule is clearly stated in *Combes v. Adams*, where *Hoke, J.*, speaking for the Court, said: 'It is accepted doctrine that a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced. . . . [M]ere inadequacy of price, without more, will not as a rule interrupt or prevent the application of the principle.'

Knott v. Cutler, 224 N.C. 427, 432, 31 S.E.2d 359, 361 (1944) (citations omitted). I can find no reported case in this jurisdiction where specific performance of a contract for the sale of land, at least in the absence of fraud, mistake, undue influence or the equivalent, has not been awarded against the nonperforming party. *See, e.g., Texaco v. Creel*, 310 N.C. 695, 314 S.E.2d 506 (1984) (specific performance approved despite rather severe "inequities" to seller). While *Byrd v. Freeman*, 252 N.C. 724, 114 S.E.2d 715 (1960), relied upon by Justice Martin, does quote broader language from *American Jurisprudence*, the Court there affirmed a decree of specific performance awarded by the trial court.

In conclusion and for the reasons stated I would vote to affirm the trial court's entry of judgment on the verdict as to the taking issue. My inclination, for the reasons set out above in footnote 2., would be to vacate the trial court's allowance of plaintiffs' motion for judgment notwithstanding the verdict on the damages issue and remand this issue for a jury trial.

Justices FRYE and WEBB concur in this dissenting opinion.

Justice FRYE dissenting.

I concur in the Chief Justice's dissenting opinion. The ultimate question before the Court in this case is whether the plaintiffs carried their burden of showing that the rezoning of plaintiffs' property amounted to a taking under either the North Carolina Constitution or the United States Constitution. The jury found that a taking had occurred. After making findings of fact, the trial court also concluded that a taking had occurred. The majority of the Court now holds that the City of Durham's motions for a directed verdict and judgment notwithstanding the verdict should have been granted, meaning that the evidence was insufficient to go to the jury in the first place. I dissent from that holding.

As the majority notes, plaintiffs' experts testified that the rezoning of plaintiffs' property from O-I to R-10 deprived plaintiffs of all practical, beneficial and reasonable use of the property. As the majority further notes, while the plaintiffs bear the burden of showing that the rezoning ordinance deprives plaintiffs of all practical use of the property and renders it of no reasonable value, for purposes of the City of Durham's motions for directed verdict and judgment notwithstanding the verdict, plaintiffs' evidence must be accepted as true.

> The judge must consider the evidence in the light most favorable to the nonmovant and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). All conflicts in the evidence are to be resolved in the nonmovant's favor, and he must be given the benefit of every inference reasonably to be drawn in his favor. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E.2d 788 (1978). Conflicts, contradictions, and inconsistencies are to be resolved in the nonmovant's favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973).

William v. Jones, 322 N.C. 42, 48, 366 S.E.2d 433, 437, *reh'g denied*, 322 N.C. 486, 370 S.E.2d 237 (1988). In the instant case, the nonmovants are the plaintiffs. Resolving all of the conflicts, contradictions and inconsistencies in the evidence in plaintiffs' favor and giving them the benefit of every inference reasonably to be drawn therefrom, I conclude that the evidence was sufficient to go to the jury and to sustain a finding that there was in fact a taking. Thus, I dissent from the Court's holding to the contrary.

STATE OF NORTH CAROLINA v. JAMES WHITESIDE, JR.

No. 431A88

(Filed 5 October 1989)

1. **Criminal Law § 61.2 (NCI3d)— admissibility of tennis shoes and shoe print comparisons**

Tennis shoes taken from defendant's residence and expert testimony describing the similarities between shoe prints found at a murder scene and the soles of the tennis shoes were admissible as tending to connect defendant with the alleged murder. Evidence concerning the tennis shoes was not rendered inadmissible by the State's evidence that defendant was wearing boots on the night in question where the State also introduced evidence from which the jury could reasonably infer that defendant wore tennis shoes on that night. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence §§ 377, 770, 1145.

2. **Criminal Law § 416 (NCI4th)— closing argument—refusal to permit excerpts from videotape of accomplices' statements**

The trial court in a first degree murder case did not abuse its discretion in refusing to permit defense counsel during closing argument to show excerpts of the videotaped confessions of two accomplices who testified for the State where the entire videotape was shown to the jury during the trial, and defense counsel was permitted to refer extensively to the videotape during his closing argument and to contrast it with the testimony of the witnesses. N.C.G.S. § 15A-1230(a), § 84-14.

Am Jur 2d, Trial § 197.

3. Criminal Law § 89.10 (NCI3d)— State's witness—exclusion of juvenile adjudications

The trial judge in a homicide case did not abuse his discretion in refusing to admit into evidence the juvenile adjudications of a State's witness after he had allowed the adjudications to be used on cross-examination for impeachment purposes. N.C.G.S. § 8C-1, Rule 609(d).

Am Jur 2d, Witnesses § 575.

4. Homicide § 12 (NCI3d); Assault and Battery § 17 (NCI3d)— indictment for murder—insufficiency to support assault convictions

An indictment charging that defendant "unlawfully, willfully and feloniously and of malice aforethought did kill and murder" a named victim is insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill. Therefore, the trial court did not err in refusing to submit potential assault verdicts to the jury. N.C.G.S. § 15-169, § 15-170.

Am Jur 2d, Homicide § 535.

5. Constitutional Law § 28 (NCI3d)— knowing use of false testimony for conviction—insufficient proof by defendant

The trial court properly denied defendant's motion for a mistrial in a murder case on the ground that the State knowingly used false testimony to obtain his conviction because the statements made by two accomplices to the police were inconsistent with their testimony at trial where the variations in testimony noted by defendant related to actions of the accomplices rather than of defendant and were not material to establishing defendant's guilt, and defendant failed to show that the accomplices' testimony was false concerning defendant's actions.

Am Jur 2d, Criminal Law § 784.

6. Criminal Law § 794 (NCI4th)— instruction on acting in concert—supporting evidence

The trial court did not err in instructing the jury that it could find defendant guilty of first degree murder on a theory of acting in concert, even if participation by defendant's two accomplices in the crime was not equal to that of defend-

ant, since the presence of the accomplices at the crime scene and evidence that they committed actions which furthered the criminal act upon the victim combined to show a common plan or purpose among the three men.

Am Jur 2d, Homicide § 507.

7. **Criminal Law § 43 (NCI4th) — acting in concert — simultaneous action and equal participation not required**

Neither simultaneous action nor equal participation in the commission of a crime by two persons is a prerequisite for application of the theory of acting in concert.

Am Jur 2d, Criminal Law § 166; Homicide § 29.

8. **Constitutional Law § 32 (NCI3d); Criminal Law § 568 (NCI4th) — same attorney representing accomplices — artificial conformity of testimony — defendant not prejudiced**

The trial court did not err in refusing to sever the joint representation of defendant's two accomplices by the same retained attorney and in denying defendant's motion for a mistrial on the ground that the joint representation created a conflict of interest between the attorney and the public's interest in the fair administration of justice due to the "artificial conformity" of the testimony of the two accomplices after they retained the same attorney where most of the testimony defendant alleged was "artificially conformed" related to actions of the accomplices rather than of defendant, and defendant failed to show that the potential conflict of interest prejudiced his rights.

Am Jur 2d, Criminal Law §§ 754-757.

Justice MITCHELL dissenting.

Justices WEBB and WHICHARD join in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered 24 May 1988 by *Sitton, J.*, in Superior Court, BUNCOMBE County, upon a jury verdict of murder in the first degree. Heard in the Supreme Court 11 May 1989.

Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Daniel R. Pollitt, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant was charged under a true bill of indictment with the murder of Gary Cooper and convicted of murder in the first degree in violation of N.C.G.S. § 14-17. The jury recommended life imprisonment, and from the judgment imposing a sentence of life imprisonment, defendant appeals to this Court. We find no prejudicial error.

The testimony presented to the jury in this case reveals a brutal sequence of events. The State's evidence tended to show that on the evening of 29 October 1987, Gary Cooper and approximately thirty-five others were celebrating a wedding at a liquor house on Gudger Street in Asheville. Gertrude Gardner operated the liquor house and saw Cooper when he arrived. On the morning of 30 October 1987, Ms. Gardner discovered Cooper's body in a field adjacent to the house and telephoned police. In response to Ms. Gardner's call, Don Babb of the Asheville Police Department was dispatched to the field adjacent to the house on Gudger Street. He observed a "partially-nude body of a white male" which "[a]ppeared to be that of a dwarf or a midget." The victim's shirt was bloody, there was dried blood in the victim's hair, one hand was underneath the head and there were gashes on the victim's leg. There were various items of clothing, a wallet and an abandoned vehicle near the body. Detective Van Smith arrived at the crime scene and recognized the body as that of Gary Cooper whom he had known for years.

Lieutenant William Gibson of the Asheville Police Department collected the following items from the field where the victim's body was found: a driver's license for Gary Cooper, a pair of blue jeans, a plaid shirt, a pair of boots, an aluminum bell housing, a steel transmission gear, a brick, and the trunk lid of a 1969 Pontiac. The aluminum bell housing was a few feet away from the victim's body and the trunk lid, which had tennis shoe prints on it, was found next to the victim's body.

Derrick Penland testified that he was present at the Gudger Street liquor house on the evening of 29 October 1987 along with

defendant James Whiteside, Marvin Brown, James Brown, Coleman Clark and Lamont Robinson. While in a room in the upstairs portion of the house, Penland saw defendant strike Cooper in the head with his fist. Cooper remained unconscious on the floor for approximately thirty minutes after which he went outside. Defendant, James Brown and Lamont Robinson also went outside. When defendant, Brown and Robinson returned, Penland overheard each of them say "[t]hey all beat . . . and pile drived" Cooper. Penland testified on cross-examination that defendant was wearing gray boots on the night in question.

Adrian Lyles, also present at the liquor house on the evening in question, noticed a cut above Cooper's eye. When she asked why Cooper was bleeding, defendant told her that he had hit Cooper. Lyles testified that she went downstairs and upon her return noticed that Cooper was "knocked out flat on the floor." Defendant stated to her that "he hit him again."

On 30 October 1987, Lamont Robinson and James Brown were arrested for breaking into a car and larceny—charges unconnected with the present case. After both men were released on bond, they were picked up again that evening for questioning concerning the death of Cooper. Both men were informed of their rights; both waived their rights and wrote voluntary statements.

Robinson eventually pleaded guilty to the second degree murder and common law robbery of Cooper, two counts of breaking or entering, and two counts of larceny. A post-arrest statement taken from Robinson was substantially the same as the testimony of other witnesses regarding the events that occurred at the liquor house. Robinson testified that when Cooper regained consciousness and left the liquor house, he remained inside while defendant, James Brown, Marvin Brown, and Coleman Clark followed the victim outside. The group of men returned approximately five minutes later. After about twenty minutes, defendant went back outside "to finish him [Cooper] off." Robinson and James Brown went outside "to see what he [defendant] was going to do." Robinson stated that he saw the victim "laying face down" in the field. Robinson demonstrated to the jury, using a doll the same size as the victim, the manner in which defendant "pile drived" the victim. His demonstration showed that defendant held the victim upside down with his head between defendant's knees. Robinson further testified that defendant "pile drived him onto his head about three times"

onto a glass bottle. He also testified that defendant "got up on the car and jumped off onto his [the victim's] neck" three times and that defendant took a "bell housing" and threw it on the victim's head. Robinson further testified that he did not kill Cooper but only kicked him several times to see if he was alive. Defendant, Robinson and others later robbed a nearby grocery store and stole beer.

James Brown also gave a voluntary written statement to police similar to Robinson's statement and to the testimony of other witnesses. At trial Brown testified that after the group of men followed Cooper outside, he saw defendant throw the victim off the porch of the house "by his legs" onto a stump. Sometime later the same group of men, including defendant and Brown, went over to the victim and carried him to the side of the house. Robinson and Brown checked the victim's clothing for money. Brown testified that the victim was still alive when the group left him. Brown's testimony corroborated that of Robinson regarding defendant's "pile driving," jumping off the hood of the car onto the victim, and throwing the "bell housing" onto the victim. He also testified that he did not murder the victim. Brown pleaded guilty to second degree murder, common law robbery, two counts of breaking or entering, and two counts of larceny.

Jessica Penland, defendant's girlfriend, testified at trial that defendant lived in her home. She identified a pair of pants defendant wore on the night in question and a pair of Nike tennis shoes frequently worn by defendant. The pants and tennis shoes were taken into custody by the police from her home following defendant's arrest.

John Neuner, a State Bureau of Investigation expert in latent evidence, testified that an examination of the automobile trunk lid found beside the victim's body revealed four footwear impressions of sufficient detail for comparison purposes. The agent further testified that the impressions were made by tennis shoes; the sole design, size and wear characteristics of the impressions were consistent with the tennis shoes in question. The agent concluded that although he could not say positively that the tennis shoes in question made the impressions, there was nothing about the shoes that would cause him to eliminate them as being the shoes that made the impressions.

Lucy Milks, a State Bureau of Investigation forensic serologist, testified that bloodstains on pants taken from Jessica Penland's

home were consistent with the victim's blood. Both defendant's coat and a brick found at the scene contained human blood. Ms. Milks further testified that she did not find any blood on the bell housing and that she found a very small bloodstain which she could not test on the right Nike tennis shoe seized from Penland's home.

Deborah Radisch, a medical examiner, performed an autopsy on the body of Cooper on 31 October 1987. She testified that Cooper was four feet, four inches tall, weighed 110 pounds (an "achondroplastic dwarf") and had a blood alcohol content of .27 percent. She further testified that Cooper's death was caused by a combination of all the injuries consistent with blunt-force type injury and asphyxia (suffocation). There were numerous abrasions all over the body and the head: a cut over the left eyebrow; a deep cut on the back of the head; lacerations on the inside and the outside of the lips; a tooth had been knocked out; small hemorrhages on the whites of the eyes; hemorrhages, bruising and bleeding in some neck muscles; a skull fracture; and a blood clot on the right side of the brain. In response to a hypothetical question, Radisch responded that in her opinion if a person of defendant's size had jumped three or four times from a car onto the neck of the victim, the injuries would have been more severe than those found on the body of Cooper. Dr. Radisch also testified that Cooper's head injuries were not consistent with the type of injuries expected if a person fell and hit his head on a broken bottle. She also testified that Cooper's hemorrhaging and neck muscle injuries were more consistent with manual strangulation even though she found no actual evidence that he had been strangled.

Defendant testified at trial that he went to the Gudger Street liquor house on the night in question and was in an upstairs room listening to headphones when Cooper entered and said "cut that music off." Cooper then came up and pushed defendant in the face and asked "did you hear what I said?" Cooper knocked the radio from the table and the headphones from defendant's head. Defendant struck Cooper after Cooper charged him with his head and got blood on defendant's pants. Defendant's testimony was consistent with the testimony of the other witnesses concerning the activity of Cooper and defendant inside the house. However, defendant testified that he did not jump off an automobile onto Cooper, did not "pile-drive" Cooper, and did not hit him with a bell housing. Defendant testified to the overall number of blows

he inflicted, stating, "I hit him above the eye, I kicked him twice, and I flipped him off the porch." Defendant also testified that he did not kill Cooper and that he was wearing his gray boots on the night in question.

Defendant introduced evidence concerning the tennis shoes in the form of the testimony of Haywood Starling, a former SBI agent, an expert in latent evidence. Starling compared the soles of the tennis shoes introduced into evidence with the footwear impressions on the trunk lid and concluded that the shoes "may have made some of the tracks, if not all of the tracks, or . . . the shoe prints on the hood may have been made [by] any other pair of shoes containing an identical design." Starling further testified that eleven or twelve different lines of Nike shoes have identical "concentric-circle" designs on their soles.

As a part of his case, defendant played before the jury the videotaped statements of Lamont Robinson and James Brown. Coleman Clark and Marvin Brown, also charged with the first degree murder of Cooper, were called by defendant as witnesses. Both Clark and Brown, through their attorneys, asserted their fifth amendment privileges against self-incrimination. Both invoked the privilege in response to defendant's questions.

The jury was permitted to consider possible verdicts of first degree murder, second degree murder, voluntary manslaughter, involuntary manslaughter or not guilty. The court rejected defendant's request to submit a possible verdict of assault inflicting serious injury. The jury returned a verdict of guilty of first degree murder. At the sentencing phase of the trial, the jury found that the murder was especially heinous, atrocious or cruel, and that defendant either delivered the fatal blows which caused the victim's death or, while acting in concert with others, attempted to kill, intended to kill, or contemplated that the life of Gary Cooper would be taken. While rejecting thirteen submitted mitigating circumstances and finding the existence of four, the sentencing jury failed to find beyond a reasonable doubt that the mitigating circumstances found were insufficient to outweigh the aggravating circumstance. Upon the unanimous recommendation of the jury, the court sentenced defendant to a term of life imprisonment. Defendant appeals to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a).

[1] Defendant argues seven assignments of error. He first contends that the trial court erroneously admitted into evidence both

the tennis shoes and the testimony regarding the footwear impressions found at the scene and erroneously denied defendant's motion in limine to preclude expert testimony concerning the footwear impressions, his motion to strike the introduction of the tennis shoes, and his motion for a mistrial. Defendant contends that all of this evidence was irrelevant and failed to connect defendant with the crime. Defendant further contends that the evidence failed to show when the footwear impressions were made or that they were made by the defendant.

N.C.G.S. § 8C-1, Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. *State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986). Evidence of footprints or shoe prints at the scene of the crime corresponding to those of the accused is admissible as relevant circumstantial evidence tending to connect an accused with the crime. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). However, the inference to be drawn from the evidence must be reasonable. *State v. Atkinson*, 298 N.C. 673, 259 S.E.2d 858 (1979). "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Hamilton*, 264 N.C. 277, 286-87, 141 S.E.2d 506, 513 (1965), *cert. denied*, 384 U.S. 1020, 16 L.Ed. 2d 1044 (1966).

Defendant contends essentially that the evidence about footwear impressions (shoe prints) and tennis shoes was irrelevant because all of the State's evidence showed that defendant was wearing boots, not tennis shoes, on the night in question. We reject defendant's contention, however, since the State also introduced evidence from which the jury could draw the reasonable inference that defendant wore tennis shoes on the night in question. While defendant's girlfriend could not remember what shoes defendant was wearing when he arrived at the apartment that night after the incident, she testified that the tennis shoes given to the detective were kept outside the apartment where defendant lived and that they were frequently worn by him. The evidence of the footwear impressions was properly admitted as evidence having a logical tendency to make the fact that the defendant jumped from the hood of the car onto the victim's neck "more probable than it would be

without such evidence." N.C.G.S. § 8C-1, Rule 401 (1988). The tennis shoes and the expert testimony describing the similarities between the footwear impressions and the soles of the tennis shoes, though circumstantial evidence, were admissible as tending to connect defendant with the alleged homicide. Once properly admitted, the weight to be given the evidence was a decision for the jury. We reject defendant's first assignment of error.

[2] By his second assignment of error defendant contends that the trial court erred by refusing to allow defendant to show excerpts of the videotaped confessions of James Brown and Lamont Robinson during closing argument. Defendant introduced the videotaped confessions of Brown and Robinson at trial, and the videotape was admitted into evidence as defendant's Exhibit 10. The tape was played in its entirety to the jury. Defense counsel, by motion, requested permission to reshow portions of the videotaped confessions to the jury during his closing argument. The trial court denied defendant's motion. Defendant contends that the court's refusal to grant the motion entitles him to a new trial. We disagree.

The scope of closing argument is governed by N.C.G.S. § 15A-1230(a) which provides that an attorney may "argue any position or conclusion with respect to a matter in issue." N.C.G.S. § 15A-1230(a) (1988). This statute is in accord with the general rule that counsel is allowed wide latitude in his arguments to the jury. *State v. Hunt*, 323 N.C. 407, 426, 373 S.E.2d 400, 412 (1988); *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed. 2d 935 (1988); *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975). Nonetheless, the permissible scope of counsel's argument to the jury is not unlimited. *State v. Taylor*, 289 N.C. 223, 227, 221 S.E.2d 359, 362 (1976). The trial judge may limit the argument of counsel within his discretion. *Id.* at 226, 221 S.E.2d at 362; *State v. Huffstettler*, 312 N.C. 92, 112, 322 S.E.2d 110, 122 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169 (1985).

While it is clear that "the whole case as well of law as of fact may be argued to the jury," N.C.G.S. § 84-14 (1985), and that "counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom," *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977), nevertheless the conduct of arguments of counsel to the jury must necessarily be left largely to the sound discretion of the trial judge. *See State v. Britt*, 291

N.C. 528, 231 S.E.2d 644. In *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986), for example, this Court held that the trial court did not abuse its discretion in allowing defense counsel to reopen his closing argument to argue six contentions prepared by defendant *pro se* but in denying argument with regard to seventeen other contentions which the court found to be either unsupported by the evidence presented, improper subjects for jury argument, or repetitions of defense counsel's arguments made during his closing argument the previous day.

We find nothing in the record to suggest the trial judge abused his discretion by disallowing the replay of excerpts from the videotape during defendant's closing argument. The two-hour videotape, containing statements of James Brown and Lamont Robinson as they were examined by defendant's attorney, was shown to the jury during trial in its entirety. As such, the videotape was viewed by the jury. The trial judge correctly noted that the videotape would be identical evidence to that previously heard by the jury. As the State notes in its brief, closing argument does not allow counsel to present witnesses to the jury to tell their version of the facts one more time.

Nevertheless, defendant, noting that "counsel's freedom of argument should not be impaired without good reason," *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983), calls our attention to cases permitting prosecutors to display various items during closing argument: *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981) (a revolver); *State v. Holbrook*, 232 N.C. 503, 61 S.E.2d 361 (1950) (a rifle); *State v. Carter*, 17 N.C. App. 234, 193 S.E.2d 281 (1972), *cert. denied*, 283 N.C. 107, 194 S.E.2d 635 (1973) (a cigar box). First, we distinguish such items from a lengthy videotape containing testimony of a witness. Secondly, defense counsel's freedom of argument was not impaired in this case since the judge permitted him to refer extensively to the videotape during his closing argument and contrast it with the testimony of the witnesses. Under these circumstances we find no abuse of discretion.

[3] In his third assignment of error, defendant contends that the trial court erred by refusing to admit the juvenile adjudications of Lamont Robinson into evidence for impeachment purposes. Defendant moved to be given a copy of the juvenile record of the witness Lamont Robinson. The trial judge asked that the record be made available to the court, and upon being informed that de-

fendant had subpoenaed the record, stated that "as soon as the subpoenaed material is available, I will review it and make the determination and rule on your request." The trial judge thereupon ruled that:

> [H]aving considered the matter and having previously received information concerning the probability of the witness, Lamont Robinson, testifying, and there being reference at some earlier time even in a taped recording concerning a juvenile record, and the Court considering the motion under Rule 609(d), the Court finds that the purported record of the witness, Lamont Robinson, would be admissible to attack the credibility as [sic] an adult, and that the Court is satisfied that the admissibility of evidence is necessary for a fair determination of guilt or innocence; that the Court thereby allows the subpoena to be served and the item to be furnished to the Court for an in-camera inspection; that the Court will, thereafter, rule whether or not you may use it. It's hereby ordered that the record be brought to the Court and turned over to the presiding judge.

Defendant made a motion to be provided a copy of Lamont Robinson's juvenile record. The trial judge allowed this motion and before cross-examination of Robinson the trial judge ordered:

> [L]et the record show that at the time the witness was called, the Court at the time called the defense counsel to the bench and handed to them the juvenile file of [Lamont Robinson] which was previously moved by counsel for the defendant that they have access to; that the Court had received the file approximately two minutes before 2 and had not had a chance to review the same, and that after the Court reviewed the matter, the Court tendered the file to counsel for the defendant.

Defendant requested permission to question Robinson concerning the information in the juvenile record, to which the trial judge stated, "Let the record show that the Court will permit it." At the close of defendant's evidence the trial judge denied defendant's motion to introduce the juvenile adjudication orders into evidence. Defendant contends that this was error. We do not agree.

Subsection (a) of Rule 609 provides "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record

during cross-examination or thereafter." N.C.G.S. § 8C-1, Rule 609(a) (1988). Juvenile adjudications are governed by subsection (d) of Rule 609 which provides:

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the issue of guilt or innocence.

N.C.G.S. § 8C-1, Rule 609(d) (1988). Subsection (d) of Rule 609 first states the general rule that evidence of juvenile adjudications is not admissible and then provides for the admission of the juvenile adjudications of a witness if the offense would be admissible to attack the credibility of an adult *and* the court is satisfied that the admission is necessary for a fair determination of guilt or innocence. The final decision rests within the discretion of the trial judge as to whether the admission of the evidence is "necessary for a fair determination of the issue of guilt or innocence." *Id.* The commentary to 609(d) explains that "leeway given the judge is intended to satisfy the requirements of *Davis v. Alaska*, 415 U.S. 308 (1974)." 1 Brandis on North Carolina Evidence § 112 (1988). On cross-examination the defense should be allowed an opportunity to alert the jury that the defense's theory for impeachment is based on a juvenile adjudication of the witness. *Davis v. Alaska*, 415 U.S. 308, 317, 39 L.Ed. 2d 347, 354 (1974). There is no mention that the juvenile convictions are admissible. A fair reading of the trial court's finding that it was satisfied that admission of Robinson's adjudications was necessary for a fair determination of guilt or innocence discloses that this finding related only to the order that the record be brought to the court and turned over to the trial judge. It was not a ruling that the orders were to be admitted into evidence. The trial judge, pursuant to the discretion afforded him in Rule 609(d), allowed the orders to be used on cross-examination for impeachment purposes but denied defendant's request to introduce them into evidence at the close of defendant's evidence.

The admissibility of Lamont Robinson's juvenile adjudications was properly assessed under N.C.G.S. § 8C-1, Rule 609(d), rather than Rule 609(a). While Rule 609(a) is a rule of general admissibility, Rule 609(d), which applies specifically to juvenile adjudications, leaves

admissibility in the trial court's discretion. We find no abuse of that discretion in this case.

[4] Fourth, defendant assigns as error the trial court's refusal to submit to the jury the following as potential verdicts: assault, assault inflicting serious injury, and assault with intent to kill. The bill of indictment charged that defendant "unlawfully, willfully and feloniously and of malice aforethought did kill and murder Gary Lee Cooper." Defendant relies primarily upon N.C.G.S. § 15-169 which provides:

> On the trial of any person for any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault, for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.

N.C.G.S. § 15-169 (1983).

N.C.G.S. § 15-170, which is also relevant, provides:

> Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

N.C.G.S. § 15-170 (1983).

In *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931), Chief Justice Stacy, in a concurring opinion, raised the question of whether a verdict of assault with a deadly weapon is supported by a statutory indictment for murder which fails to allege that the homicide was committed by means of assault and battery or assault with a deadly weapon. Chief Justice Stacy made reference to an earlier version of N.C.G.S. § 15-169 and earlier cases in which it was said that on an indictment for murder the defendant may be convicted of an assault with a deadly weapon or of a simple assault if the evidence warrants such a finding. He noted, however, that "in all of these cases, and others of like import, the observation is carefully made that, to warrant one of the lesser verdicts, assault

with a deadly weapon or simple assault, the crime charged must include an assault against the person as an ingredient." (Citations omitted.) *Id.* at 699-700, 158 S.E. at 397. The question raised by Chief Justice Stacy in *Watkins* was answered by Justice Denny for a unanimous Court in *State v. Rorie*, 252 N.C. 579, 114 S.E.2d 233 (1960). The indictment in *Rorie* charged that defendant "unlawfully, wilfully and feloniously did kill and slay [the victim] against the form of the statute in such case made and provided and against the peace and dignity of the State." *Id.* at 579, 114 S.E.2d at 234. Defendant was convicted of assault with a deadly weapon. On appeal to this Court, the first assignment of error was stated as follows: "Is a verdict of assault with a deadly weapon supported by a statutory indictment for manslaughter which fails to allege that a homicide was committed by means of an assault and battery or assault with a deadly weapon?" After noting the language of N.C.G.S. § 15-169 and N.C.G.S. § 15-170, Justice Denny stated:

> Notwithstanding the provisions of the above statutes, when it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon, in case the greater offense, murder or manslaughter, is not made out, the indictment for murder should be so drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect.

Rorie at 581, 114 S.E.2d at 235. (Citations omitted.) Concluding "that the form of indictment under consideration charges an offense of which assault with a deadly weapon may or may not be an ingredient," the Court concluded that the indictment was "insufficient to cover assault and battery or assault with a deadly weapon as an independent charge, separate and apart from the charge of manslaughter." The Court went on to hold "that the bill of indictment in the present case is insufficient to support a verdict of assault with a deadly weapon . . . ."

In summary, *Rorie* held that an indictment charging that defendant "unlawfully, wilfully and feloniously did kill and slay [the victim]" is insufficient to support a verdict of guilty of assault with a deadly weapon. Likewise, we hold that the bill of indictment in the instant case, which charges that defendant "unlawfully, willfully, and feloniously and of malice aforethought did kill and murder [the victim]" is insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill. Since

the indictment would not support an assault verdict, the trial judge did not err in refusing to submit potential assault verdicts to the jury.

[5] Fifth, defendant contends that he is entitled to a new trial because the State knowingly used false testimony to obtain his conviction, thus violating his state and federal constitutional rights. Defendant contends that the statements of accomplices James Brown and Lamont Robinson made to police on 30 October 1987 were inconsistent with their testimony at trial. The specific inconsistencies related to Robinson and Brown's complicity in the events leading to the death of Cooper. Defendant also notes that policeman Van Smith testified that shortly before the guilty plea hearing, Robinson changed his account of the events. Defendant's motions for a mistrial based on Robinson and Brown's false testimony and alleged fraud on the court were denied. Defendant contends that the denial of his motion for a mistrial amounted to an abuse of discretion by the trial court.

"In order to prevail on a claim of perjured testimony, defendant must show that the testimony was in fact false, material, and knowingly and intentionally used by the state to obtain his conviction." *State v. Robbins*, 319 N.C. 465, 514, 356 S.E.2d 279, 308, *cert. denied*, 484 U.S. 918, 98 L.Ed. 2d 226 (1987).

We agree with defendant's assertion that the adverse testimony of accomplices should be carefully scrutinized and it is true that "a skeptical approach to accomplice testimony is a mark of the fair administration of justice." *State v. Bailey*, 254 N.C. 380, 388, 119 S.E.2d 165, 171 (1961). However, the fact that the allegedly perjured testimony was given by jointly represented accomplices does not remove defendant's burden of showing that their testimony was both false and material. The inconsistent testimony of Robinson and Brown was not material to establishing the guilt of defendant. The variations in testimony noted by defendant relate to the actions of the accomplices rather than to the actions of defendant. Defendant has not shown that the accomplices' testimony was false concerning defendant's actions nor has he shown how the inconsistent testimony increased the likelihood of his own guilt. Their testimony was subject to rigorous cross-examination by defense counsel. Under these circumstances the trial court did not abuse its discretion by denying defendant's motions for a mistrial.

[6] Sixth, defendant contends that the trial court committed plain error by instructing the jury that it could find the defendant guilty

of first degree murder on a theory of acting in concert. The trial judge instructed the jury in accordance with N.C.P.I. Crim. 202.10. The judge charged the jury that:

> I further instruct you, members of the jury, that for a person to be guilty of a crime, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit first degree murder, or any lesser included offense, considering those in regard to the lesser included offenses, each of them is held responsible for the act of the others done in the commission of the offense.

Defendant contends that the trial court committed error by giving the instruction because there was no evidence of a concert of action in the instant case. Defendant further contends that James Brown and Lamont Robinson played only a marginal role in the assault on Gary Cooper by following defendant out of the house and simply watching defendant as he assaulted Cooper. Defendant argues that if Brown and Robinson did not act in concert with defendant, then the theory of acting in concert cannot be used against defendant.

[7] We reject defendant's argument for the reason that neither simultaneous action nor equal participation in the commission of a crime by two persons is a prerequisite for the application of the theory of acting in concert. In *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979), this Court said:

> [w]here the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of the crime in order to be convicted of that crime under the concerted action principle *so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.*

Id. at 357, 255 S.E.2d at 394 (emphasis added). The evidence in the instant case supports an inference that Robinson, Brown and defendant acted together pursuant to a common plan or purpose to kill Cooper. Robinson and Brown's presence at the scene of the crime *and* the evidence that they committed actions which furthered the criminal act upon the victim combine to show a common plan or purpose between the three men. Defendant's contention that Robinson and Brown did not act pursuant to a common plan or scheme rests on the assumption that their sole purpose in attacking Cooper was to rob him. This assumption is ill-founded, however, as the force used by the group of men to rob the victim far exceeded that which would be necessary to subdue an already injured man of considerably lesser physical stature. It was not necessary that Brown and Robinson commit any particular act constituting the crime of first degree murder in order to apply the principle of acting in concert to the defendant. All that was necessary was evidence that all three men acted in some way to pursue the common plan or purpose.

Defendant relies on *State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1960), to show that Brown and Robinson's level of participation in the crime was not enough to establish their responsibility, as a matter of law, under the theory of acting in concert. In *Hargett*, the trial court found that defendant's level of participation did not support a first degree murder charge based on a theory of concert of action where defendant accompanied the perpetrator to a dumpsite; the perpetrator assaulted the victim and pushed him, face down, into a puddle; and the unconscious victim drowned as defendant stood by. This Court found that defendant's presence was not enough to establish responsibility because the defendant neither expressed consent by words or actions nor acted in a manner to contribute to the execution of the crime. 255 N.C. at 415-16, 121 S.E.2d at 591-92.

Hargett may be distinguished from the instant case in that the defendant in *Hargett* was sleeping in the back of the automobile driven by the perpetrator when he awoke and saw the perpetrator assault the victim. He protested the assault on the victim but was too intoxicated to take action to prevent the killing. In the instant case, neither Robinson nor Brown protested defendant's acts and their presence at the scene was intentional and voluntary. Both displayed a higher degree of participation than the defendant in *Hargett*. Although Robinson and Brown did not expressly en-

courage defendant, the act of robbing and kicking the victim implied their consent to defendant's felonious purpose and contributed to the execution of the crime as well.

Taken as a whole, the evidence of Brown, Robinson, and defendant's behavior before, during and after the killing is sufficient that a reasonable jury could find that defendant acted in concert with Robinson and Brown to brutally kill Cooper. Thus, we reject defendant's sixth assignment of error.

[8] Defendant contends under his final assignment of error that he is entitled to a new trial because the trial court erroneously denied his motions for inquiry, to resolve conflict of interest, and for a mistrial based on Attorney Bruce Elmore's joint representation of Robinson and Brown. Defendant further contends that the joint representation resulted in "artificial conformity" of their testimony. Defendant alleges that Robinson and Brown's pre-trial statements differed as to the number of times they went outside the liquor house, the events that occurred while outside, whether defendant threw a bell housing onto the victim, whether Robinson checked to see if the victim was dead, and as to the length of time they were in the liquor house before Cooper went outside. After both Brown and Robinson retained Attorney Elmore, however, their statements became more similar and less incriminating of one another. Defendant specifically notes that Robinson admittedly changed his version of the events from his October 1987 statement to the version given at trial.

On 21 March 1988, defendant filed a motion for inquiry regarding the joint representation of Brown and Robinson. Following a hearing held on 21 and 28 March 1988, the trial court denied defendant's motion for inquiry and refused to sever the joint representation. On 9 May 1988, defendant filed a motion to resolve conflict of interest, offering as new evidence the videotaped interviews of Brown and Robinson. The trial court viewed the videotape and subsequently denied defendant's motion. At the close of the state's evidence, defendant made a motion for a mistrial which the trial court denied.

Ordinarily, an attorney may be disqualified for conflicts of interest when the interests of one of two persons, jointly represented by the same attorney, are adverse to the other. This is not the type of conflict of interest alleged in this case. Here, both Brown and Robinson employed the same attorney and neither of them

objects to the joint representation. Nor do they claim any conflict of interest. Instead, defendant argues that the joint representation of Brown and Robinson created a conflict of interest between their attorney and the public's interest in the fair administration of justice due to what he labels as the "artificial conformity" of the testimony of the two accomplices. Defendant further argues that the joint representation precluded him from obtaining a witness who could testify on his behalf since both eyewitnesses were represented by the same attorney.

However, defendant has failed to show prejudice. Defendant's interests are not sufficient to overcome Brown and Robinson's rights to representation by counsel of their choice where defendant fails to show that the potential conflict of interest has prejudiced his rights.

Most of the testimony defendant alleges was "artificially conformed" relates to the actions of the accomplices, rather than defendant's actions. The statement relating to the bell housing did implicate defendant and was made by both Brown and Robinson in all portions of their testimony except Robinson's voluntary, written, post-arrest statement. However, there is no showing that this omission was attributable to an "artificial conformity" rather than other causes such as Robinson's intoxication or stress resulting from the arrest.

We find no fault with the trial judge's handling of defendant's motion to inquire into joint representation of the two accomplices. The trial court held a hearing on defendant's motion for inquiry and questioned Attorney Elmore concerning potential conflicts of interest from joint representation. The court made findings of fact which indicated no conflict in the joint representation of the two accomplices by their chosen attorney. We find no error or abuse of discretion in the actions of the trial court.

We conclude that defendant has had a fair trial, free of prejudicial error. His conviction, and the sentence entered thereon, remain undisturbed.

No error.

Justice MITCHELL dissenting.

Relying upon our decision in *State v. Rorie*, 252 N.C. 579, 114 S.E.2d 233 (1960), the majority concludes that the murder indict-

ment against this defendant in the form prescribed by N.C.G.S. § 15-144 is insufficient to support a verdict for assault, assault inflicting serious injury or assault with intent to kill. As a result, the majority further concludes that the trial court did not err in refusing to submit possible verdicts for any of those lesser offenses.

The majority specifically relies upon a statement in *Rorie*—which I believe was overbroad and *obiter dictum* in that manslaughter case—to the effect that:

> [W]hen it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon, in case the greater offense, murder or manslaughter, is not made out, the indictment for murder should be so drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect.

252 N.C. at 581, 114 S.E.2d at 235. That statement was influenced, no doubt, by the Court's view that the *manslaughter* indictment before it in *Rorie* charged "an offense of which assault with a deadly weapon *may or may not* be an ingredient." 252 N.C. at 582, 114 S.E.2d at 236 (emphasis added). In my view such statements and supporting reasoning in *Rorie* were wrong at the time that case was decided and have been since overruled—at least implicitly—by this Court's decision in *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982).

It is not necessary for an indictment charging a felony to specifically allege the elements essential to a separate indictment for a lesser included offense in order to support a conviction of the lesser included offense. In *Weaver* we stated:

> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978). In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

306 N.C. at 635, 295 S.E.2d at 378-79. Under the clear and firm definitional test set forth in *Weaver*, there simply is no reason—in fact, there never was a reason—for the statement in *Rorie* that a murder indictment must specifically allege necessary elements of the lesser included offenses of assault, assault inflicting serious injury or assault with intent to kill before the murder indictment will support a conviction for such lesser offenses. The murder indictment here charges the defendant with all lesser included offenses, just as though they were set out separately. *State v. Miller*, 272 N.C. 243, 244-45, 158 S.E.2d 47, 48 (1967). Therefore, it also is sufficient to support his conviction for any other offense which *by definition* is a lesser included offense. Assault, assault inflicting serious injury, and assault with intent to kill are lesser offenses included *by definition* in the indictment for murder in the present case. *See id.*

I am also of the opinion that the evidence in the present case of the vicious and prolonged assault by the defendant *and others* upon the victim would support a reasonable finding by the jury that this defendant assaulted the victim with the intent to kill him or assaulted the victim and inflicted serious injury upon him, but that one of the other assailants actually killed the victim. I find no evidence, however, which would support the jury in reasonably returning a verdict for simple assault.

As it is my view that the trial court committed reversible error by failing to permit the jury to consider verdicts for lesser offenses included *by definition* within the murder charged by the bill of indictment and supported by evidence, I conclude that the defendant must receive a new trial. Therefore, I dissent from the decision of the majority.

Justices WEBB and WHICHARD join in this dissenting opinion.

ALLSTATE INSURANCE COMPANY v. JOHNIE KEITH McCRAE, DONNIE LEE WALL, LEO ELLERBE, JR. AND ANTHONY ELLERBE

No. 552PA88

(Filed 5 October 1989)

1. **Insurance § 81 (NCI3d)— assigned risk insurance—Commissioner's waiver of notice requirement—exceeded authority**

The Court of Appeals correctly determined that the Commissioner of Motor Vehicles exceeded his authority by promulgating a rule that insurers were not required to notify DMV of the termination of automobile insurance policies in effect for six months or longer, effectively administering the statutory requirement out of existence since most, if not all, automobile insurance policies are written for six months or longer. N.C.G.S. § 20-309(e) and (f).

Am Jur 2d, Automobile Insurance §§ 21, 39.

2. **Insurance § 81 (NCI3d)— assigned risk insurance—no notice of termination to DMV—termination effective**

The failure of Allstate to notify DMV of a lapse in Ellerbe's coverage did not result in continued coverage of Ellerbe's vehicle under the Allstate policy. Only defective notice to the insured renders cancellation of the policy ineffective and extends the liability of the insurer. Allstate is obligated to notify DMV of Ellerbe's lapsed coverage, but there is a civil penalty for noncompliance. N.C.G.S. § 20-309(e).

Am Jur 2d, Automobile Insurance §§ 21, 39.

ON discretionary review of a decision of the Court of Appeals, reported at 91 N.C. App. 505, 372 S.E.2d 337 (1988), affirming a summary judgment in favor of defendants McCrae and Wall entered by *John, J.*, on 15 October 1987 in Superior Court, RICHMOND County. Heard in the Supreme Court 12 September 1989.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates, for plaintiff-appellant.

Sharpe & Buckner, by Richard G. Buckner, for defendant-appellee Johnie Keith McCrae.

Page, Page & Webb, by Alden B. Webb, for defendant-appellee Donnie Lee Wall.

WHICHARD, Justice.

Allstate Insurance Company (Allstate) issued a noncertified assigned risk policy of automobile liability insurance to Leo Ellerbe, Jr. (Ellerbe). The policy provided coverage for a 1967 Ford automobile from 13 August 1983 to 13 February 1984. Allstate mailed Ellerbe an offer to renew the policy on 5 January 1984. The offer specified that Ellerbe could continue his coverage only by paying a premium by the due date, 12 February 1984. Ellerbe did not pay the premium. Allstate did not notify the Division of Motor Vehicles (DMV) that Ellerbe's insurance policy was terminated, as required by N.C.G.S. § 20-309(e).

On 6 April 1984 defendants Johnie Keith McCrae (McCrae) and Donnie Lee Wall (Wall) were injured in an automobile accident while riding in the 1967 Ford. Ellerbe was driving the car, which was owned by Anthony Ellerbe. Wall and McCrae filed suit against Leo and Anthony Ellerbe seeking damages for injuries sustained in the accident. Allstate filed this separate declaratory judgment action to determine whether the Allstate policy provided coverage for the Ellerbe car at the time of the accident. Wall and McCrae counterclaimed seeking compensation under the policy. The trial court entered summary judgment in favor of defendants Wall and McCrae, and the Court of Appeals affirmed. We allowed discretionary review on 9 February 1989.

The issues are whether the governing statute required Allstate to notify DMV upon termination of Ellerbe's insurance coverage, and if so, whether its failure to give such notice resulted in continued coverage for Ellerbe's automobile. The version of N.C.G.S. § 20-309(e) in effect at the time of the dispute provided, in part:

> Upon termination by cancellation or otherwise of an insurance policy provided in subsection (d), the insurer shall notify the North Carolina Division of Motor Vehicles of such termination as directed by the Commissioner of the Division of Motor Vehicles in accordance with subsection (f) of this section.

1979 N.C. Sess. Laws, ch. 1279, § 1 (codified at N.C.G.S. § 20-309(e)). Subsection (f) provided: "The Commissioner shall administer and enforce the provisions of this Article and may make rules and regulations necessary for its administration . . . ." 1979 N.C. Sess. Laws, ch. 1279, § 1 (codified at N.C.G.S. § 20-309(f)). The Assistant Director of DMV's Vehicle Registration Section testified in an af-

fidavit filed in this action that the Commissioner of DMV promulgated a rule requiring insurers to notify DMV within twenty days after termination for policies in effect for less than six months, but that no notice of termination was required for termination of policies in effect for six months or longer. Defendants note that because almost all, if not all, automobile insurance policies are written for six months or longer, the rule effectively abolished the statutory requirement of notification to DMV. Allstate argues that the legislature delegated discretion to the Commissioner to waive the notification requirement; therefore, it was under no duty to notify DMV of the lapse in Ellerbe's coverage.

[1] The Court of Appeals held that the Commissioner had exceeded his authority by promulgating a rule that in effect "administered" the notice requirement out of existence. It stated that N.C.G.S. § 20-309(e) and (f) "merely allowed the Commissioner to direct the *manner* by which the insurer should furnish such notice." *Allstate Ins. Co. v. McCrae*, 91 N.C. App. 505, 508, 372 S.E.2d 337, 338 (1988). The mandatory language of the statute "did not invest the Commissioner with authority to override" the notification requirement of the statute. *Id.* at 508, 372 S.E.2d at 339. We agree. As stated by the Court of Appeals:

> The purpose of the notification requirement is to enable the Division to recall the registration and license plate issued for a vehicle unless the owner makes some other provision for compliance with the Financial Responsibility Act. . . . To protect innocent third parties from the risks posed by uninsured motorists, our Legislature placed responsibility upon insurance companies to notify the Division of Motor Vehicles that an insured's coverage had ended. Notwithstanding the construction the Commissioner gave to it, we hold that subsection (e) required Allstate to notify the Division of the termination of Mr. Ellerbe's policy.

Id. at 508-09, 372 S.E.2d at 339.

[2] Having concluded that Allstate was required to notify DMV of the lapse in Ellerbe's coverage, we next consider whether its failure to notify resulted in continued coverage of Ellerbe's vehicle under the Allstate policy. Defendants argue, and the Court of Appeals held, that notification to DMV was a condition precedent to effective termination of the policy. It is true that defective notice of cancellation to the insured can result in ineffective ter-

mination of the policy and thus in continued coverage by the insurer. *Pearson v. Nationwide Mutual Ins. Co.*, 325 N.C. 246, 382 S.E.2d 745 (1989). This is not true, however, when the defective notice is directed to DMV. The Court of Appeals acknowledged that, under previous versions of the statute requiring notification to DMV, "North Carolina case law uniformly held that, under circumstances in which the insured's own act caused coverage to end, the insurer's notifying [DMV] was *not* a condition precedent to effective cancellation." 91 N.C. App. at 509, 372 S.E.2d at 339. Under these earlier versions of section 20-309(e), however, a distinction was made between policies terminated by the insurer and those terminated by the insured. Because the version of subsection (e) under consideration eliminated the distinction between insurer/insured terminations for notification purposes, the Court of Appeals reasoned, "[e]ither the General Assembly contemplated that notification by the insurer would be a prerequisite to cancellation, or else it considered that the insurer's failure to notify would be of no consequence to effective termination." *Id.* at 510, 372 S.E.2d at 339-40. The Court of Appeals "incline[d] toward the former view." *Id.* at 510, 372 S.E.2d at 340.

We disagree with the Court of Appeals' conclusion. The notice provision originally was enacted by 1957 N.C. Sess. Laws, ch. 1393, § 2, which provided:

> Upon the termination of insurance by cancellation or failure to renew, notice of such cancellation or termination shall be mailed by the insurer to the Commissioner of Motor Vehicles not later than fifteen (15) days following the effective date of such cancellation or other termination.

We construed this provision in *Nixon v. Insurance Co.*, 258 N.C. 41, 127 S.E.2d 892 (1962). The plaintiff there argued that cancellation of her noncertified assigned risk policy was ineffective because defendant insurer did not notify DMV of the lapsed coverage until after plaintiff was involved in an automobile accident. In addition, the notice to DMV stated an incorrect date of cancellation. As here, the initial notice to the insured of the policy's termination complied with statutory requirements. The notification statute then in effect, like the version now under consideration, did not distinguish between insurer/insured termination for purposes of notification to DMV. Construing the earlier statute, this Court stated:

> Neither defective notice, nor failure to give notice, *to the Commissioner* affects the validity or binding effect of the cancellation; the notice to the Commissioner serves an entirely different purpose [from notice to the insured]. The statute provides for notice to the Commissioner "upon the termination of insurance by cancellation." Hence, the policy is terminated before notice is sent to the Commissioner. Notice to the Commissioner *follows* cancellation. Notice of cancellation could not be mailed to the Commissioner if there had been no cancellation.

Id. at 43, 127 S.E.2d at 894. *Accord Levinson v. Indemnity Co.*, 158 N.C. 672, 674, 129 S.E.2d 297, 300 (1963). This reasoning is equally applicable here. As in the earlier version of the statute, N.C.G.S. § 20-309(e) (1983) predicates notice to DMV "[u]pon termination" of the policy. Termination thus necessarily precedes notification.

The notification provision was amended in 1963 to read: "No insurance policy provided in paragraph (d) may be terminated by cancellation or otherwise by the insurer without having given the North Carolina Motor Vehicles Department notice of such cancellation fifteen (15) days prior to effective date of cancellation." 1963 N.C. Sess. Laws, ch. 964, § 1. It is thus apparent that the legislature is capable of creating an express condition precedent to termination if it so desires.

The statutory prerequisite of notice to DMV before termination was short-lived, however. In 1965 the above provision was amended to add the following sentence to the 1963 version: "Where the insurance policy is terminated by the insured the insurer shall immediately notify the Department of Motor Vehicles that such insurance policy has been terminated." 1965 N.C. Sess. Laws, ch. 272, § 1. This is the only version of the statute that has prescribed different notification procedures depending on whether the insurer or the insured terminated the policy. In *Insurance Co. v. Cotten*, 280 N.C. 20, 185 S.E.2d 182 (1971), decided under the 1965 version of the statute, the insured failed to renew his policy by paying the premium. The insurer did not notify DMV immediately of the lapse in coverage, as required. The Court looked to the dual notice requirements in the statute and concluded that when the insured terminated the policy by failing to renew, the insurer's delay in notifying DMV would not defeat termination of coverage. *Id.* at 29, 185 S.E.2d at 188.

In 1975 the General Assembly again amended section 20-309(e) to impose the same requirement for notification to DMV regardless of whether the insurer or insured terminated the policy. In either case, the insurer was required "forthwith" to notify DMV of the termination. At this time the statute also was amended to provide for a civil penalty for noncompliance:

> Any person, firm or corporation failing to give notice of termination as required herein shall be subject to a civil penalty of two hundred dollars ($200.00) to be assessed by the Commissioner of Insurance upon a finding by the Commissioner of Insurance that good cause is not shown for such failure to give notice of termination to the Department of Motor Vehicles.

1975 N.C. Sess. Laws, ch. 302, § 1. In 1979 the provision considered here was enacted to require notification to DMV as directed by the Commissioner of DMV. 1979 N.C. Sess. Laws, ch. 1279, § 1.

The Court of Appeals surmised a legislative intent to create a condition precedent to effective termination from the return to identical notice requirements, regardless of whether the insurer or the insured terminated coverage. We glean no such intent from this change in the statute. The absence of any direct legislative action to change the result reached in *Cotten*, coupled with the provision for a civil penalty for noncompliance with the notification requirement, lead us to conclude that the General Assembly did not intend that failure to notify DMV would preclude effective termination of a policy. Thus, coverage of the Ellerbe automobile terminated effectively on 14 February 1984.

We recently discussed with approval the different results that follow when the insurer gives defective notice to the insured, as compared with defective notice to DMV. *Pearson*, 325 N.C. at 257-258, 382 S.E.2d at 750-751. We said: "Central to our holding in *Nixon* and *Cotten* was that the notice under scrutiny was the notice required to be sent to the then Department, or Commissioner, of Motor Vehicles rather than the notice required to be sent to the insured." *Id.* at 257, 382 S.E.2d at 751. Only defective notification to the *insured* renders cancellation of the policy ineffective and extends the liability of the insurer. *Id.* at 257, 382 S.E.2d at 751.

The Court of Appeals expressed concern that the remedial purpose of the Financial Responsibility Act "is vitiated if the notification requirement of the 1983 statute is read in such a way as

to have allowed an uninsured vehicle to operate on our roads without an insurance company being under any effective obligation to alert the Division of lapsed coverage." 91 N.C. App. at 510, 372 S.E.2d at 340. The Court continued:

> We do not believe the Legislature intended the notification provision to have been a nullity, allowing insurance companies to ignore subsection (e) without fear of liability. Nor do we believe that the Legislature contemplated that subsection (e) would be read in such a way as to expose innocent individuals to the risk of injury without means of adequate compensatory redress.

Id. As discussed above, Allstate was obligated to notify DMV of Ellerbe's lapsed coverage. The notification requirement was not rendered a nullity by noncompliance, however, because N.C.G.S. § 20-309(e) provided a civil penalty therefor. Defendants argue that this provision is inadequate to motivate insurance companies to comply with the statute. That argument should be addressed to the General Assembly. By enacting the civil penalty without expressly overturning our prior interpretation of the requirement of notification to DMV, the General Assembly appears to have intended that the civil penalty be the exclusive sanction for failure to give DMV the required notice of termination. This interpretation is bolstered by the title to the chapter enacting the civil penalty: "AN ACT TO REWRITE G.S. 20-309(E) TO PROVIDE FOR NOTICE OF TERMINATION RATHER THAN INTENT TO TERMINATE BY CARRIERS OF MOTOR VEHICLE LIABILITY INSURANCE COVERAGE *AND PENALTY FOR NONCOMPLIANCE*." 1975 N.C. Sess. Laws, ch. 302, § 1 (emphasis added).

Accordingly, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Richmond County, for entry of summary judgment for plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BOBBY W. BIRDSONG

No. 43PA89

(Filed 5 October 1989)

1. Criminal Law § 67 (NCI4th)— misdemeanor—presentment—jurisdiction in superior court

The superior court had jurisdiction to try defendant for the misdemeanor of willful failure to discharge official duties in violation of N.C.G.S. § 14-230 where the amended record on appeal shows that this charge was initiated by presentment. N.C.G.S. § 15A-271.

Am Jur 2d, Criminal Law § 358; Indictments and Informations § 27.

2. Public Officers § 11 (NCI3d)— failure to discharge official duties—omissions conjoined in indictment—proof of only one omission required

Where the indictment charged that defendant Department of Correction employee failed to discharge the duties of his office "by failing to follow the directives of the officer in charge *and* by failing to investigate facts received concerning the possible death of an inmate," the State was not required to prove both omissions in order to make out the offense, and the trial court's refusal to submit the omission of failure to follow directives because the evidence was insufficient to support it did not require the dismissal of the charge entirely.

Am Jur 2d, Public Officers and Employees §§ 416, 419.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals, 92 N.C. App. 382, 375 S.E.2d 526 (1988), which arrested judgment by *Bowen, J.*, presiding at the 9 November 1987 Criminal Session of Superior Court, WAKE County, entered on defendant's conviction for willful failure to discharge official duties. The State's motion to amend the record on appeal and petition for discretionary review were allowed on 9 February 1989. Argued in the Supreme Court 14 September 1989.

Lacy H. Thornburg, Attorney General, by LaVee Hamer Jackson, Assistant Attorney General, for the State-appellant.

George E. Kelly, III for defendant-appellee.

EXUM, Chief Justice.

This appeal presents two questions. The first is whether the superior court had jurisdiction to try defendant for the misdemeanor of willful failure to discharge official duties proscribed by N.C.G.S. § 14-230. The second is whether the evidence was sufficient to support the verdict in light of the indictment. We hold that the superior court had jurisdiction and that the evidence was sufficient to support the verdict. We therefore reverse the decision of the Court of Appeals that the superior court lacked jurisdiction and remand for reinstatement of the verdict and judgment of the trial court.

I.

Inmate William Moye died of an apparent suicide on 1 November 1986 while at Central Prison in Raleigh. Defendant was at that time a lieutenant in the North Carolina Department of Correction, working at Central Prison. On 30 March 1987 the Wake County Grand Jury returned a presentment directing the district attorney to conduct an investigation into the circumstances surrounding Moye's death and into allegations that defendant "committed the misdemeanors of willful failure to discharge duties and obstruction of justice." The presentment further directed the district attorney to submit to the grand jury bills of indictment which he deemed necessary and proper with respect to these or other offenses.

On 13 April 1987 the Wake County Grand Jury indicted defendant. One count of the indictment alleged that defendant willfully failed to discharge the duties of his office in violation of N.C.G.S. § 14-230. A second count alleged that defendant delayed or obstructed a public officer in violation of N.C.G.S. § 14-223. Both offenses are misdemeanors.

In pertinent part, Count I of the indictment read:

> [T]he defendant named above unlawfully, willfully did omit, neglect or refuse to discharge the duties of his office by failing to follow the directives of the officer in charge *and* by failing to investigate facts received concerning the possible death of

an inmate, said behavior endangering the safety of others. At the time, the defendant was a lieutenant with the North Carolina Department of Corrections [sic].

(Emphasis added.)

At the close of the State's evidence, defendant moved to dismiss both counts of the indictment for insufficient evidence. The trial court denied the motion, stating, however, that it had a serious question regarding the sufficiency of the evidence under Count I as to "the allegation of failing to follow the directives of the officer in charge." Defendant renewed his motion at the close of all the evidence. The trial court ruled that Count I would be submitted to the jury only on "failing to investigate" and not "as it relates to failing to follow the directive of the officer in charge." Defendant then moved to dismiss all of Count I "on the grounds that by dismissing part of the indictment, the effect of that should be that the entire first count is dismissed." The trial court denied this motion.

The jury convicted defendant of the offense charged in Count I but found him not guilty under Count II. Judgment was rendered that defendant pay the costs of court.

The Court of Appeals arrested judgment on the ground the superior court had no jurisdiction to try the misdemeanor. The record on appeal before the Court of Appeals contained the indictment but not the presentment. After its decision was filed but before its mandate was issued the State moved the Court of Appeals to permit it to amend the record on appeal to show the presentment and moved also for other relief from the Court of Appeals' decision. The Court of Appeals denied these motions. This Court allowed the State's petition for further review and its motion to amend the record on appeal to include the presentment.

II.

[1] We conclude the superior court had jurisdiction to try defendant for the misdemeanor offense because the record on appeal as amended shows this charge was initiated by presentment.

N.C.G.S. § 7A-272(a) vests the district court with exclusive jurisdiction over misdemeanors, except where otherwise provided. In pertinent part, N.C.G.S. § 7A-271 gives to the superior court "exclusive, original jurisdiction over all criminal actions not as-

signed to the district court division . . . except that the superior court has jurisdiction to try a misdemeanor when the charge is initiated by presentment." According to N.C.G.S. § 15A-641(c),

> [a] presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person . . . with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

The accusation in the presentment and Count I of the indictment arose out of the same incident and are substantively identical: willful failure to discharge official duties and obstruction of justice. Thus the charge in the indictment was initiated by presentment, and jurisdiction properly lay in superior court. *State v. Cole*, 294 N.C. 304, 240 S.E.2d 355 (1978).

III.

[2] We next consider whether the evidence was sufficient to support the verdict of guilty under Count I of the indictment in light of its language. We conclude the evidence was sufficient.

The focal point of defendant's argument relates to the use of the conjunctive "and" in the indictment. Count I charges that defendant failed "to discharge the duties of his office by failing to follow the directives of the officer in charge *and* by failing to investigate facts received concerning the possible death of an inmate, said behavior endangering the safety of others." (Emphasis supplied.) Defendant contends the conjoining of these two omissions in the indictment required the State at trial to prove both omissions to make out the offense. He further contends that the trial court's refusal to submit one of the omissions to the jury, presumably because the evidence was insufficient to support it, required the trial court to dismiss the charge entirely. Defendant argues that the jury considered a charge never passed upon by the Grand Jury because the Grand Jury said that failure to investigate *and* failure to follow directives constituted willful failure to discharge duties, and that "said behavior" endangered others. Thus, defendant contends, there was no allegation that either omission standing

alone constituted willful failure to discharge duties or that either alone was sufficient to endanger others. Defendant cites no authority for the position he advances.

N.C.G.S. § 14-230 sets out the offense with which defendant was charged:

> If any . . . official of any of the State institutions . . . shall willfully omit, neglect, or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor.

The offense has two statutory components: (1) that the defendant be an official of a State institution and (2) that he willfully fail to discharge the duties of his office. Injury to the public is a judicially recognized element of the crime. In *State v. Anderson*, 196 N.C. 771, 773, 147 S.E. 305, 306 (1929), the Court stated: "It is to be observed that the essentials of the crime as prescribed are: first, a wilful neglect in the discharge of official duty; and second, injury to the public."[1]

In order properly to allege an offense an indictment need only allege the essential elements of that offense. *State v. Hord*, 264 N.C. 149, 141 S.E.2d 241 (1965). It need not allege the evidentiary support for those elements. *State v. Greer*, 238 N.C. 325, 77 S.E.2d 917 (1953). Unnecessary terms that are included in the indictment may be disregarded as surplusage. *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972). "Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *Id.*

The use of the conjunctive form to express alternative theories of conviction is proper.

> The indictment should not charge a party disjunctively or alternatively, in such a manner as to leave it uncertain what is relied on as the accusation against him. The proper way is to connect the various allegations in the indictment with the conjunctive term "and," and not with the word "or."

State v. Swaney, 277 N.C. 602, 612, 178 S.E.2d 399, 405 (1971) (citations omitted). In *State v. Moore*, 315 N.C. 738, 340 S.E.2d

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1. The statute in effect at the time *Anderson* was decided is virtually identical to the present version.

401 (1986), the indictment conjoined several of the statutory bases for making kidnapping a first degree offense. Addressing this, we stated that

> [t]he indictment in a kidnapping case must allege the purpose or purposes on which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment. . . . Although the indictment may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a conviction of kidnapping.

Id. at 743, 315 S.E.2d at 404 (citations omitted). In *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977), defendant was charged with first degree rape. The indictment alleged in the conjunctive more than one of the statutory bases for conviction. We stated that "[w]here an indictment sets forth conjunctively two means by which the crime charged may have been committed, there is no fatal variance between indictment and proof when the state offers evidence supporting only one of the means charged." *Id.* at 293, 233 S.E.2d at 920 (citations omitted).

Applying these legal principles to the case at bar, we conclude that evidence supporting only one of the alleged omissions would be sufficient to support the failure-to-discharge-duties element of the crime charged in Count I of the indictment if the jury found that this omission did in fact amount to such a failure and was injurious to the public.[2] First, it was unnecessary for the State to allege at all the factual underpinnings tending to support one of the essential elements of the offense. Second, that the State alleged two factual underpinnings for, or factual theories of, conviction did not require it to prove both. Proof of only one factual theory was legally sufficient and at most placed the State at risk of failing to persuade the jury of defendant's guilt.

For the reasons given we find no error in defendant's trial and we reverse the decision of the Court of Appeals finding no jurisdiction in the trial court. The case is remanded to the Court

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2. Presumably there was evidence to support, and a correct charge to the jury on, all other elements of the offense. Neither the evidence nor the charge to the jury were brought forward in the record on appeal. In the absence of these items we must presume that the evidence was sufficient and that the charge to the jury was correct. *State v. Fennell*, 307 N.C. 258, 297 S.E.2d 393 (1982).

of Appeals for further remand to the Superior Court, Wake County, in order that the verdict and judgment entered there may be reinstated.

Reversed and remanded.

STATE OF NORTH CAROLINA EX REL. S. THOMAS RHODES, SECRETARY, DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT v. RALPH GASKILL

No. 548PA88

(Filed 5 October 1989)

Appeal and Error § 9 (NCI3d)— consent judgment—moot appeal

An appeal is dismissed as moot where a consent judgment settling all matters in controversy between the parties was entered while the appeal was pending.

Am Jur 2d, Appeal and Error §§ 761, 763.

ON discretionary review of a decision by a unanimous panel of the Court of Appeals allowed 2 March 1989. *State ex rel. Rhodes v. Gaskill*, 91 N.C. App. 639, 372 S.E.2d 746 (1988), *disc. rev. allowed*, 324 N.C. 251, 377 S.E.2d 763 (1989). Heard in the Supreme Court 11 September 1989.

Lacy H. Thornburg, Attorney General, by J. Allen Jernigan, Assistant Attorney General, for the State-appellant.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by C. R. Wheatly, III, for defendant-appellee.

Conservation Council of North Carolina, by John D. Runkle, General Counsel, amicus curiae.

PER CURIAM.

On 29 August 1986, the plaintiff, State of North Carolina ex rel. S. Thomas Rhodes, Secretary of the Department of Natural Resources and Community Development, filed a verified complaint and motion for preliminary mandatory injunction in Carteret County Superior Court to restrain defendant, Ralph Gaskill, from violating

the Coastal Area Management Act of 1976, N.C.G.S. ch. 113A, art. 7 (1983 & Cum. Supp. 1985) ("CAMA"), and the Dredge and Fill Act, N.C.G.S. § 113-229 (1983), and to require the restoration of the property excavated by defendant for a duck pond in coastal wetlands. Defendant answered, denying the material allegations of the complaint, asserting a counterclaim in the nature of inverse condemnation, and demanding trial by jury. On 9 December 1986, Judge George M. Fountain entered a preliminary injunction against defendant. On 26 May 1987, Judge David E. Reid, Jr., dismissed defendant's counterclaim and denied the State's motion for summary judgment. On 1 June 1987, the State filed a motion to deny defendant's jury trial demand. By order filed 21 August 1987, Judge Reid denied the State's motion. The State appealed to the Court of Appeals, where this case was consolidated for hearing with *State ex rel. Rhodes v. Simpson*, 91 N.C. App. 517, 372 S.E.2d 312 (1988), *disc. rev. allowed*, 324 N.C. 251, 377 S.E.2d 763 (1989). Relying on its decision in *Simpson*, a companion case which raised the same issues, the Court of Appeals affirmed the denial of the State's motion to deny defendant's demand for a jury trial. This Court allowed the State's petition for discretionary review.

At the oral argument of this case, the Court was informed that subsequent to the filing of the decision of the Court of Appeals in this case and prior to oral argument before this Court, a consent judgment had been entered which settled all matters in controversy between the parties. This Court requested and received from the Clerk of Court of Carteret County a copy of said consent judgment.

The judgment, consented to by the Director of the Division of Coastal Management, Department of Natural Resources and Community Development; the Attorney General; defendant; and the attorneys for the State and defendant, was signed and entered by Judge Herbert O. Phillips on 14 August 1989, approximately ten months after the filing of the Court of Appeals decision, five months after the case had been pending in this Court, and one month prior to the oral arguments before this Court. The consent judgment provides for the restoration of the land to achieve compliance with the statutes as sought by the State and a maximum civil penalty from which defendant may seek remission before the Coastal Resources Commission. The judgment acknowledges that the State and defendant have agreed upon and settled all matters in controversy between them as regards this proceeding. As ex-

plained in *Pearson v. Martin*, 319 N.C. 449, 355 S.E.2d 496 (1987), the case has been made moot by the entry of the consent judgment:

> That a court will not decide a "moot" case is recognized in virtually every American jurisdiction. . . . In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint. . . .
>
> Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. . . .
>
> Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.

In re Peoples, 296 N.C. 109, 147-48, 250 S.E. 2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297 (1979) (citations omitted).

Id. at 451, 355 S.E.2d at 497-98.

As no motion to dismiss for mootness has been filed herein, as is usually the case, we dismiss the appeal *ex mero motu.*

The action is moot, and the case on appeal is hereby dismissed.

Appeal dismissed.

STATE OF NORTH CAROLINA v. DUANE LEE BROWN

No. 612A87

(Filed 5 October 1989)

Constitutional Law § 40 (NCI3d)— capital case—indigent defendant—failure to appoint assistant counsel

The trial court committed prejudicial error in failing to appoint assistant counsel to represent an indigent defendant in a capital trial instead of merely allowing a paralegal to aid defendant's appointed attorney "in legal research and filing defense motions." N.C.G.S. § 7A-450(b1).

Am Jur 2d, Criminal Law §§ 976, 977.

APPEAL of right by defendant from a judgment entered by *Allen, J.*, at the 19 October 1987 Criminal Session of Superior Court, DURHAM County, sentencing him to death upon his conviction for the offense of first degree murder. Decided in the Supreme Court upon the record and briefs, without oral argument, pursuant to N.C.R. App. P. 30(f).

Lacy H. Thornburg, Attorney General, by Thomas J. Ziko, Assistant Attorney General, for the State.

Thomas F. Loflin III for defendant-appellant.

PER CURIAM.

Defendant was convicted of first degree murder and sentenced to death. Prior to trial, upon finding that defendant was indigent, the district court appointed Arthur Vann of the Durham County Bar to represent him. Mr. Vann was the only licensed attorney who represented defendant at trial. The record establishes, and the State does not dispute, that upon Mr. Vann's motion Judge James Beaty did not appoint "assistant counsel" to appear for defendant, but instead allowed a paralegal to aid Mr. Vann "in legal research and filing defense motions."

N.C.G.S. § 7A-450(b1) 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." N.C.G.S. § 7A-450(b1) (1986). We have noted that this statute "reflects a special concern for the adequacy

of legal services received by indicted indigents who face the possibility of the death penalty," and have held that it is "clearly mandatory." *State v. Hucks*, 323 N.C. 574, 577, 579, 374 S.E.2d 240, 242, 244 (1988). The failure to appoint additional counsel "violate[s] the mandate of N.C.G.S. § 7A-450(b1) and [is] prejudicial error per se." *Id.* at 581, 374 S.E.2d at 245. Where this statutory mandate is violated, we do not engage in harmless error analysis. *Id.* at 580, 374 S.E.2d at 244.

Assuming, without deciding, that a defendant in a capital trial may waive the right to assistant counsel, he may do so only "if the waiver is made knowingly and intelligently." *Id.* at 580, 374 S.E.2d at 244. Further, waiver of counsel may not be presumed from a silent record. *Carnley v. Cochran*, 369 U.S. 506, 515, 8 L.Ed.2d 70, 77 (1962); *State v. Moses*, 16 N.C. App. 174, 191 S.E.2d 368 (1972). *See also* N.C.G.S. § 7A-457 (1986) (indigent defendant may waive counsel "if the Court finds of record" that the defendant "acted with full awareness of his rights and of the consequences of the waiver"); N.C.G.S. § 15A-603 (1988). The record here is silent as to whether defendant knowingly and intelligently waived his right to assistant counsel provided by N.C.G.S. § 7A-450(b1). We thus cannot conclude that a waiver occurred.

Accordingly, defendant must be awarded a new trial.

New trial.

EVANGELINE G. BEAM v. PAUL H. BEAM AND BEAM ELECTRIC COMPANY

No. 33A89

(Filed 5 October 1989)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 92 N.C. App. 509, 374 S.E.2d 636 (1988), reversing an order of summary judgment for defendants entered by *Snepp, J.*, on 7 December 1987 in Superior Court, MECKLENBURG County. On 2 March 1989 this Court allowed defendants' petition for review of additional issues. Heard in the Supreme Court 13 September 1989.

Jean B. Lawson for plaintiff-appellee.

Tucker, Hicks, Hodge and Cranford, P.A., by Warren C. Stack, Fred A. Hicks and Edward P. Hausle, for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion of Greene, J., 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, Mecklenburg County, for reinstatement of the order of summary judgment in favor of defendants.

Reversed and remanded.

ALICE BONITA BRANDT v. ROBERT O. BRANDT

No. 75A89

(Filed 5 October 1989)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 92 N.C. App. 438, 374 S.E.2d 663 (1988), affirming the judgment of *Morelock, J.*, entered 11 September 1987 in District Court, WAKE County. Defendant's petition for discretionary review of additional issues allowed 7 March 1989. Heard in the Supreme Court 13 September 1989.

Smith, Debnam, Hibbert & Pahl, by John W. Narron and Lisa C. Bland, for plaintiff appellee.

Merriman, Nicholls & Crampton, P.A., by Nicholas J. Dombalis II and Elizabeth Anania, for defendant appellant.

PER CURIAM.

Defendant's petition for discretionary review of additional issues improvidently allowed. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. DARRYL EUGENE HUNT

No. 551PA88

(Filed 5 October 1989)

ON discretionary review of the decision of the Court of Appeals, 91 N.C. App. 574, 372 S.E.2d 744 (1988) ordering a new trial for the defendant. Heard in the Supreme Court 12 September 1989.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Adam Stein, for the defendant appellee.

North Carolina Academy of Trial Lawyers, by E. Ann Christian, Louis D. Bilionis and Richard A. Rosen, Amicus Curiae.

PER CURIAM.

Discretionary review improvidently allowed.

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

BATTLE v. NASH TECH.

No. 327P89

Case below: 94 N.C.App. 601

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

COATS v. ECKERT

No. 242PA89

Case below: 93 N.C.App. 792

Petition by defendant (Eckert) for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1989.

FEDERAL LAND BANK v. BREWER

No. 354P89

Case below: 94 N.C.App. 780

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

HARRIS v. BROWN

No. 244P89

Case below: 94 N.C.App. 223

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

KIRBY BLDG. SYSTEMS v. McNIEL

No. 222PA89

Case below: 91 N.C.App. 444; 89SC181PC

Petition by plaintiff for writ of certiorari to review the order of the Court of Appeals denying certiorari in that court allowed 27 June 1989.

KIRBY BLDG. SYSTEMS v. McNIEL

No. 222PA89

Case below: 91 N.C.App. 444; 89SC181PC

Cross petition by third-party defendants (Morton) for writ of certiorari to the Court of Appeals allowed 19 October 1989 for the limited purpose of entering the following order: On this appeal the Court will consider the whole record, and the parties may assign error to such portions of the entire record as they deem appropriate.

KNOTVILLE VOLUNTEER FIRE DEPT. v. WILKES COUNTY

No. 302P89

Case below: 94 N.C.App. 377

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

NCNB v. GUTRIDGE

No. 301P89

Case below: 94 N.C.App. 344

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

N.C. FARM BUREAU MUTUAL INS. CO. v. WARREN

No. 307PA89

Case below: 94 N.C.App. 591

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1989.

PARSONS v. HIATT

No. 296P89

Case below: 94 N.C.App. 390

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989. Motion by defendant to dismiss appeal for lack of a substantial constitutional question allowed 5 October 1989.

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

PETROLEUM WORLD v. THOMAS PETROLEUM

No. 234P89

Case below: 93 N.C.App. 513

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

PRIME CONSTRUCTORS v. TOWN OF PARMELE

No. 278P89

Case below: 94 N.C.App. 224

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STANCIL v. STANCIL

No. 299PA89

Case below: 94 N.C.App. 319

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 5 October 1989.

STATE v. COOKE

No. 336P89

Case below: 94 N.C.App. 386

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. CUNNINGHAM

No. 329P89

Case below: 94 N.C.App. 601

Petition by defendant (McCullough) for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

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

STATE v. DIGGS

No. 426P89

Case below: 95 N.C.App. 661

Petition by defendant (Berry) for discretionary review pursuant to G.S. 7A-31 denied 9 October 1989. Petition by defendant for writ of supersedeas and temporary stay denied 9 October 1989.

STATE v. FREUND

No. 406A89

Case below: 95 N.C.App. 661

Petition by the Attorney General for writ of supersedeas and temporary stay allowed 25 September 1989.

STATE v. FRY

No. 306P89

Case below: 94 N.C.App. 390

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. MASHACK

No. 287P89

Case below: 94 N.C.App. 225

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. MEADLOCK

No. 364P89

Case below: 95 N.C.App. 146

Petition by the Attorney General for writ of supersedeas and temporary stay denied 5 October 1989. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. MOORE

No. 279P89

Case below: 94 N.C.App. 55

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. MORGAN

No. 425P89

Case below: 95 N.C.App. 639

Petition by Attorney General for temporary stay allowed 6 October 1989.

STATE v. PAKULSKI

No. 407P89

Case below: 95 N.C.App. 517

Petition by Attorney General for writ of supersedeas and temporary stay allowed 2 October 1989.

STATE v. PARSONS

No. 297P89

Case below: 94 N.C.App. 391

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. PRUITT

No. 305P89

Case below: 94 N.C.App. 261

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. ROBINSON

No. 323P89

Case below: 94 N.C.App. 225

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 October 1989.

STATE v. SCHUITMAKER

No. 352P89

Case below: 95 N.C.App. 225

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

STATE v. STEWART

No. 321P89

Case below: 94 N.C.App. 225

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 5 October 1989.

STATE v. TEW

No. 405A89

Case below: 95 N.C.App. 634

Petition by the Attorney General for writ of supersedeas and temporary stay allowed 25 September 1989.

TATE v. CHAMBERS

No. 276P89

Case below: 94 N.C.App. 154

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

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

TRAVIS v. KNOB CREEK, INC.

No. 295P89

Case below: 94 N.C.App. 374

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

WALLACE COMPUTER SERVICES v. WAITE

No. 402P89

Case below: 95 N.C.App. 439

Petition by defendants for writ of supersedeas and temporary stay denied 25 September 1989.

WILLIAMS v. RANDOLPH

No. 300P89

Case below: 94 N.C.App. 413

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

ZAGAROLI v. POLLOCK

No. 269P89

Case below: 94 N.C.App. 46

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 5 October 1989.

PETITION TO REHEAR

SUTTON v. AETNA CASUALTY & SURETY CO.

No. 539PA88

Case below: 325 N.C. 259

Petition by defendant to rehear denied 5 October 1989.

STATE OF NORTH CAROLINA EX REL. JAMES G. MARTIN, AS GOVERNOR OF THE STATE OF NORTH CAROLINA AND JAMES G. MARTIN, IN HIS CAPACITY AS A CITIZEN AND GOVERNOR OF THE STATE OF NORTH CAROLINA, PLAINTIFFS v. EDWIN S. PRESTON, JR., HENRY V. BARNETTE, JR., FRANKLIN R. BROWN, ROBERT E. GAINES, AND DONALD STEPHENS, IN THEIR INDIVIDUAL CAPACITIES AS REGULAR SUPERIOR COURT JUDGES AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED SUPERIOR COURT JUDGES, AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ORIGINAL DEFENDANTS, AND THE NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, INTERVENING DEFENDANT

No. 58PA89

(Filed 9 November 1989)

1. **Constitutional Law § 10.2 (NCI3d)— judicial review—deference to legislation**

Although North Carolina was among the first to recognize the doctrine of judicial review, great deference will be paid to the acts of the Legislature, which is the agent of the people for enacting laws.

Am Jur 2d, Constitutional Law §§ 84 et seq.

2. **Constitutional Law § 2.1 (NCI3d)— North Carolina Constitution—rule of construction**

Issues concerning the proper construction of the Constitution of North Carolina are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments; where the meaning is clear from the words used, a meaning will not be searched for elsewhere.

Am Jur 2d, Constitutional Law §§ 84 et seq.

3. **Constitutional Law § 1.1 (NCI3d)— North Carolina Constitution—issues finally resolved only by N. C. Supreme Court**

Issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by the North Carolina Supreme Court, which is not bound by the decisions of federal courts.

Am Jur 2d, Constitutional Law §§ 84 et seq.

4. Elections § 1 (NCI3d)— judicial redistricting—election dates changed—no constitutional violation

In a constitutional challenge to Chapter 509 of the 1987 Session Laws, which created new judicial districts and which delayed election dates to eliminate staggered terms in some districts, the Supreme Court concluded that securing uniformity in the beginning of terms of office for public officials is an adequate purpose to sustain Chapter 509 under the state constitution. Moreover, the General Assembly could reasonably have decided that Chapter 509 was an act providing for the continued compliance with the Voting Rights Act and that this too was a public purpose.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges §§ 10, 15.

5. Elections § 1 (NCI3d)— judicial redistricting—delayed election dates—no violation of N. C. Constitution

A judicial redistricting which delayed election dates to eliminate staggered terms did not violate Art. IV, § 16 of the North Carolina Constitution because the effect of Chapter 509 did not extend current terms, but created a one-time interim or hiatus between certain terms of office. Since no successors will be elected and qualified at the expiration of the old terms, the incumbent judges will continue to serve, as anticipated by the constitutional provision that judges remain in office until their successors are elected and qualified.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges §§ 10, 15.

6. Elections § 1 (NCI3d)— judicial redistricting—delayed elections—fundamental right to vote for judges not denied

A judicial redistricting which postponed some judicial elections to eliminate staggered terms did not deny citizens their fundamental right under Art. IV, § 16 of the North Carolina Constitution to vote for judges at the expiration of their eight-year terms of office because the right to vote per se is not a fundamental right under our constitution; the equal right to vote once the right to vote is conferred is fundamental. The North Carolina Constitution sets no specified interval between judicial elections but only requires that superior court judgeships have eight-year terms of office and that elections be often and free.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges §§ 10, 15.

7. Elections § 1 (NCI3d)— judicial redistricting—delayed elections—no denial of right to seek office

A judicial redistricting which delayed elections in certain districts to eliminate staggered terms did not deny qualified candidates the right to seek office because the right to seek office is a political privilege and not inalienable; the fact that a candidate's aspiration has been thwarted by a non-discriminatory change of law gives him no cause of action.

Am Jur 2d, Elections §§ 4-7, 12-15, 201; Judges § 10.

8. Elections § 1 (NCI3d)— judicial redistricting—no usurption of power to make judicial appointments

The Legislature did not unconstitutionally usurp the governor's authority to make judicial appointments by a judicial redistricting act which also delayed some elections to eliminate staggered terms. The incumbent judges remained in office under the constitutional holdover provision allowing incumbents to continue serving in the interim, and not by the legislative act.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges §§ 10, 11.

9. Elections § 1 (NCI3d)— judicial redistricting—eight-year judicial term not rendered meaningless

A judicial redistricting which also postponed certain elections to eliminate staggered terms and multiple districts did not render the eight-year term limitation in the North Carolina Constitution meaningless because it created a one-time delay in certain districts for the reasonable public purpose of eliminating staggered terms.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges §§ 10, 11.

10. Elections § 1 (NCI3d)— judicial redistricting—delayed elections—not special emolument upon incumbents

A judicial redistricting which delayed elections in certain judicial districts to eliminate staggered terms did not confer a special emolument upon the incumbents in violation of Art. I, § 32 of the North Carolina Constitution because any benefit to the incumbent judges was incidental and subordinate to the legitimate public benefits obtained by delaying elections for certain judges.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

11. Elections § 1 (NCI3d)— judicial redistricting—delayed elections—vacancy not created

A judicial redistricting which delayed some elections to eliminate staggered terms in multi-seat districts did not result in a vacancy in the judgeship held by Robert Gaines, even though his term expired in 1988. Even though the Legislature delayed elections for that office from 1988 to 1990, it acted within its authority and, as Judge Gaines could hold over until a successor was elected and qualified, no vacancy was created.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges §§ 10, 16.

12. Elections § 1 (NCI3d)— judicial redistricting—new districts—incumbents appointed—no constitutional violation

A judicial redistricting which assigned forty incumbent superior court judges to new districts in which they reside was not unconstitutional because the new districts in all cases were comprised of portions of the old districts and a subset of the same voters who nominated or elected the incumbent judges assigned to the new districts. Although the new districts were smaller in size, the voters in the new districts fully participated in all instances in the elections by which the incumbent judges assigned to them were chosen.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

13. Elections § 1 (NCI3d)— judicial redistricting—new districts—appointment of incumbent judges—no violation of separation of powers

A judicial redistricting in which smaller districts were created from existing districts and incumbent judges assigned to the smaller districts did not amount to appointments of individuals to vacant superior court judgeships in violation of the doctrine of separation of powers because the incumbent judges held over and no vacancies arose.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

14. Elections § 1 (NCI3d)— judicial redistricting—appointment of incumbent judges to new districts

A judicial redistricting which created new, smaller judicial districts from certain existing districts and which assigned incumbent judges to those new districts did not deny Democratic

voters residing in the new districts the right to participate in that party's districtwide nomination process.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

15. Elections § 1 (NCI3d)— judicial redistricting—new districts—incumbents appointed—no deprivation of right to run for judgeship

A judicial redistricting which created new, smaller districts from certain existing districts and which appointed incumbent judges to the new districts did not deprive potential candidates of the right to run for judgeships because there were no vacancies.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

16. Elections § 1 (NCI3d)— judicial redistricting—failure to follow county boundaries—no constitutional violation

A judicial redistricting which created superior court districts of less than a whole county and in two instances of parts of two counties did not violate the North Carolina Constitution because there is no prohibition against the splitting of counties when creating superior court districts. Although the constitution requires one clerk of superior court per county, the clerk is a county officer while the judge is a state officer and, while the constitution specifically requires that county boundaries be followed in creating legislative districts, the constitution does not require that county boundaries be followed in creating judicial districts.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

17. Elections § 1 (NCI3d)— judicial redistricting—candidates required to reside in new districts

A judicial redistricting which required those filing a notice of candidacy for superior court judge to reside in the judicial district as it will exist at the time the person would take office if elected was constitutional.

Am Jur 2d, Elections §§ 4-7, 12-15; Judges § 10.

ON discretionary review prior to a determination by the Court of Appeals, pursuant to Rule 15(a) of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31(a), of judgment entered

by *McKinnon, J.*, in Superior Court, WAKE County, on 17 November 1988. Heard in the Supreme Court on 11 October 1989.

Maupin, Taylor, Ellis & Adams, P.A., by W. W. Taylor, Jr., Charles B. Neely, Jr., Thomas A. Farr and John T. Matteson, for the plaintiff.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, and James Wallace, Jr., Assistant Attorney General, for the original defendants.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by James E. Ferguson, II, and Leslie J. Winner, for the intervening defendant.

MITCHELL, Justice.

His Excellency The Governor of North Carolina, the Honorable James G. Martin, initiated this declaratory judgment action by the filing of a complaint on 23 December 1987 in his official capacity as Governor of the State of North Carolina and in his individual capacity as a citizen of the State. By his complaint, the plaintiff sought a construction of Chapter 509 of the 1987 North Carolina Session Laws (hereafter "Chapter 509").[1] The plaintiff also sought a declaration that certain provisions of Chapter 509 violate the Constitution of North Carolina and sought an injunction prohibiting the holding of primary or general elections for certain superior court judgeships pursuant to the requirements of Chapter 509.

The original defendants, the North Carolina State Board of Elections and certain regular superior court judges, filed an answer on 22 January 1988. On the same day, the trial court entered an order granting the motion of the North Carolina Association of Black Lawyers to intervene as a defendant.

On 17 November 1988, the trial court entered judgment granting in part and denying in part the plaintiff's and defendants' motions for summary judgment and granting in part injunctive relief sought by the plaintiff. Both the plaintiff and the defendants entered timely notices of appeal. The petition by all parties for discretionary

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1. 1987 N.C. Sess. Laws ch. 509 added, repealed and modified various sections and subsections of N.C.G.S. chs. 7A and 163. The provisions directly challenged by the plaintiff primarily relate to the elections, districts and terms of office for various regular superior court judgeships.

review of the judgment of the trial court, prior to a determination by the Court of Appeals, was allowed by this Court on 6 March 1989.

This action was heard by the trial court upon stipulated facts. Therefore, the facts material to the issues presented before this Court are undisputed.

The State of North Carolina has had several Constitutions. The current judicial article, article IV, was entirely rewritten and ratified by the voters in 1962 and was not substantively changed when the Constitution of 1971 was ratified. *See* J. Sanders, *A Brief History of the Constitutions of North Carolina*, in *Constitution of North Carolina: Its History and Content* (1987). The following provisions of article IV are relevant to the issues raised in this litigation:

> Sec. 9. Superior Courts.
>
> (1) *Superior Court Districts.* The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district. Each regular Superior Court Judge shall reside in the district for which he is elected. . . .
>
> . . . .
>
> Sec. 16. Terms of office and election of . . . Judges of the Superior Court.
>
> . . . [R]egular Judges of the Superior Court shall be elected by the qualified voters and shall hold office for terms of eight years and until their successors are elected and qualified. . . . Regular Judges of the Superior Court may be elected by the qualified voters of the State or by the voters of their respective districts, as the General Assembly may prescribe.
>
> . . . .
>
> Sec. 19. Vacancies.
>
> Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members

of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices.

N.C. Const. art. IV.

Chapter 509 was ratified by the General Assembly of North Carolina on 29 June 1987 and became effective upon its ratification. It increased the number of superior court judicial districts in North Carolina from thirty-four to sixty. Eighteen of the former judicial districts were retained under Chapter 509. Twenty-four new judicial districts were created by dividing former districts—ignoring county boundaries and dividing counties—into separate judicial districts as follows:

1. Former District 7, comprised of Nash, Edgecombe, and Wilson Counties, was divided into District 7A, comprised of Nash County; District 7B, comprised of part of Edgecombe County and part of Wilson County; and District 7C, comprised of part of Edgecombe County and part of Wilson County;

2. Former District 10, comprised of Wake County, was divided into Districts 10A, 10B, 10C, and 10D, each of which is comprised of a part of Wake County;

3. Former District 12, comprised of Cumberland County and Hoke County, was divided into Districts 12A, 12B, and 12C, all comprised of parts of Cumberland County, with Hoke County being placed with Scotland County in District 16A;

4. Former District 14, comprised of Durham County, was divided into Districts 14A and 14B, each of which is comprised of a part of Durham County;

5. Former District 18, comprised of Guilford County, was divided into Districts 18A, 18B, 18C, 18D, and 18E, each of which is comprised of a part of Guilford County;

6. Former District 21, comprised of Forsyth County, was divided into Districts 21A, 21B, 21C, and 21D, each of which is comprised of a part of Forsyth County; and

7. Former District 26, comprised of Mecklenburg County, was divided into Districts 26A, 26B, and 26C, each of which is comprised of a part of Mecklenburg County. 1987 N.C. Sess. Laws ch. 509, tit. I, § 1(a), (b), and (c) (codified as N.C.G.S. § 7A-41(a), (b), and (c)).

Chapter 509 also created eighteen new judicial districts comprised of one or more entire counties:

1. Former District 3, comprised of Pitt, Craven, Pamlico, and Carteret Counties, was divided into District 3A (Pitt) and District 3B (Craven, Pamlico, and Carteret);

2. Former District 4, comprised of Sampson, Duplin, Jones, and Onslow Counties, was divided into District 4A (Sampson, Duplin, and Jones) and District 4B (Onslow);

3. Former District 6, comprised of Halifax, Northampton, Hertford, and Bertie Counties, was divided into District 6A (Halifax) and District 6B (Northampton, Hertford, and Bertie);

4. Former District 8, comprised of Greene, Lenoir, and Wayne Counties, was divided into District 8A (Greene and Lenoir) and District 8B (Wayne);

5. Former District 16, comprised of Scotland and Robeson Counties, was divided into District 16A (Hoke County, taken from former District 12, and Scotland County) and District 16B (Robeson);

6. Former District 19A, comprised of Cabarrus and Rowan Counties, was divided into District 19A (Cabarrus) and District 19C (Rowan);

7. Former District 20, comprised of Anson, Richmond, Moore, Union, and Stanly Counties, was divided into District 20A (Anson, Richmond, and Moore) and District 20B (Union and Stanly);

8. Former District 25, comprised of Caldwell, Burke, and Catawba Counties, was divided into District 25A (Caldwell and Burke) and District 25B (Catawba); and

9. Former District 30, comprised of Cherokee, Graham, Clay, Swain, Macon, Haywood, and Jackson Counties, was divided into District 30A (Cherokee, Graham, Clay, Macon, and Swain) and District 30B (Haywood and Jackson). *Id.*

Under Chapter 509 a total of forty incumbent regular superior court judges were assigned to thirty-four of the new judicial districts. 1987 N.C. Sess. Laws ch. 509, tit. I, § 1(d) (codified as N.C.G.S. § 7A-41(d)). Chapter 509 changed the election dates for, *inter alia*, eight superior court judgeships by two years and for a ninth judgeship by four years, thereby eliminating the system of staggered terms of office for regular superior court judgeships which

had previously existed in some multi-seat districts. *Id.*, § 1(d)(7), (17), (22), (25), (26), (47), (52), (54), and (55) (codified as N.C.G.S. § 7A-41(d)(7), (17), (22), (25), (26), (47), (52), (54), and (55)). Chapter 509 also provided that no person may file as a candidate for a superior court judgeship or be nominated for the office of superior court judge under N.C.G.S. § 163-114 "unless that person is a resident of the judicial district as it will exist at the time the person would take office if elected." *Id.*, tit. IV, § 13 (codified as N.C.G.S. § 163-106(i)).

Following the State's submission of Chapter 509 to the Attorney General of the United States for preclearance pursuant to the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the Attorney General advised the State by letter of 25 September 1987 that he chose to interpose no objection under 42 U.S.C. 1973c to the submitted legislation.

The trial court conducted a hearing upon cross-motions by the plaintiff and the defendants for summary judgment as to the constitutionality of various provisions of Chapter 509. All pertinent facts having been stipulated by the parties, the trial court concluded that: "Because there is no dispute as to any issue of material fact bearing on State constitutional issues, entry of summary judgment is appropriate as to the State constitutional issues raised in this action." The trial court further concluded that, to the extent that Chapter 509 "extended" the terms of some regular superior court judgeships and, in each instance, designated the incumbent judge to hold the office during the extended period, Chapter 509 violated the provisions of article IV, section 16 of the Constitution of North Carolina. As a result, the trial court granted the plaintiff's motion for summary judgment declaring those subsections of N.C.G.S. § 7A-41(d) unconstitutional and enjoined their enforcement. The trial court denied the defendants' motion for summary judgment to the extent that it sought to have those subsections declared constitutionally valid. As to all other provisions contained in Chapter 509, the trial court allowed the defendants' motion for summary judgment declaring Chapter 509 constitutional and enforceable.

The issues raised by the plaintiff and the original defendants in the trial court and before this Court on appeal are limited exclusively to questions concerning the interpretation of North Carolina statutes and the constitutionality *vel non* of those statutes under the Constitution of North Carolina. As we conclude that the an-

swers to those questions—questions exclusively of state law—are dispositive of this case on appeal, a brief review of North Carolina's long history of state constitutional jurisprudence is appropriate.

[1] Prior to the creation of the United States of America by the ratification of the Constitution of the United States, North Carolina courts applied the doctrine of judicial review to strike down a legislative act as contrary to the Constitution of North Carolina. *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). Thus, approximately sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 135 (1803), North Carolina's courts were among the first to recognize the doctrine of judicial review. Further, applying judicial review under the "law of the land" clause of the Constitution of North Carolina, the Supreme Court of North Carolina, in *University v. Foy*, 5 N.C. (1 Mur.) 58 (1805), became one of the first courts to define the modern concept of due process of law. C. Haines, *The American Doctrine of Judicial Supremacy* 63-121 (1914) (discussing state precedents for judicial review prior to 1789).

Since our earliest cases applying the power of judicial review under the Constitution of North Carolina, however, we have indicated that great deference will be paid to acts of the legislature—the agent of the people for enacting laws. This Court has always indicated that it will not lightly assume that an act of the legislature violates the will of the people of North Carolina as expressed by them in their Constitution and that we will find acts of the legislature repugnant to the Constitution only "if the repugnance do really exist and is plain." *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 9 (1833) (Ruffin, C.J.), *overruled on other grounds by Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903).

Our acceptance of our duty to exercise the power of judicial review under the Constitution of North Carolina, tempered by our recognition of every reasonable presumption that the legislature as the lawmaking agent of the people has not violated the people's Constitution, has led this Court in more recent generations to accept certain principles of state constitutional construction which are now well established. For example, it is firmly established that our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited

by that Constitution. *Id. See Lassiter v. Board of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958); *Airport Authority v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

Glenn v. Board of Education, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936).

[2] Issues concerning the proper construction of the Constitution of North Carolina "are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953).

> The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (citations omitted). In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere. *Elliott v. Board of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932).

[3] It is also appropriate to note here that issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by this Court. *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81, 64 L. Ed. 2d 741, 752 (1980) (affirming California's "sovereign right" to interpret its State Constitution); *Murdock v. City of Memphis*, 87 U.S. (20 Wall) 590, 22 L. Ed. 429 (1875). Further, it must be remembered that in construing and applying our laws and the Constitution of North Carolina, this Court is not bound

by the decisions of federal courts, including the Supreme Court of the United States, although in our discretion we may conclude that the reasoning of such decisions is persuasive. *See White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 203 (1983); *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

Bearing the foregoing principles in mind, we turn to an examination of certain questions—purely of state constitutional and statutory construction and application—which have been raised by the parties before us and which we find dispositive of this case on appeal.

DEFENDANTS' ASSIGNMENT OF ERROR

The sole assignment of error of either the original or intervening defendants which we need address concerns the effect of Chapter 509 on the election dates for certain superior court judgeships. Chapter 509, title I, § 1(d), amending N.C.G.S. § 7A-41(d), postponed the election dates for eight superior court judgeships by two years, and for a ninth judgeship by four years. Chapter 509 deviated to this extent from the otherwise statutorily established practice of holding elections for regular superior court judges at the general election immediately preceding the expiration of the incumbents' terms of office. The trial court held that these provisions of Chapter 509 violated our Constitution. The defendants assign error to this holding, and the parties advance several arguments supporting and refuting this part of the trial court's judgment. We conclude that the trial court's holding in this regard was error and reverse this part of its judgment.

[4] We note at the outset that the expressly stated purposes of the General Assembly in enacting Chapter 509 were "to provide for continued compliance with the Voting Rights Act and to improve the administration of justice by providing for the elimination of staggered terms for superior court judges, creating more superior court judicial districts, eliminating the office of special superior court judge, and making conforming changes." 1987 N.C. Sess. Laws ch. 509 (title). We conclude that the stated purposes of the General Assembly are beneficial public purposes and that Chapter 509 as enacted serves those purposes.[2]

2. There is considerable authority for the view that securing uniformity in the beginning of terms of office for public officials is, standing alone, a public

[5] Our Constitution provides that superior court judges "shall hold office for terms of eight years and *until their successors* are elected and qualified." N.C. Const. art. IV, § 16. The plaintiff argues, and the trial court concluded, that the provisions of Chapter 509 delaying certain elections unconstitutionally "extended" certain incumbent judges' terms of office. The defendants argue that the terms of office were not extended; the legislature merely created a one-time interim, for the briefest period possible, between terms of office to serve a legitimate public purpose. The defendants contend that the incumbents simply are holding over until their successors are elected and qualified.

We conclude that the effect of the provisions of Chapter 509 postponing certain elections was to cause each superior court judgeship within a multi-seat district to be placed on the same election schedule as the other judgeships in that district. Superior court terms of office, under our Constitution, must be eight years in length, so staggered terms could not be eliminated by shortening some existing terms of office. *Rhyne v. Lipscombe*, 122 N.C. 650, 29 S.E. 57 (1898). Instead, the legislature eliminated staggered terms within multi-seat judicial districts by creating a one-time interim or hiatus between certain terms of office. The current terms were not extended; they expire at the end of their eight-year duration. The next eight-year terms do not commence immediately upon the expiration of the old terms, however, but are instead made to commence two years, or in one case four years, later. Since no successors will be elected and qualified at the expiration of

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purpose. *E.g., Wilson v. Clark*, 63 Kan. 505, 65 P. 705 (1901). We conclude that this independent purpose is an adequate public purpose to sustain Chapter 509 under our State Constitution. Further, questions concerning whether Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, applies to judicial elections and whether the existence of numbered seats or staggered terms of office for judges in multi-seat judicial districts violates that section are problematic. Although the Supreme Court of the United States has not spoken, a majority of the lower federal courts which have considered these questions appear to have held that Section 2 applies to judicial elections and that numbered seats and staggered elections in multi-seat judicial districts have the impermissible effect of diluting the votes of racial minorities. *See* Note, *State Judicial Elections and the Voting Rights Act: Will Section 2 Protect Minority Voters?*, 23 Ga. L. Rev. 787 (1989) (a compilation and analysis of federal cases to date on these questions). Although we need not and do not address the substance of such questions, we can and do conclude that our General Assembly could reasonably decide that, since neither numbered seats nor staggered terms exist in multi-seat judicial districts in North Carolina after the passage of Chapter 509, Chapter 509 was an act providing for "continued compliance with the Voting Rights Act" and that this too was a public purpose.

the old terms, the incumbent judges will continue to serve. Our Constitution anticipates such "hold over" situations by providing that elected judges remain in office "until their successors are elected and qualified." N.C. Const. art. IV, § 16.

The distinction between extended terms and an interim or hiatus separating terms may appear artificial at first, but is substantively sound upon analysis. While we have not directly addressed this issue previously, we agree with and see no need to improve upon the statements of the Supreme Court of Kansas in *Wilson v. Clark*, 63 Kan. 505, 65 P. 705 (1901), and *Murray v. Payne*, 137 Kan. 685, 21 P.2d 333 (1933), when it addressed the constitutionality of legislative acts which delayed elections for offices with mandated term lengths.

> [W]hen the constitution fixes the duration of a term it is not in the power of the legislature either to extend or abridge it. An examination of the act challenged, however, shows that no attempt has been made either to lengthen or shorten official terms, or to alter or affect the tenure of the incumbents of any of the offices named in the act. The policy of the statute, as we have seen, is to secure uniformity in the beginning of official terms . . . . The postponement of elections for one year is a reasonable and, in fact, the only practicable method of accomplishing the beneficial purpose of the legislature. If the legislature had postponed elections an unreasonable length of time, longer than was necessary to effect the avowed purpose, and so long as to betray an intention to make the offices appointive by preventing the people from choosing their officers at stated intervals and for regular terms, or, if it appeared that it was done merely to extend official terms and as a favor to incumbents of offices, there might be occasion for judicial interference and condemnation.

Wilson v. Clark, 63 Kan. at 510, 65 P. at 707.

> What happened was that by canceling the election in 1933, there is to be an interval, not a part of any term, between April, 1933, and April, 1935. Such an interval is given various names—interim, interregnum, exceptional term, etc. "Exceptional term" is a misnomer here, because no term of any length is involved.
>
> A term of office is one thing. An office holder is something else. The incumbent may go out, nobody come in, and the

> term goes on. If a successor is appointed or elected, he fills the unexpired portion of the term. A term may come to an end, but the incumbent may rightfully carry on. . . .
>
> When there is an interval between the end of a term and the beginning of another, the public business must go on without interruption. Some one must do the business in the capacity of a public officer. . . . The prevailing rule in the United States is that in the absence of constitutional or statutory provision to the contrary, express or implied, an officer is entitled to hold until his successor is chosen and has qualified.

Murray v. Payne, 137 Kan. at 689-90, 21 P.2d at 335. Other states have long held in accord with the Kansas Court's view which we find persuasive and adopt. *See McCoy v. Story*, 243 Ark. 1, 417 S.W.2d 954 (1967); *Scott v. State ex rel. Gibbs*, 151 Ind. 556, 52 N.E. 163 (1898); *Jordan v. Bailey*, 37 Minn. 174, 33 N.W. 778 (1887); *State ex rel. Attorney General v. McGovney*, 92 Mo. 428, 3 S.W. 867 (1887); *Best v. Moorhead*, 96 Neb. 602, 148 N.W. 551 (1914); *State ex rel. Barton v. McCracken*, 51 Ohio St. 123, 36 N.E. 941 (1894); *State ex rel. Wagner v. Compson*, 34 Ore. 25, 54 P. 349 (1898); *State Board of Education v. Commission of Finance*, 122 Utah 164, 247 P.2d 435 (1952).

The plaintiff's reliance on *Gemmer v. State ex rel. Stephens*, 163 Ind. 150, 71 N.E. 478 (1904), is misplaced, as that case is distinguishable from the instant controversy. *Gemmer* involved a legislative postponement of a county treasurer's election, but the constitutional provisions addressed in *Gemmer* were different from our constitutional provisions now at issue. Unlike the provisions of our Constitution under consideration here, the Indiana Constitution *specified* that the county treasurer was to be elected at the same time as legislators, set the date for such elections, required elections every two years, and prohibited a person from serving as treasurer for more than four out of six years. *Gemmer v. State ex rel. Stephens*, 163 Ind. at 160, 71 N.E. at 482. Therefore, the legislature's attempt by statute to modify the election schedule was contrary to very specific mandates of the Constitution of Indiana. Additional cases cited by the plaintiff are equally distinguishable.

We note that both the plaintiff's and the original defendants' discussions of *Opinion of the Judges*, 114 N.C. 925, 21 S.E. 963

(1894) are of no assistance. Not only is that opinion factually distinguishable, but advisory opinions formerly issued on occasion by this Court merely expressed the individual opinions of the subscribing justices and have no precedential authority. *In re Advisory Opinion*, 314 N.C. 679, 680, 335 S.E.2d 890, 891 (1985).

As noted earlier, one of Chapter 509's purposes was to eliminate staggered terms of office in multi-seat superior court districts. *See* 1987 N.C. Sess. Laws ch. 509 (title); *id.*, tit. I, § 1(d). Significantly, our Constitution does not specify when judicial elections are to be held, other than that they "shall be often held." N.C. Const. art. I, § 7. In contrast, our Constitution does specify an election schedule for the Governor, Lieutenant Governor, and Council of State members (every four years, *id.*, art. III §§ 2, 7), as well as General Assembly members (every two years, *id.*, art. II, § 6). The distinction between those provisions of our Constitution and the provisions before us in this case concerning judges must have been intentional and further evidences a constitutional intent for flexibility in setting the times for holding judicial elections.

[6] The plaintiff also argues that by postponing elections Chapter 509 denies certain citizens their "fundamental right" under article IV, section 16 of the Constitution of North Carolina to vote for judges at the expiration of their eight-year terms of office. The right to vote *per se* is not a fundamental right under our Constitution; instead, once the right to vote is conferred, the *equal* right to vote is a fundamental right. *White v. Pate*, 308 N.C. 759, 768, 304 S.E.2d 199, 205 (1983).

As discussed previously, our Constitution does not specify when judicial elections must be held. "[T]he public has no vested right in the election of any officer except as that mode of selection may be guaranteed by the Constitution, under provisions which are unalterable by legislative action." *Penny v. Board of Elections*, 217 N.C. 276, 279, 7 S.E.2d 559, 561 (1940). Our Constitution sets no specific interval between judicial elections—as it does for certain executive and legislative elections—but only requires that superior court judgeships have eight-year terms of office and that elections be "often" and "free." *See* N.C. Const. art. I, §§ 7, 8. Therefore, the one-time delay in certain judicial elections created by Chapter 509 did not violate a right of citizens to vote guaranteed by our Constitution.

[7] The plaintiff also contends that, by delaying elections in certain districts, Chapter 509 denies qualified candidates their right to seek office. However, the right to seek office "is a political privilege and not inalienable, and certainly when a different method of selection has been provided, consistent with the Constitution, the fact that [a candidate's] aspiration has been thwarted by a nondiscriminatory change of the law gives him no cause of action." *Penny v. Board of Elections*, 217 N.C. at 279, 7 S.E.2d at 561.

[8] The plaintiff further contends that, by allowing nine judges to hold over in office beyond their terms' expirations, the legislature has unconstitutionally usurped his authority to make judicial appointments. Article IV, section 19 of the Constitution of North Carolina provides that vacancies in judicial offices are to be filled by gubernatorial appointment unless otherwise provided in article IV. In light of our foregoing analysis, the plaintiff's contention is incorrect. Once the incumbent judges' terms of office expire, their service ends when their successors are elected and qualified. N.C. Const. art. IV, § 16. Where, as here, the incumbents' terms end without successors having been elected and qualified, and new terms of office have not begun, the Constitution's "hold over" provision operates and allows the incumbents to continue serving in the interim. *See id.* The constitutional provision, not the legislative act, allows the judges to remain in office. No vacancies arise and no legislative appointments have been made.

[9] The plaintiff argues that the eight-year term limitation is meaningless if the legislature has the power to postpone the election of a superior court judge's successor beyond the general election immediately preceding the current term of office's expiration. We do not agree. Chapter 509 only creates a one-time election delay in certain districts for the reasonable public purpose of eliminating staggered elections in multi-seat districts. We do not mean to imply, however, that the legislature may delay such elections for purposes other than public purposes or for periods of time longer than necessary to achieve such public purposes.

[10] The plaintiff finally argues that delaying elections in certain judicial districts confers a separate emolument upon the incumbents, violating article I, section 32 of our Constitution. We disagree.

Article I, section 32 of our Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration

of public services." This Court has previously said that "not every classification which favors a particular group of persons is an 'exclusive or separate emolument or privilege' within the meaning of the constitutional prohibition." *Lowe v. Tarble*, 312 N.C. 467, 470, 323 S.E.2d 19, 21 (1984), *aff'd on rehearing*, 313 N.C. 460, 329 S.E.2d 648 (1985).

> In sum, a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.

Town of Emerald Isle v. State of N.C., 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987).

The incumbent judges do receive a benefit here from holding over in office. However, public and private interests often coincide, and "[t]he initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight." *Mitchell v. Financing Authority*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968). In light of our prior discussion and the presumption of constitutionality given to legislative acts, we find any benefit to the incumbent judges to be incidental and subordinate to the legitimate public benefits obtained by delaying elections for certain superior court judges under Chapter 509.

In summary, our Constitution does not specify when judicial elections must be held, and it does have a "hold over" provision. Our legislature was thus free under our Constitution to delay elections one time in certain districts for a public purpose, which resulted in the incumbents holding over. We conclude that the provisions of Chapter 509 creating a one-time delay of elections and a one-time interim or hiatus between terms of office for certain superior court judgeships—causing the incumbents to hold over until the next elections are held and the succeeding terms of office begin—serve a public purpose and do not violate the Constitution of North Carolina. To the extent that the judgment of the trial court held to the contrary, it is reversed.

PLAINTIFF'S ASSIGNMENTS OF ERROR

[11] The plaintiff first assigns as error the trial court's conclusion that no vacancy arose on 1 January 1989 in Superior Court District 27A by reason of the expiration of the term of office for the judgeship held then and currently by Judge Robert E. Gaines. For reasons which differ from those of the trial court, we agree with its conclusion in that regard.

Although the trial court declared the provisions of Chapter 509 delaying certain elections in certain superior court districts unconstitutional—which part of the judgment we reverse—the trial court did not conclude that a vacancy existed in the judgeship currently held by Judge Gaines. Of the nine judgeships for which elections were delayed by Chapter 509, only the one held by Judge Gaines involved a term of office expiring in 1988; the other eight involved terms of office expiring in 1990 or later.

The plaintiff argues that the only reason an elected and qualified successor for Judge Gaines did not exist at his term of office's expiration on 31 December 1988 was that the legislature had unconstitutionally canceled the "regularly scheduled election" for that office. For reasons extensively discussed in addressing the defendants' assignment of error above, we conclude that the legislature acted within its constitutional authority when it delayed from 1988 to 1990 the election for the office occupied by Judge Gaines and when it caused the next eight-year term for that office to begin on 1 January 1991. Judge Gaines may hold over in office until his successor is elected and qualified, as no vacancy in the office he holds was created by such provisions of Chapter 509. This assignment of error by the plaintiff is overruled.

[12] The plaintiff next assigns as error the refusal of the trial court to declare unconstitutional those provisions of Chapter 509 which purport to assign forty incumbent superior court judges to the new districts in which they reside. We do not agree. Having divided certain existing judicial districts into two or more new judicial districts, the legislature assigned certain regular superior court judges, who had been elected from the old districts, to serve new districts in which they reside. Their new districts, in all instances, are comprised of portions of their old districts. The trial court concluded that Chapter 509 did not violate the Constitution of North Carolina in this regard. We affirm this portion of the trial court's judgment.

The plaintiff has brought forward several arguments in support of this assignment of error which we address *seriatim*.

The plaintiff first argues that the legislative assignments of forty superior court judges made it "impossible" for those judges to reside in the districts for which they were elected, because the districts for which they were elected no longer exist. We do not agree.

Historically, necessity has prompted the subdivision of political authority. Progress demands that government should be further refined in order to best respond to changing conditions. Several provisions of our Constitution provide the elasticity which ensures the responsive operation of government. Specifically, the Constitution of North Carolina allows the General Assembly "*from time to time*, [to] divide the State into a *convenient number* of Superior Court Judicial Districts." N.C. Const. art IV, § 9(1) (emphasis added). Indeed, the General Assembly is free to divide the judicial districts whenever the need exists. *Rhyne v. Lipscombe*, 122 N.C. 650, 655, 29 S.E. 57, 58 (1898).

Chapter 509 subdivided, *inter alia*, sixteen existing superior court districts to conveniently apportion judicial resources evenly throughout the state. At the time of enactment of Chapter 509, thirty-seven regular superior court judges had been elected from those sixteen districts. Those judges were in various stages of their eight-year terms. As we have previously noted, the legislature could neither shorten nor eliminate the terms of those incumbent superior court judges. *Id.* Therefore, the General Assembly was forced to make a practical decision concerning the proper judicial district to which the judgeships held by those judges should be assigned.

In light of the requirement in our Constitution that "[e]ach regular Superior Court Judge shall reside in the district for which he is elected," the General Assembly assigned all of the incumbent superior court judges involved to the districts of their residence. N.C. Const. art. IV, § 9(1). The districts to which the incumbent judges were assigned represent, in all instances, subdivisions of the former districts for and from which they were elected. While Chapter 509 reduced the geographic area of the district for which each of those incumbent judges was elected, the new smaller district is, in each instance, comprised of a part of the area of the former district and a subset of the same voters who nominated or elected

the incumbent judge assigned. Therefore, we conclude that under Chapter 509 those resident superior court judges continue to serve and reside in districts for which they were elected, to the extent required by our Constitution.

The plaintiff next argues that Chapter 509 unconstitutionally deprived the voters of the new smaller districts of their right to elect superior court judges. The plaintiff argues that Chapter 509 creates new judicial districts in which no incumbents survive. He asserts that all judges for the new districts must now be chosen by districtwide nomination and statewide election. This argument implies that Chapter 509 abolished the terms of incumbent judges. We do not agree. The General Assembly cannot shorten or eliminate the term of a resident superior court judge. *Rhyne v. Lipscombe*, 122 N.C. at 655, 29 S.E. at 58.

We conclude that the incumbent judges assigned to new smaller districts carved out of their former larger districts by Chapter 509 were properly elected to serve the new districts within the meaning of our Constitution. Although the new districts were smaller in size, the voters residing in the new districts fully participated, in all instances, in the districtwide primary elections and statewide general elections by which the incumbent judges assigned to them were chosen. Under Chapter 509, the incumbents assigned to those new districts continue to serve the terms for which they were elected.

[13] By his next argument, the plaintiff contends that the legislative assignments of judges to the new smaller districts amounted to appointments of individuals to vacant superior court judgeships in violation of the doctrine of separation of powers. N.C. Const. art. I, § 6. The defendants counter that the legislature only placed duly elected and qualified incumbents in districts for which they were elected. For reasons previously discussed, no vacancies in the offices held by the incumbent judges arose by virtue of the enactment of Chapter 509. Therefore, no appointments have been made. Indeed, where former districts have been divided and no resident incumbent has been assigned to certain of the new smaller districts, Chapter 509 provides that the regular superior court judgeships for those new districts be filled by election. Therefore, this argument by the plaintiff is without merit.

[14] The plaintiff next argues that the assignment of the incumbent superior court judges in question disenfranchised those Democratic voters who reside in the new smaller districts by deny-

ing them the right to vote in a districtwide party primary for the offices held by the incumbents. As we have already fully discussed, Chapter 509 has not excluded any qualified voter residing in the new districts from the primary and general election process. For the reasons we have discussed, no Democratic voters residing in the new districts have been denied participation in that party's districtwide nomination process.

[15] By his next argument, the plaintiff contends that the legislative assignment of incumbent judges to the smaller new districts deprived potential candidates of their right to run for superior court judgeships and constitutes a separate emolument. Again, the plaintiff assumes that vacancies were created in the offices held by the incumbent judges assigned to the new districts and that the legislative assignments amounted to appointments to those offices. We disagree for reasons already fully discussed.

For the reasons we have discussed, we conclude that the trial court did not err in that part of its judgment refusing to declare unconstitutional the provisions of Chapter 509 assigning certain incumbent resident superior court judges to new smaller districts in which they reside and which were carved from the former larger districts for which they were elected. Therefore, this assignment of error by the plaintiff is without merit and is overruled.

[16] By his next assignment of error the plaintiff contends that the trial court erred by upholding those provisions of Chapter 509 creating new superior court districts consisting of less than a whole county and two new superior court districts which consist, in both instances, of parts of two different counties. We do not agree.

Chapter 509, *inter alia*, created certain new superior court districts which do not follow county boundaries. The plaintiff argues that superior court districts must be comprised of whole counties and that the legislature's creation of new judicial districts which are not so comprised violated our constitution. The trial court held that Chapter 509 was constitutional in this regard. We affirm this portion of the trial court's judgment.

Our Constitution anticipates that the needs of the state will change over time. It specifically provides that "[t]he General Assembly shall, *from time to time*, divide the State into a *convenient* number of Superior Court judicial districts . . . ." N.C. Const. art. IV, § 9(1) (emphasis added). Contrary to the plaintiff's argu-

ment, there is no prohibition in our Constitution against the splitting of counties when creating superior court districts. Instead, our Constitution only requires that any division of the state into judicial districts be "convenient."

The plaintiff argues that our Constitution implicitly requires that each superior court district must consist of a whole county or whole counties. The plaintiff employs article IV, section 9(3) to support his contention. Since our Constitution requires one clerk of superior court per county, the plaintiff asserts that the framers of our Constitution assumed that each county would have one superior court. We are not persuaded.

The clerk of superior court is a county officer. *Id.* art. IV, § 9(3). On the other hand, a superior court judge is a state officer; each judge is elected in a statewide general election and may hold court in any county of the state. *Id.* art. IV, § 9(1). Therefore, comparing superior court judges to clerks of court is not persuasive.

The plaintiff also points out that our Constitution provides that, "[f]or each county, the senior resident Judge of the Superior Court serving the county shall appoint . . . Magistrates who shall be officers of the district court." *Id.* art. IV, § 10. The plaintiff argues that such language assumes that only one superior court shall exist in each county and that the magistrates serving the county shall be appointed by a judicial officer whose constituency includes all of the voters in the county. We do not agree.

Our Constitution *specifically requires* that county boundaries be followed in creating legislative districts. *Id.* art. II, §§ 3, 5. Our Constitution *does not require*, however, that county boundaries be followed in creating judicial districts. *See id.* art. IV. We conclude that this distinction between legislative and judicial districts in our Constitution was intentional and that the legislature is not required to follow county boundaries when dividing the state "from time to time" into a "convenient number of Superior Court judicial districts." *Id.* art. IV, § 9(1). Therefore, we conclude that this assignment of error by the plaintiff is without merit, and it is overruled.

[17] The plaintiff also assigns as error that part of the judgment of the trial court declaring constitutional the provisions of Chapter 509, amending N.C.G.S. § 163-106, which provide that

> [n]o person may file a notice of candidacy for superior court judge unless that person is at the time of filing the notice

> of candidacy a resident of the judicial district as it will exist at the time the person would take office if elected. . . . This subsection implements Article IV Section 9 (1) of the North Carolina Constitution which requires regular Superior Court Judges to reside in the district for which elected.

1987 N.C. Sess. Laws ch. 509, tit. IV, § 13. We conclude that the trial court did not err in declaring that these provisions are constitutionally valid. Accordingly, we affirm that portion of the trial court's judgment.

The Constitution of North Carolina requires that "[e]ach regular Superior Court Judge shall reside in the district for which he is elected." N.C. Const. art. IV, § 9. The plaintiff argues that our Constitution imposes only a *post-election* residency requirement, and Chapter 509's pre-candidacy residency requirement unconstitutionally denies otherwise qualified candidates the right to seek office. We do not agree.

Our Constitution sets very specific residency requirements for certain elective offices. Candidates for Governor and Lieutenant Governor must reside in North Carolina "for two years immediately preceding [their] election." *Id.* art. III, § 2. Candidates for the General Assembly must reside in their districts "for one year immediately preceding [their] election." *Id.* art. II, §§ 6, 7. Comparing those very specific residency requirements for candidates for executive and legislative offices with our Constitution's more general language addressing residency requirements for candidates for the superior court, we perceive a constitutional intent to provide the legislature some limited flexibility in setting residency requirements for candidates for superior court judgeships. Given the well-established presumption in favor of the constitutionality of legislative acts, we will not upset the reasonable interpretation of our Constitution reflected in the language the legislature used in adopting these provisions of Chapter 509. The plaintiff's assignment of error is overruled.

For the foregoing reasons, we conclude that Chapter 509 as enacted by the General Assembly does not violate our State Constitution and is fully effective. Therefore, we hold that the trial court erred in those parts of its judgment declaring that certain provisions of Chapter 509 violate the Constitution of North Carolina. Accordingly, we reverse those parts of the trial court's judgment and dissolve the injunctive relief granted by the trial court. We

affirm the remaining parts of the trial court's judgment which declared that the other provisions of Chapter 509 at issue do not violate the Constitution of North Carolina.

Our conclusions and holdings with regard to this case on appeal are based exclusively upon our resolution of independent questions of state law wholly adequate to support our disposition of the issues presented. Therefore, we do not reach, consider or decide any federal question whatsoever.

Affirmed in part and reversed in part.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER AND LIGHT COMPANY; CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES; CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.; UNITED STATES DEPARTMENT OF DEFENSE; CONSERVATION COUNCIL OF NORTH CAROLINA; AND ELIZABETH ANNE CULLINGTON v. LACY H. THORNBURG, ATTORNEY GENERAL (APPELLANT)

No. 57A88

(Filed 9 November 1989)

1. **Utilities Commission § 44 (NCI3d); Judgments § 37.4 (NCI3d) — prior rate cases — treatment of cancellation costs — res judicata inapplicable**

The exercise of the Utilities Commission's ratemaking powers is a legislative rather than a judicial function and is not governed by the principle of res judicata. Therefore, the Commission's treatment of costs associated with canceled nuclear power units in prior general rate cases was not res judicata in this rate case.

Am Jur 2d, Public Utilities §§ 89, 133 et seq.

2. **Electricity § 3 (NCI3d); Utilities Commission § 38 (NCI3d) — electric rates — canceled nuclear power units — amortization of costs as operating expenses**

A decision by the Utilities Commission to authorize a power company to amortize costs associated with canceled nuclear power units as "reasonable operating expenses" under N.C.G.S. § 62-133(b)(3) for ratemaking purposes was within the Commission's power and was supported by competent,

material and substantial evidence. N.C.G.S. § 62-133(c) does not require a nexus between operating expenses and property "used and useful" in providing service, and the recovery of abandonment costs through a liberal interpretation of the operating expense component is consistent with the purpose of the Public Utilities Act set forth in N.C.G.S. § 62-2(3), is supported by language of N.C.G.S. § 62-133(d) allowing the Commission to consider all material facts of record in determining rates, and is further supported by decisions from other jurisdictions and strong policy considerations.

Am Jur 2d, Public Utilities §§ 89, 133 et seq.

Justice MARTIN dissenting in part.

APPEAL by Lacy H. Thornburg, Attorney General, pursuant to N.C.G.S. § 62-90 and N.C.G.S. § 7A-29(b) from the Utilities Commission's (Commission) Order Granting Partial Increase in Rates and Charges entered on 27 August 1987 in Docket No. E-2, Sub 526. Heard in the Supreme Court 14 March 1989.

Lacy H. Thornburg, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, Karen E. Long, and Lemuel W. Hinton, Assistant Attorneys General, for the State.

Richard E. Jones, Vice President and General Counsel, Robert W. Kaylor, Associate General Counsel, and Robert S. Gillam, Associate General Counsel, for Carolina Power and Light Company, appellee.

FRYE, Justice.

The questions presented on this appeal are: (1) whether the Commission erred as a matter of law by authorizing a utility to amortize cancellation costs as operating expenses for ratemaking purposes; and (2) whether the Commission's treatment of cancellation costs in prior orders is res judicata as to issue one. We answer both issues in the negative and affirm the Commission's order.

I.

This is an appeal from an order of the Commission in a general rate case involving Carolina Power and Light Company (CP&L). CP&L is a public utility organized and existing under the laws of North Carolina and is engaged in the business of developing,

generating, transmitting, distributing, and selling electric power and energy to the general public within a broad area of North Carolina and South Carolina.

Procedurally this case comes to this Court as follows:

On 6 January 1987 CP&L in Docket No. E-2, Sub 526 filed an application with the Commission for authority to adjust and increase electric rates and charges for certain of its North Carolina customers. The application sought the Commission's approval of rates that would produce approximately $173.4 million in additional annual revenues from CP&L's operations for an approximate 13.07% increase in total retail rates and charges. One of the principal reasons set forth in CP&L's application as necessitating the requested increase was the need to include in rates a portion of the costs associated with the abandoned construction of the Shearon Harris Nuclear Power Plant (Harris Plant).

On 11 March 1987 the Commission entered an order pursuant to N.C.G.S. § 62-137 declaring CP&L's application to be a general rate case, establishing the test period, scheduling public hearings, requiring the company to give public notice of its application and of the scheduled hearings, and requiring intervenors or other parties having an interest in the proceeding to file interventions, motions, or protests in accordance with applicable Commission rules and regulations.

Subsequently, the United States Department of Defense, the Carolina Industrial Group for Fair Utility Rates, the Attorney General of North Carolina, the Conservation Council of North Carolina, Carolina Utility Customers Association, Inc., and Elizabeth Anne Cullington all filed Petitions or Notices of Intervention which were allowed by the Commission.

The case in chief came on for hearing before the Commission on 9 June 1987. On 5 August 1987, the Commission issued a Notice of Decision and Order which ordered that CP&L be allowed an opportunity to earn a rate of return of 10.45% on its investment used and useful in providing electric utility service in North Carolina. In order to have the opportunity to earn this rate of return, CP&L was authorized to adjust its electric rates and charges to produce an increase in gross revenues of $92,467,000 on an annual basis.

On 10 August 1987, CP&L filed proposed rates and charges to reflect the authorized increase. Upon examining CP&L's pro-

posal, its application, the testimony and exhibits received into evidence at the hearings, the briefs submitted by the parties, and the entire record involved in this proceeding, the Commission on 27 August 1987 entered an Order Granting Partial Increase In Rates And Charges.[1] The Commission's order reviewed the history of the ratemaking treatment of the Harris Plant abandonment losses, noting:

> The ratemaking treatment of the Harris abandonment losses has been considered by the Commission in previous general rate cases of CP&L. In Docket No. E-2, Sub 444, the Commission allowed a recovery of the cost associated with cancelled Harris Units 3 and 4 over a ten-year period with inclusion of the interest arising from the debt financing portion of the unamortized balance. In Docket No. E-2, Sub 461, the Commission reexamined the ratemaking treatment of abandonment losses in order to develop a more consistent and equitable approach. The Commission determined that CP&L should be allowed to continue amortization of the Harris abandonment losses, but that no ratemaking treatment should be allowed which would have the effect of allowing CP&L to earn a return on the unamortized balance. The Commission concluded that this treatment provided the most equitable allocation of the loss between the utility and its ratepayers. In CP&L's last general rate case, Docket No. E-2, Sub 481, the Commission dealt with CP&L's decision to cancel the construction of Harris Unit 2. Consistent with its treatment of the earlier Harris cancellations, the Commission ruled that the abandonment losses of Harris Unit 2 should be amortized over ten years with no return allowed on or with respect to the unamortized balance. Consistent with these previous orders, CP&L proposes in this case to include in operating expenses the amortization of the three abandoned Harris units.

In this order the Commission reaffirmed its previous treatment of the Harris Plant abandonment losses allowing CP&L to continue to recover as operating expenses an amount reflecting an amortization of the cost of these abandoned units. The Attorney General now appeals from this order.

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1. This unanimous order was entered by Commissioner Edward B. Hipp, presiding; and Commissioners Julius A. Wright and William W. Redman, Jr.

II.

On appeal the Attorney General presses two basic contentions. First, he argues the Commission erred by permitting CP&L to continue to include as an allowable expense for ratemaking purposes costs associated with the abandonment of the company's Harris Plant. Second, he argues the determination of the first contention is not barred by the doctrine of res judicata. We will address these arguments in reverse order.[2]

A.

[1] The Attorney General contends on this appeal that the Commission's prior treatments of the cancellation costs of the Harris Plant, allowing the amortization of these costs as operating expenses in the ratemaking formula, are not res judicata on this issue. The Attorney General argues that since the ratemaking activities of the Commission are a legislative function, rather than a judicial function, Commission actions cannot be res judicata. CP&L counters, claiming the issue of amortization of Harris Plant cancellation costs has already been determined, and, therefore, the Attorney General's position is barred by the doctrine of res judicata. CP&L explains:

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2. In order to properly address each side's contentions on each of these issues, we think it is helpful to review the public utility ratemaking formula found in N.C.G.S. § 62-133. This statute requires the Commission to determine the utility's rate base (RB), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components are then combined according to a formula which can be expressed as follows:

(RB x RR) + OE = REVENUE REQUIREMENTS

The rate base is the reasonable cost of the utility's property which is used and useful in providing service to the public, minus accumulated depreciation, and plus the reasonable cost of the investment in construction work in progress. *See* N.C.G.S. § 62-133(b)(4) (Cum. Supp. 1988 & 1982 Repl. Vol.); C. F. Phillips, Jr., *The Regulation of Public Utilities* 332 (1984). Operating expenses generally include costs for fuel, wages and salaries, and maintenance, as well as annual depreciation charges and taxes. C. F. Phillips, Jr., *The Regulation of Public Utilities* 229 (1984). The rate of return is a percentage multiplier applied to the rate base to produce the amount of money the Commission concludes should be earned by the utility, over and above its reasonable operating expenses. *See* N.C.G.S. § 62-133(b)(4) (Cum. Supp. 1988 & 1982 Repl. Vol.).

Per an exhibit of CP&L witness Paul S. Bradshaw, Vice President and Controller of CP&L, the Commission's order at issue in this proceeding allows CP&L to include $26,776,643 of unamortized Harris Plant abandonment costs in the OE component of the ratemaking formula.

> [T]he issue of how the costs of Harris Unit Nos. 2-4 should be treated for ratemaking purposes is not new. The Commission held in Sub 444, and reaffirmed in Sub 461, that CP&L is entitled to amortize the costs of Unit Nos. 3 and 4. It held in Sub 481 that the Company is entitled to amortize the costs of Unit No. 2. These rulings resolved the issue once and for all; the Attorney General did not appeal from any of them, and they are binding on him under the doctrine of res judicata.

CP&L relies essentially on this Court's decision in *State ex rel. Utilities Commission v. Public Staff*, 322 N.C. 689, 370 S.E.2d 567 (1988) (hereinafter *Duke 1988*) as support for its position. We agree with the Attorney General's position on this issue.

As we recently noted in *Duke 1988*:

> The doctrine of *res judicata* treats a final judgment as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." C. Wright, *Federal Practice and Procedure* § 4402 (1969). "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Hogan v. Cone Mills Corporation*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985).

Duke 1988, 322 N.C. at 692, 370 S.E.2d at 569; *see, e.g., In re Trucking Co.*, 285 N.C. 552, 560, 206 S.E.2d 172, 177-78 (1974). More specifically, in addressing the issue of whether a Commission order can be deemed res judicata this Court has held that "only specific questions actually heard and finally determined by the Commission in its *judicial* character are *res judicata*, and then only as to the parties to the hearing." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 570, 126 S.E.2d 325, 333 (1962) (emphasis added). Moreover, this Court has stated that ratemaking activities of the Commission are a legislative function. *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978); *Utilities Commission v. General Telephone Company*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972). It follows that since the exercise of the Commission's ratemaking power is a legislative rather than a judicial function, such orders are not governed by the principles of res judicata and are reviewable by this Court in later appeals of closely related matters. *See Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. at 603, 242 S.E.2d at 866 (Commission's

exercise of rule-making power is legislative and therefore not governed by res judicata).

With these principles in mind we hold that the Attorney General's position is not barred by the doctrine of res judicata. The prior Commission rulings relied upon by CP&L as a bar to the Attorney General's position were all designated by the Commission as "general rate cases" in which CP&L sought Commission authority to increase its electric rates and charges. *Carolina Power & Light Co.*, Docket No. E-2, Sub 481, 74 N.C.U.C. 198 (1984); *Carolina Power & Light Co.*, Docket No. E-2, Sub 461, 73 N.C.U.C. 183 (1983); *Carolina Power & Light Co.*, Docket No. E-2, Sub 444, 72 N.C.U.C. 133 (1982). In each of these prior orders, as in the order now before us, the Commission authorized the recovery and amortization of the cancelled Harris Plant costs through the rate fixing requirements set out in N.C.G.S. § 62-133. In fixing rates to be charged by CP&L, the Commission was exercising a function delegated to it by the legislative branch of government. *Utilities Comm. v. Telephone Co.*, 281 N.C. at 336, 189 S.E.2d at 717. This exercise of the Commission's ratemaking power is not governed by the principles of res judicata. *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. at 603, 242 S.E.2d at 866.

CP&L's reliance on our decision in *Duke 1988* is misplaced. In *Duke 1988* we addressed the Attorney General's contention that the Commission erred in reaffirming its earlier decisions to allow Duke Power Company (Duke) to recover from its ratepayers costs incurred in its previously cancelled nuclear power station projects. *Duke 1988*, 322 N.C. at 691, 370 S.E.2d at 569. We agreed with appellee Duke that our earlier decision in *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987), constituted res judicata as to the issue of whether Duke could amortize the costs of these plants and the Attorney General was therefore barred from pressing this contention. *Duke 1988*, 322 N.C. at 691, 370 S.E.2d at 569.

In *Eddleman* for the first time we considered whether the Commission had improperly allowed Duke to recover costs incurred in the construction of its abandoned nuclear power stations. *Eddleman*, 320 N.C. at 350, 358 S.E.2d at 345. Duke sought to recover from its ratepayers costs incurred in the construction of these plants, amortized over a period of years. *Id.* at 347, 358 S.E.2d at 343. The Commission, as it had done in the past without

challenge on appeal, decided to permit this procedure. *Id.* at 348, 358 S.E.2d at 344. The Attorney General and other parties appealed to this Court, contending for various reasons that the Commission's decision was legally impermissible. *Id.* at 350, 358 S.E.2d at 345. This Court, one Justice not participating, affirmed the Commission's decision by an evenly divided vote. *Id.* at 386, 358 S.E.2d at 365.

Concluding in *Duke 1988* that our decision in *Eddleman* was res judicata on the plant abandonment issue we stated:

> While our decision in *Eddleman* to affirm the Commission has no precedential value [as a result of the evenly divided vote], it does finally determine the rights of the parties in that litigation on the abandoned plant cost issue. Since those parties and that issue are the same as in the instant case, those parties may not here relitigate that issue.

Duke 1988, 322 N.C. at 693, 370 S.E.2d at 570.

CP&L now claims in this proceeding that our decision in *Duke 1988* is "precisely analogous" to the case before us with one insignificant exception and therefore res judicata should apply. The one exception is "the fact that in *Duke 1988* the previous case had become final by reason of an appeal to this Court which resulted in an affirmance by an equally divided vote having no precedential value, whereas in the case now before the Court the Sub 444, Sub 461, and Sub 481 rulings were not appealed on the cancellation costs issue and became final by virtue of the passage of time . . . ." Contrary to CP&L's position, we find that this one exception distinguishes the instant case from *Duke 1988*. In *Duke 1988* it was the judgment of this Court which was given res judicata effect, not a prior Commission decision. It is well established that "[w]here an administrative determination has been reviewed by the courts, the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision." 2 Am. Jur. 2d *Administrative Law* § 499 (1962). This Court has not previously affirmed the Commission's decision in CP&L's rate cases allowing the inclusion of cancelled Harris Plant costs in rates. Here, therefore, there is no judgment to which res judicata can attach. For this reason, our decision in *Duke 1988* does not support CP&L's contention that the position taken here by the Attorney General is barred by res judicata.

We hold that on this record the Commission's treatment of cancellation costs in prior orders is not res judicata in this proceeding.

B.

[2] The Attorney General's main contention in this appeal is that North Carolina law does not allow recovery by CP&L, or any utility, of its investment in generating facilities which were cancelled prior to completion and operation. The Attorney General summarizes his argument by stating:

> The plain language of N.C.G.S. § 62-133(c)—the "operating expense" subsection—as well as cases interpreting it, make it clear that in North Carolina there must be a nexus between allowable operating expenses/revenues and property used and useful in providing service during the test year. Cancelled nuclear units are property which will never be used and useful in providing electrical service. Therefore, the investment in them does not qualify for inclusion in rate base and is equally unqualified for treatment as the source of an operating expense. Finally, any change in the regulatory scheme to authorize charges for cancelled plant to ratepayers may only be accomplished by the General Assembly.

The Attorney General also contends that both analogous decisions from other jurisdictions and public policy support his position. CP&L counters, claiming the language of N.C.G.S. § 62-133 does not prohibit amortization of cancellation costs and such amortization is supported by the state's utility policy, as declared by the General Assembly, and by universally accepted principles of statutory construction. CP&L also claims that its position on this issue is supported by the overwhelming weight of authority in other states and by most academic commentators. We agree with CP&L's position on this issue.

The question we must decide is not one of constitutional proportions, but one of statutory construction. The United States Supreme Court has clearly held that a state scheme of utility regulation does not "take" the utility's property in violation of the fifth and fourteenth amendments simply because it disallows recovery of capital investment in cancelled plant not "used and useful in service to the public," even though the expenditures were prudent and reasonable when made. *Duquesne Light Co. v. Barasch*, 488 U.S. 488, 102 L. Ed. 2d 646 (1989). The question is whether the

North Carolina statutes authorize the Commission to permit a utility to recover capital invested in cancelled plant by amortizing such costs as "reasonable operating expenses" under N.C.G.S. § 62-133(b)(3) without allowing a return on any part of the cancellation costs.

The scope of appellate review of a decision by the Commission is set out in N.C.G.S. § 62-94. Under this standard, the reviewing court

> 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(b)-(c) (1982 Repl. Vol.). As this Court has often stated, our "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. N.C. Natural Gas Corp.*, 323 N.C. 630, 639, 375 S.E.2d 147, 152 (1989); *accord State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. 481, 489, 374 S.E.2d 361, 365-66 (1988); *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. 238, 243-44, 372

S.E.2d 692, 695 (1988); *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 355, 358 S.E.2d at 347; *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).

For a proper understanding of the parties' contentions on this issue, it is necessary to set forth the provisions of N.C.G.S. § 62-133(a) through (d) in their entirety:

> (a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than bus companies, motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.
>
> (b) In fixing such rates, the Commission shall:
>
> (1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection may be included, to the extent the Commission considers such inclusion in the public interest and necessary to the financial stability of the utility in question, subject to the provisions of subparagraph (b)(4a) of this section.
>
> (2) Estimate such public utility's revenue under the present and proposed rates.
>
> (3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.
>
> (4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its

shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based

upon circumstances and events occurring up to the time the hearing is closed.

(d) 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(a)-(d) (1982 Repl. Vol. & Cum. Supp. 1988).

Our statutory scheme of utility regulation does not contain a definition of "reasonable operating expenses" as that term is used in N.C.G.S. § 62-133(b)(3). It does not expressly permit or prohibit the inclusion of cancellation costs associated with abandoned plant in the calculation of reasonable operating expenses. Thus, interpretation and analysis of the statutory regulatory scheme is necessary in order to determine if the Commission has exceeded its authority in allowing the recovery of such costs through amortization as a reasonable operating expense.

Our statute provides that "the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer," N.C.G.S. § 62-133(a), and, in fixing such rates, the Commission shall: "(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1)." N.C.G.S. § 62-133(b)(5) (Cum. Supp. 1988). While this statute makes clear that the rates to be charged by the public utility allow a return on the cost of the utility's property which is used and useful within the meaning of N.C.G.S. § 62-133(b)(1), the statute permits recovery but no return on the reasonable operating expenses ascertained pursuant to subdivision (3). The real question in this appeal is whether the utility may be permitted to recover all or any part of the cancellation costs from the ratepayers through the operating expense category or whether the entire cancellation costs must be borne by the stockholders.

In interpreting N.C.G.S. § 62-133 in prior decisions we have noted:

> Certain fundamental legal principles are applicable and must be adhered to in applying the statute . . . . We begin with the proposition that the Commission is vested with the power to regulate the rates charged by utilities. The General

> Assembly has delegated to the Commission, and not to the courts, the duty and power to establish rates for public utilities. The rates fixed by the Commission must be just and reasonable. Rates fixed by the Commission are deemed *prima facie* just and reasonable.
>
> The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. The rate order of the Commission will be affirmed if upon consideration of the whole record we find that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn.

Utilities Commission v. Duke Power Co., 305 N.C. 1, 10, 287 S.E.2d 786, 791-92 (1982) (citations omitted); *see, e.g., State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. at 491, 374 S.E.2d at 366.

With these statutory provisions and principles in mind we hold that the Commission's order does not err as a matter of law in authorizing CP&L to continue to recover a portion of the cancellation costs of the abandoned Harris Plant as operating expenses through amortization. The Commission's determination was supported by several findings and conclusions. First, the Commission found that although "[t]his case must of course be decided on the basis of North Carolina statutes" the "majority of courts and commissions that have dealt with this issue have allowed ratemaking treatment of abandonment losses, usually as operating expenses." Second, the Commission concluded "that a liberal interpretation of the operating expense element of ratemaking so as to include the Harris abandonment losses is appropriate herein."[3] Last, the Commission found further support for its conclusion was provided by N.C.G.S. § 62-133(d), which allows the Commission to consider all material facts in the record in determining rates.

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3. The Commission based this conclusion on several factors, including: this Court's liberal construction of operating expenses in *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. at 606, 242 S.E.2d at 868; the general purposes of the Public Utilities Act, as set forth in N.C.G.S. § 62-2; and, the observation, contrary to the Attorney General's position, that "[m]any reasonable operating expenses cannot be tied to specific utility property."

The Attorney General's contrary position on this issue must fail. First, we disagree with the Attorney General's contention that "[t]he plain language of G.S. § 62-133(c) . . . as well as cases interpreting it, make it clear that in North Carolina there must be a nexus between allowable operating expenses . . . and property used and useful in providing service during the test year." The Commission's conclusion rejecting this argument is not erroneous as a matter of law. We believe the plain language of N.C.G.S. § 62-133(c) merely provides that the components of the ratemaking formula are to be determined based on a historical test period. *See* N.C.G.S. § 62-133(c). This provision does not require a nexus between operating expenses and "property used and useful." *Id.* The statute reserves this requirement solely to the reasonable original cost of the public utility's *property*, the rate base component which is described in N.C.G.S. § 62-133(b)(1). In contrast, the statute's description of *operating expenses* in N.C.G.S. § 62-133(b)(3) simply provides that these expenses must be "reasonable." As the Commission's order points out, "[m]any reasonable operating expenses cannot be tied to specific utility property." Examples include the costs of planning and forecasting, research and development, tort claims, and the salaries of administrative employees. *See* 64 Am. Jur. 2d, *Public Utilities* § 173 (1972).

In *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. at 606-07, 242 S.E.2d at 868, this Court considered the scope of the operating expense component of the ratemaking formula. In that decision we allowed certain natural gas distribution companies to include approved exploration costs in the operating expenses they passed on to ratepayers. *Id.* We stated:

> When a narrow construction of the operating expense element of a regulatory act would frustrate the purposes of the act . . . the term should be liberally interpreted and applied . . . . [O]ne of the primary policies set out in [the legislature's explanation of its objectives in N.C.G.S. § 62-2] is to promote adequate utility services . . . .

Id. N.C.G.S. § 62-2, entitled "Declaration of policy," provides, in part:

> Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina

is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

. . . .

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State . . . .

In the instant case, both the construction and the cancellation of the Harris Plant were approved by the Commission, and the Attorney General does not in this proceeding dispute the validity of this approval. The recovery of these costs through a liberal interpretation of the operating expense component is, like the recovery of exploration costs in *Edmisten*, consistent with the act's purpose as set forth in N.C.G.S. § 62-2.

Finally, the Commission's rejection of the Attorney General's strict interpretation of allowable operating expenses is also supported by the language of N.C.G.S. § 62-133(d). As the Commission's order correctly notes, all sections of N.C.G.S. § 62-133 must be given weight in construing the language of any individual section. *See Utilities Commission v. Duke Power Co.*, 305 N.C. at 18, 287 S.E.2d at 796. N.C.G.S. § 62-133(d) has been interpreted by this Court as allowing the Commission to consider "all other material facts of record" beyond those specifically set forth in the statute. *See Utilities Commission v. Duke Power Co.*, 305 N.C. at 18, 287 S.E.2d at 796. Therefore, even assuming arguendo that the Attorney General's interpretation of N.C.G.S. § 62-133(c) is correct, the Commission would not be bound by a strict interpretation of the operating expense component.

On this record the Commission's decision to allow the recovery of Harris Plant cancellation costs through the operating expense component was within the Commission's power and was supported by competent, material, and substantial evidence. This Court is therefore without authority to disturb that decision. *See, e.g., State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. at 491, 374 S.E.2d at 366.

Second, we disagree with the Attorney General's contention that analogous cases from other jurisdictions support his position. The Commission's order correctly points out "that the majority of courts and commissions that have dealt with this issue have allowed ratemaking treatment of abandonment losses, usually as

operating expenses."[4] The Attorney General relies essentially on *Office of Consumers' Counsel v. Public Utilities Commission*, 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), *appeal dismissed sub nom., Cleveland Illuminating Co. v. Office of Consumers' Counsel*, 455 U.S. 914, 71 L. Ed. 2d 455 (1982). In *Consumers' Counsel*, the Ohio Supreme Court held that costs associated with abandoned plants could not be considered operating expenses. *Consumers' Counsel*, 67 Ohio St. 2d at 166, 423 N.E.2d at 828. This decision, however, is clearly distinguishable from the case before us. The Ohio statute involved provides as follows:

> (A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges shall determine:
>
> . . . .
>
> (4) The cost to the utility of rendering the public utility service for the test period . . . .

Ohio Rev. Code Ann. § 4909.15(A)(4) (Anderson 1977).

In *Consumers' Counsel*, the Ohio Supreme Court relied on the fact that the definition of operating expenses in the Ohio statute is explicitly tied to costs associated with service provided by the utility during the test period. *Consumers' Counsel*, 67 Ohio St. 2d at 163, 423 N.E.2d at 827; Ohio Rev. Code Ann. § 4909.15(A)(4)

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4. Decisions upholding amortization of cancelled plant costs include *Union Electric Co. v. Federal Energy Regulatory Commission*, 668 F.2d 389 (8th Cir. 1981); *Gulf Power Co. v. Cresse*, 410 So.2d 492 (Fla. 1982); *Central Maine Power Co. v. Public Utilities Commission*, 433 A.2d 331 (Me. 1981); *Attorney General v. Department of Public Utilities*, 390 Mass. 208, 455 N.E.2d 414 (1983); *State ex rel. Union Electric Co. v. Public Service Commission*, 687 S.W.2d 162 (Mo. 1985); *Abrams v. Public Service Commission*, 67 N.Y.2d 205, 492 N.E.2d 1193, 501 N.Y.S.2d 777 (1986); *People's Organization for Washington Energy Resources v. Washington Utilities & Transportation Commission*, 104 Wash. 2d 798, 711 P.2d 319 (1985); *Wisconsin Public Service Corp. v. Public Service Commission of Wisconsin*, 109 Wis.2d 256, 325 N.W.2d 867 (1982); and *Pacific Power & Light Co. v. Public Service Commission*, 677 P.2d 799 (Wyo.), *cert. denied*, 469 U.S. 831, 83 L. Ed. 2d 62 (1984). Cases to the contrary are *Citizens Action Coalition, Inc. v. Northern Indiana Public Service Co.*, 485 N.E.2d 610 (Ind. 1985), *appeal dismissed*, 476 U.S. 1137, 90 L. Ed. 2d 687 (1986); *Appeal of Public Service Co. of New Hampshire*, 125 N.H. 46, 480 A.2d 20 (1984); *Office of Consumers' Counsel v. Public Utilities Commission*, 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), *appeal dismissed sub nom., Cleveland Electric Illuminating Co. v. Office of Consumers' Counsel*, 455 U.S. 914, 71 L. Ed. 2d 455 (1982); and *Barasch v. Pennsylvania Public Utility Commission*, 516 Pa. 142, 532 A.2d 325 (1987), *aff'd sub nom., Dequesne Light Co. v. Barasch*, 488 U.S. ---, 102 L. Ed. 2d 646 (1989).

(Anderson 1977). As noted above, there is no such explicit connection in our ratemaking statute.

Last, we disagree with the Attorney General's contention "that strong policy considerations support the disallowance of [cancellation] expenses." We note that jurisdictions have generally dealt with the allocation of cancelled plant costs in one of the following three ways:

(1) recovery of all of the costs from ratepayers, by allowing amortization of the investment plus a return on the unamortized balance;

(2) recovery of all costs from shareholders through a total disallowance of recovery in rates, instead requiring the utility to write off the entire amount in a single year; or

(3) recovery from ratepayers and shareholders through amortization of costs in rates over a period of years, with no return on the unamortized balance.

See P. Rodgers & C. P. Gray, *State Commission Treatment of Nuclear Plant Cancellation Costs*, 13 Hofstra L. Rev. 443, 450-51 (Spring 1985). Strong policy considerations support the Commission and commentators who have concluded that method three is the best of the three alternatives in that it promotes "an equitable sharing of the loss between ratepayers and the utility stockholders." *See* Pierce, *The Regulatory Treatment of Mistakes in Retrospect: Cancelled Plants and Excess Capacity*, 132 U. Pa. L. Rev. 497, 558 (1984); Sommers, *Recovery of Electric Utility Losses from Abandoned Construction Projects*, 8 Wm. Mitchell L. Rev. 363, 374 (1982). Method two, argued by the Attorney General, though initially placing the entire cost upon the shareholders, may actually in the long term be less favorable to the ratepayers than method three. The Attorney General conceded during oral argument that method two would allow the Commission to reevaluate CP&L's rate of return. As one commentator has noted:

> [I]n the long run, consumers end up paying—and paying twice—because what they gain by "saving" cancellation costs, they lose in higher rates of return as well as in diminished utility stature in the capital markets.

Olsen, *Statutes Prohibiting Cost Recovery for Cancelled Nuclear Power Plants: Constitutional? Pro-Consumer?*, 28 Wash. U.J. Urb.

& Contemp. L. 345, 377 (1985). On this record, the Commission's continued use of method three is within the Commission's discretion, and this Court will not disturb that decision. *See, e.g., State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. 481, 374 S.E.2d 361; *Utilities Commission v. Duke Power Co.*, 305 N.C. at 10, 287 S.E.2d at 791-92.

Based on our review of the whole record, we conclude that the Commission's order is supported by competent, material, and substantial evidence and is not erroneous as a matter of law in authorizing CP&L to continue to recover a portion of the cancellation costs of the abandoned Harris Plant as operating expenses through amortization.

In conclusion and for the reasons stated, we hold that the Commission did not err in this proceeding. Its order is, therefore,

Affirmed.

Justice MARTIN dissenting in part.

I cannot agree with the approval by the majority of the Commission's inclusion of the cost of the abandoned Units 2, 3 and 4 of the Shearon Harris nuclear plant as operating expenses under N.C.G.S. § 62-133. The law does not permit, for rate-making purposes, a utility to earn a return on property not used or useful in rendering services to the public.

N.C.G.S. § 62-133(b) prescribes the formula which the Commission is required to follow in fixing rates for service to be charged by a public utility. The effect of the entire statute is to impose "used and useful" or "operational" limitations on plant costs, revenues and expenses. Therefore, allowable operating expenses must have a *nexus* with "used and useful" property. The abandoned units have no value. These cancelled nuclear units will never be "used and useful" in providing electrical service to the customers of CP&L.

Thus, the Attorney General is correct in his argument that only those costs associated with operational plants are to be considered expenses. The Commission, by including the costs of the abandoned units in its operating expenses, violates these statutory requirements. The costs of abandoned property, however prudently scheduled at the outset of the project, cannot be recovered under our statute. This may indeed produce a harsh result at times,

but it is the result required under the law, the Commission having no equitable powers. The utility must look to resources other than the Commission in its efforts to recoup its losses.

This Court has so held in *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397 (1985), *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1987), where we stated that only operating expenses incurred in the provision of service to consumers may be considered by the Commission in setting rates. To the same effect is our holding in *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 314 N.C. 171, 333 S.E.2d 259 (1985). The majority recognizes this principle in footnote two where it states that operating expenses "include costs for fuel, wages and salaries, and maintenance, as well as annual depreciation charges and taxes." As the majority implicitly recognizes, capital expenses such as costs incurred by the abandonment of plants cannot be properly charged as operating expenses.

Of course, the utility does not contend that the abandoned plant costs were for plant which is now "used and useful" in providing electric service. North Carolina does not recognize such property as "used and useful." *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E.2d 705 (1972); *Utilities Comm. v. Morgan, Attorney General*, 278 N.C. 235, 179 S.E.2d 419 (1971). Nor can such capital expenditures be recovered through amortization as operating expenses incurred in rendering service to customers. In so doing the Commission acted beyond its statutory authority. This the Commission may not do.

These enormous expenses are not operating expenses under the statute—rather, they are capital costs. Without legislative action, cancelled plant costs may not be correctly allowed as operating expenses. The Commission only has its statutory authority which may not be extended by inference for reasons of convenience or necessity.

There is clear authority for this line of reasoning based on decisions from other states. The first decision on this issue by a state's high court was by the Ohio Supreme Court which held that costs associated with abandoned plants could not be considered operating expenses. *Office of Consumers' Counsel v. Public Utilities Commission*, 67 Ohio St. 2d 153, 423 N.E.2d 820 (1981), *appeal dismissed sub nom., Cleveland Illuminating Co. v. Office of Consumers' Counsel*, 455 U.S. 914, 71 L. Ed. 2d 455 (1982). Ohio's

rate-making statutory scheme set forth in Ohio Rev. Code Ann. § 4909.15(D)(2)(b) is very similar to North Carolina's. The Wyoming Supreme Court clearly disallowed recovery of any costs of or return on abandoned plants, either in rate base or through operating expenses or through a statutory "other values of the system" provision of its public utilities code. *Pacific Power and Light Co. v. Public Service Commission*, 677 P.2d 799 (Wyo.), *cert. denied*, 469 U.S. 831, 83 L. Ed. 2d 62 (1984). *See* Wyo. Stat. § 37-2-119 (1977). In *Citizen's Action Coalition of Indiana, Inc. v. Northern Indiana Public Service Company*, 485 N.E.2d 610 (1985), *cert. denied*, 476 U.S. 1137, 90 L. Ed. 2d 687 (1986), the Indiana Supreme Court held that the costs of an abandoned nuclear project were not allowable, amortizable operating expenses since the abandoned plant was not "used and useful" property. The relevant Indiana statute required that charges by a public utility for any "service" rendered should be reasonable and just. Ind. Code § 8-1-2-4 (1988). The court reasoned that:

> Any allowable operating expense must have a connection to the service rendered before it can be recovered through retail rates. . . . This connection is established when the operating expense is incurred as a result of the process whereby existing "used and useful" property . . . is employed to produce the product or commodity . . . or accommodation . . . rate payers receive. For example, wages, salaries, fuel, maintenance plus annual charges for depreciation and operating taxes.

Citizen's Action Coalition, 485 N.E.2d at 614.

The majority recognizes that the Commission in the entry of its order was exercising what it perceived to be its equitable authority. The Commission has no equitable authority, but can only exercise such powers as are expressly delegated to it by the legislature. By using equitable principles in its order, the Commission arrived at the incongruous result of allowing the utility to recoup some, but not all, of its expenditures incurred by the abandonment of the nuclear units. Under the statute granting the Commission its authority, the utility was either entitled to recover all of these losses or none. I find that the Commission erred as a matter of law by including as operating expenses CP&L's costs of the abandoned Units 2, 3 and 4 of the Shearon Harris nuclear plant.

I am authorized to state that Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., INTERVENOR; CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES (CIGFUR-II), INTERVENOR; NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, INTERVENOR; UNITED STATES SECRETARY OF THE NAVY, INTERVENOR; ELIZABETH ANNE CULLINGTON, INTERVENOR; AND NORTH CAROLINA FAIR SHARE, INTERVENOR v. LACY H. THORNBURG, ATTORNEY GENERAL, INTERVENOR; CAROLINA POWER & LIGHT COMPANY, APPLICANT, AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR

No. 89A89

(Filed 9 November 1989)

1. **Electricity § 3 (NCI3d); Utilities Commission § 32 (NCI3d)—electric rates—cluster design of nuclear units—abandonment of units—excess common facilities—reasonableness of costs of nuclear plant**

There was sufficient evidence in the record to support findings by the Utilities Commission that a power company acted prudently in selecting a cluster design for four proposed nuclear power units which resulted in the construction of excess common plant facilities when three of the units were abandoned and that the company's costs in building the nuclear power plant were reasonable.

Am Jur 2d, Public Utilities § 160.

2. **Electricity § 3 (NCI3d); Utilities Commission § 35 (NCI3d)—electric rates—excess common facilities for abandoned units—not includable in rate base**

An amount spent by a power company to build excess common facilities to serve abandoned nuclear generating units cannot be considered as "used and useful" within the meaning of N.C.G.S. § 62-133(b)(1) and thus cannot be included in the company's rate base.

Am Jur 2d, Public Utilities §§ 139, 160.

3. **Electricity § 3 (NCI3d); Utilities Commission § 38 (NCI3d)—electric rates—excess common facilities for abandoned units—amortization of costs as operating expenses**

The entire amount spent by a power company to build excess common facilities to serve abandoned nuclear generating

units should be treated as cancellation costs of the abandoned units and recovered as operating expenses through amortization.

Am Jur 2d, Public Utilities §§ 161-163, 178-183.

4. Utilities Commission § 41 (NCI3d)— electric rates—removal of amount from rate base—new rate of return

Where the decision of the Supreme Court in a general rate case resulted in removal of $389,000,000 from the rate base of a power company, it will be necessary for the Utilities Commission, on remand, to determine whether a new rate of return must be fixed in accordance with N.C.G.S. § 62-133(b)(4) in order that the rate fixed by the Commission will be fair to the power company and to the consumer.

Am Jur 2d, Public Utilities §§ 135, 190, 191.

Justice MITCHELL dissenting.

Justice MARTIN dissenting.

APPEAL by Lacy H. Thornburg, Attorney General, and Carolina Power and Light Company (CP&L), and cross-appeal by Public Staff—North Carolina Utilities Commission (Public Staff), pursuant to N.C.G.S. § 7A-29(b) and N.C.G.S. § 62-90 from the Utilities Commission's (Commission) Order Granting Partial Increase In Rates and Charges entered 5 August 1988 in Docket No. E-2, Sub 537, and E-2, Sub 333, and appeal by Lacy H. Thornburg, Attorney General, and cross-appeal by Public Staff from Commission's Order Denying Motions for Reconsideration entered 1 September 1988. Heard in the Supreme Court 11 October 1989.

James D. Little and David T. Drooz for Public Staff—North Carolina Utilities Commission, Cross-Appellant.

Lacy H. Thornburg, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, Karen E. Long and Lemuel W. Hinton, Assistant Attorneys General, for Attorney General, Appellant.

Richard E. Jones, Vice President and General Counsel and Robert S. Gillam, Associate General Counsel for Carolina Power and Light Company, Appellant.

FRYE, Justice.

This is a general rate case in which CP&L sought to include in the rate base the full costs of the Shearon Harris Nuclear Power Plant (Harris Plant), which became operational in May, 1987. Approximately $570,000,000 of the total costs of constructing Unit 1 was quantified as the cost of constructing common facilities to service abandoned Units 2, 3, and 4.

The essential questions presented for our review are whether the Commission erred in allowing CP&L to include in its rate base costs of $389,442,000 of the approximately $570,000,000 invested in plant facilities to service abandoned Units 2, 3, and 4 and in allowing CP&L to amortize the remaining $180,558,000 as cancellation costs. In order to answer these questions, we must examine two statutes, N.C.G.S. § 62-94, which establishes the standard of review for an appeal from a decision by the Commission, and N.C.G.S. § 62-133, which sets out the ratemaking process for the Commission to follow when deciding a general rate case. We hold that the orders of the Commission were affected by an error of law, N.C.G.S. § 62-94(b)(4), requiring that this case be remanded to the Commission with instructions to remove approximately $389,000,000 from the rate base and include it with the approximately $181,000,000 to be treated as cancellation costs because the former amount was not spent for property that is "used and useful" in providing electric service to the consumers as required for inclusion in the rate base under N.C.G.S. § 62-133(b)(1). Our decision further requires that the Commission on remand determine whether a new rate of return must be fixed in accordance with N.C.G.S. § 62-133(b)(4) in order that the rates fixed by the Commission shall, pursuant to N.C.G.S. § 62-133(a), be fair to CP&L and to the consumer.

I.

On 10 September 1987 CP&L filed an application with the Commission for a rate increase which would include the full construction costs of the Harris Plant. The Commission entered an order on 9 October 1987 declaring the application a general rate case. Eight parties were allowed to intervene. They were: the Public Staff, the North Carolina Department of Justice, the United States Department of Defense, Carolina Utility Customers Association, Inc., Carolina Industrial Group for Fair Utility Rates, the North Carolina Electric Membership Corporation, North Carolina Fair

Share, and Elizabeth Anne Cullington. Hearings were held in Goldsboro, Wilmington, Asheville, and Raleigh during March and April of 1988. Seventy-five witnesses testified at these hearings. Further hearings were held in Raleigh from 14 April 1988 to 16 June 1988. Six of the eight intervening parties introduced testimony from twenty-one expert witnesses and six industrial consumers.

When the Harris Plant was originally designed in 1971, it included four nuclear generating units with one unit scheduled to be brought on line each year from 1977 through 1980. CP&L based its plans for this plant on projected growth rates which would require construction of all four nuclear generating units at the Harris Plant to meet the projected electric needs of its customers. However, the 1973 OPEC oil embargo changed the projected demands for electricity. New studies showed that CP&L would not need the four units originally planned for the Harris Plant. Therefore, CP&L decided to cancel the plans for Units 2, 3, and 4.

The initial cost estimate to build Harris Unit 1 was approximately $315,000,000. Harris Unit 1 actually came into commercial operation in 1987 at a cost of approximately $3,900,000,000. The original plans for the Harris Plant, adopted in 1971, called for a cluster design with the four units sharing certain common plant facilities such as the fuel handling building and waste processing building. The purpose of the cluster design was to save money overall by sharing common facilities rather than building these facilities separately for each unit. However, with the cluster design, the first unit built would be more costly than follow-up units because certain structures and systems needed to operate the first unit are sized to be shared with the other units. Since construction on Unit 1 was begun before the other units were cancelled and because the original cluster design was not altered, these common facilities were built to service Unit 1 alone. Thus, the support facilities for Unit 1 were larger than necessary to serve that single unit since they were built to serve all four units.

As a result of the delays and cost overruns on Harris, the Public Staff filed a motion requesting a prudence audit of the plant's construction costs. The Commission issued an order suggesting that the Public Staff oversee such an audit. The Public Staff hired Canatom, Inc., an international engineering and consulting firm with extensive experience in nuclear power plant implementation, to investigate the reasonableness of management decisions and

costs related to Unit 1. Canatom spent a year conducting this study and presented its findings in a three-volume report. This report was filed with the Commission in this rate case.

The only part of Canatom's report which is of concern on this appeal is its finding of imprudence on the part of CP&L on the "redesign" issue. Canatom's report indicates that CP&L itself conducted a study to estimate the cost impact of shared or common facilities on Harris Unit 1 due to the original four unit design. The CP&L study quantified approximately $570,000,000 as the value of the additional burden assumed by Unit 1 in anticipation of reducing the costs of the remaining three units which were later cancelled. Canatom reported that $180,558,000 of this amount could have been saved if CP&L had abandoned the cluster design in 1975 and implemented a different design. Canatom concluded that the failure to redesign in 1975 constituted imprudence on the part of CP&L.

In its Order Granting Partial Increase in Rates and Charges filed on 5 August 1988, the Commission made certain findings of fact. Among these findings were:

> 7. CP&L has met the prudence standard in its financing of the Shearon Harris plant. CP&L's financial management practices relating to Shearon Harris were generally reasonable and efficient.
>
> 8. Except as hereinafter found and discussed, the costs of the Shearon Harris nuclear plant are reasonable and were prudently incurred.
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> . . . .
>
> 11. CP&L should be allowed to recover as an expense its abandonment loss sustained as a result of the Company's having cancelled and abandoned its Mayo Unit No. 2 in March 1987. Recovery of the investment in that unit should be accomplished over a ten-year amortization period. CP&L should be allowed to continue to recover the cancellation costs of Harris Units 2, 3, and 4. Costs of $180,558,000 ($98,340,000 on a North Carolina retail jurisdictional basis) proposed for inclusion in rate base as part of Harris Unit 1 should be reallocated and assigned as cancellation costs of Harris Units 2, 3, and 4; these costs should be excluded from rate base

and should be treated in a manner consistent with the other CP&L cancellation costs discussed herein.

. . . .

17. CP&L's reasonable original cost rate base used and useful in providing service to its North Carolina retail customers is $3,677,225,000, consisting of electric plant in service of $4,869,311,000, net nuclear fuel investment of $133,271,000, and an allowance for working capital of $114,033,000, reduced by accumulated depreciation of $949,412,000 and accumulated deferred income taxes of $489,978,000.

Commissioner Ruth Cook dissented from the part of the Commission's Order which allowed CP&L to amortize the $180,558,000 over a ten-year period. In her dissent, she concluded that this amount should be classified as "excess plant or plant held for future use" rather than cancellation costs.

Both the Public Staff and the Attorney General made motions for reconsideration by the Commission, and these motions were denied in an Order Denying Motions for Reconsideration filed on 1 September 1988. In this order, the Commission again restated its position that CP&L's decision to use the cluster design, which resulted in the building of excess facilities at a cost of $570,000,000, was prudent. The Commission further explained its decision to divide this amount into $389,442,000 which would be included in the rate base and $180,558,000 which would be treated as cancellation costs. The Commission noted, "this was a ratemaking adjustment that was, in effect, adopted by the Commission on its own motion since no party to this proceeding proposed such an adjustment. We adopted this treatment for reasons of fairness and equity."

The Attorney General, the Public Staff, and CP&L all appealed from the Commission's order of 5 August 1988. Only the Attorney General and the Public Staff appealed from the order denying reconsideration. The Attorney General contends that the Commission erred in concluding that CP&L's choice of a cluster design in 1971 was prudent. We find no error in this portion of the Commission's order. The Public Staff contends that the Commission erred in quantifying the cancellation costs for common facilities built to serve Harris Units 2, 3, and 4 at $180,558,000 instead of $570,000,000. We agree. CP&L contends that the entire $570,000,000 should be included in the rate base because the Commission found

that these expenses were prudently incurred. We do not agree with CP&L's position on this issue.

II.

The Utilities Commission is charged with the duty of "fixing such rates as shall be fair both to the public utility and to the consumer." N.C.G.S. § 62-133 (Cum. Supp. 1988). Section 62-133 provides a step-by-step procedure for the Commission to follow in fixing these rates. We reviewed the public utility ratemaking formula in *State ex rel. Utilities Comm. v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451 (1989) (*Thornburg II*).

> This statute requires the Commission to determine the utility's rate base (RB), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components are then combined according to a formula which can be expressed as follows:
>
> (RB x RR) + OE = REVENUE REQUIREMENTS
>
> The rate base is the reasonable cost of the utility's property which is used and useful in providing service to the public, minus accumulated depreciation, and plus the reasonable cost of the investment in construction work in progress. *See* N.C.G.S. § 62-133(b)(4) (Cum. Supp. 1988 & 1982 Repl. Vol.); C. F. Phillips, Jr., *The Regulation of Public Utilities* 332 (1984). Operating expenses generally include costs for fuel, wages and salaries, and maintenance, as well as annual depreciation charges and taxes. C. F. Phillips, Jr., *The Regulation of Public Utilities* 229 (1984). The rate of return is a percentage multiplier applied to the rate base to produce the amount of money the Commission concludes should be earned by the utility, over and above its reasonable operating expenses. *See* N.C.G.S. § 62-133(b)(4) (Cum. Supp. 1988 & 1982 Repl. Vol.).

325 N.C. at 467 n.2, 385 S.E.2d at 453 n.2.

In this portion of the appeal, we are concerned with the procedure for determining what goes into the *rate base*. In determining what goes into the rate base, the statute directs the Commission to

> (1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within

> a reasonable time after the test period, in providing the service rendered to the public within the State . . . .

N.C.G.S. § 62-133(b)(1) (Cum. Supp. 1988).

The statute sets out a two-part test for the Commission to use in deciding what goes into the *rate base* for all costs except costs of construction work in progress. The Commission must: (1) determine the *reasonable* original cost of the property and (2) determine if the property is "used and useful, or to be used and useful within a reasonable time after the test period." *Id.* If the costs in question do not meet both parts of the test, the costs may not be included in the *rate base* for ratemaking purposes. *See id.*; N.C.G.S. § 62-133(b)(4) and (5).

In contending that the Commission erred in its finding, the Attorney General argues CP&L's decision to use the cluster design was not prudent and does not meet the first part of the test and, therefore, none of the $570,000,000 can be included in rate base. While we agree with the Attorney General's conclusion that the approximately $570,000,000 cannot be included in rate base, we do so, not on the basis of the *reasonableness* of the costs, i.e., prudence, but on the basis that the property does not meet the second part of the test, i.e., the "used and useful" test.

The standard of review by this Court of an order of the Utilities Commission is set out in N.C.G.S. § 62-94. Under this standard, the reviewing court

> 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(b) and (c) (1982 Repl. Vol.). As this Court has often stated, our "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. N.C. Natural Gas Corp.*, 323 N.C. 630, 639, 375 S.E.2d 147, 152 (1989); *accord State ex rel. Utilities Comm. v. Public Staff*, 323 N.C. 481, 489, 374 S.E.2d 361, 365-66 (1988); *State ex rel. Utilities Comm. v. Carolina Utility Customers Assoc.*, 323 N.C. 238, 243-44, 372 S.E.2d 692, 695 (1988); *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. at 355, 358 S.E.2d at 347; *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). We will not disturb the findings of fact of the Commission as long as they are supported by competent, material, and substantial evidence in view of the whole record and are not arbitrary or capricious. *Utilities Commission v. Thornburg*, 314 N.C. 509, 511, 334 S.E.2d 772, 773 (1985) (*Thornburg I*).

[1] The Attorney General contends that the Commission's finding of prudence on the part of CP&L violates subsections (4), (5), and (6) of N.C.G.S. § 62-94(b). The Attorney General claims that the Commission did not consider uncontested evidence in the whole record which indicated that CP&L's circumstances and problems in 1971 should have prevented it from selecting the cluster design because it was a high risk choice. We conclude that the Commission's finding that CP&L's costs in building the Harris Plant were prudently incurred is supported by competent, material, and substantial evidence in view of the whole record and is not arbitrary or capricious. In its discussion found in the Order of 5 August 1988 under Evidence and Conclusions For Finding of Fact No. 8,

the Commission discusses its finding that selection of the cluster design in 1971 was prudent. In support of this finding, the Commission states:

> CP&L's choice of the cluster design was a prudent decision. CP&L considered a number of different alternative plant layouts and eventually selected the cluster design. The Company's decision to use the cluster design was based on specific and identified design criteria. The cluster design did meet the specific and identified design criteria. The cluster design did meet the specific design criteria better than the alternatives. These design criteria were consistent with the Company's long held philosophy of using common facilities at its plants in order to reduce material quantities, construction duration capital costs and total life cycle costs of its plants.

In discussing the Attorney General's contention that choice of the cluster design was not prudent, the Commission states,

> the Attorney General's proposed disallowance of $560 million on this issue is premised on the assumption that the only prudent choice in 1971 was the slide-along arrangement. In cross-examination, however, Attorney General witness Marvetich refused to take a position on the prudence of selecting a twin-unit design in 1971. Evidence in this case indicates that CP&L would have selected the twin unit as its second choice, and the twin unit also would have caused the construction of common facilities for one unit.

The Commission further explains its finding that the choice of the cluster design was prudent: "The testimony of Canatom and CP&L Direct Panels, I, II, IV, CP&L Rebuttal Panel II, and CP&L Rebuttal witnesses Reinsch and Boyd are more than ample to support the finding that the choice of the cluster design was prudent." While contrary evidence was presented, the record contains sufficient evidence to support the Commission's finding that CP&L's choice of the cluster design was prudent, and this finding will not be disturbed on appeal. *See Thornburg I*, 314 N.C. at 511, 334 S.E.2d at 773.

III.

[2] The Public Staff contends that the Commission erred in allowing $389,442,000 in the rate base rather than including this amount with the $180,558,000 which the Commission treated as cancellation

costs. As stated earlier, to be included in the rate base, the cost must be both reasonable and incurred for property that is "used and useful" in providing service to the customers. N.C.G.S. § 62-133(b)(1). The Public Staff contends that the amounts in controversy cannot be included in the rate base because they were not incurred for property that is "used and useful." CP&L contends that the costs were prudently incurred for property that is "used and useful" and that the Commission, in Finding of Fact No. 17, implicitly, if not specifically, found this to be true.

A fair reading of the Commission's Finding of Fact No. 17, quoted in full earlier in this opinion, would indicate that the Commission found that $389,442,000 of the $570,000,000 construction costs was incurred for property that was "used and useful" in providing electric service to its customers as is required by N.C.G.S. § 62-133(b)(1).[1] However, in reading the Evidence and Conclusions For Finding Of Fact No. 11 and the Order Denying Motions For Reconsideration, we find that the evidence showed and the Commission actually found that the $570,000,000 figure represented costs of construction of *excess* common facilities. In the Evidence and Conclusions For Finding Of Fact No. 11, the Commission stated:

> Nevertheless, the Commission further concludes that CP&L's utilization of the cluster design, while prudent in 1971 and 1974 and thereafter, has in fact resulted in the construction of *excess common facilities* at the Harris Plant in the fuel handling building, the waste processing building, the water treatment building, and the diesel generator and fuel oil tank building. These buildings were designed and built to serve *four* nuclear units. (Emphasis added.)

In its Order Denying Motions For Reconsideration, the Commission was even clearer that the total cost for the excess common facilities was the $570,000,000 figure. In that Order, the Commission quotes from the Canatom Report:

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1. Notwithstanding the contest over proper treatment of the approximately $570,000,000, neither this figure nor the $389,442,000 figure is referred to by the Commission in its twenty-eight Findings of Fact. However, when the Commission, in Finding of Fact No. 17, found that "CP&L's reasonable original cost rate base used and useful in providing service to its North Carolina retail customers is $3,677,225,000," having excluded only $180,558,000 (Finding of Fact No. 11) of the $570,000,000 (*see* Order Denying Motions for Reconsideration) from the rate base, it is clear that the remaining $389,442,000 of the $570,000,000 is included in the $3,677,225,000 cost rate base found by the Commission to be used and useful.

> CP&L conducted a study to estimate the cost impact of shared common facilities on Harris Unit I due to the original four unit design. Specifically, the study sought to arrive at a value for the additional burden assumed by Unit 1 (the common facilities burden) in anticipation of reducing the costs of the follow-on units. This cost has been determined to be approximately *$570,000,000.* (Emphasis added.)

The Commission then goes further to state:

> While the Commission clearly recognized the extent of CP&L's total investment in common facilities to serve Harris Units 2, 3, and 4 as reflected in the Canatom Report and Witness Schlissel's testimony, we decided that it was appropriate to treat only a "reasonable portion" of the Company's *total investment* in those common facilities as cancellation costs. The intent of our decision was to arrive at an "equitable sharing" of the costs of common facilities between CP&L's shareholders and its North Carolina retail ratepayers. (Emphasis added.)

While the Commission's findings of fact are conclusive when supported by "competent, material, and substantial evidence," *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972) (General I), all the evidence in this case tends to show that the $570,000,000 was spent to build *excess* common facilities. If the facilities are *excess*, as a matter of law, they cannot be considered "used and useful" as that term is used in N.C.G.S. § 62-133(b)(1). *See, e.g., General I*, 281 N.C. at 351, 189 S.E.2d at 729. Since the excess common facilities are not "used and useful," they cannot be included in the rate base. N.C.G.S. § 62-133(b)(1). The Commission committed an error of law in including $389,442,000 in the rate base because this amount was part of the $570,000,000 used to construct the excess common facilities to serve abandoned Harris Units 2, 3, and 4.

IV.

[3] Since the Commission erred in placing $389,442,000 in the rate base, the next question we must answer is the proper treatment of this amount. The $389,442,000 figure is part of the $570,000,000 figure which was given as the value of the additional burden assumed by Unit 1 in anticipation of building Harris Units 2, 3, and 4. After removing the $389,442,000 from the $570,000,000, the

Commission majority classified the remaining $180,558,000 as cancellation costs.

As we have already discussed, the Commission found that the entire $570,000,000 spent to build this excess facility was prudently incurred. We have also held that the *excess* common facilities cannot be considered "used and useful" so as to be included in rate base. The Public Staff argues that the entire $570,000,000 should be included in the cancellation costs of the abandoned Units 2, 3, and 4. We agree.

The Attorney General contends that the Commission has acted in an arbitrary and capricious manner by classifying the $180,558,000 figure as an abandonment loss subject to amortization as operating expenses. The Attorney General argues that the Commission acted in excess of its statutory authority to find that the $180,558,000 is excess common facilities and then to classify it as abandonment loss. The Attorney General cites *General I*, 281 N.C. 318, 189 S.E.2d 705; *State ex rel. Utilities Commission v. Mebane Home Telephone Company*, 298 N.C. 162, 257 S.E.2d 681 (1979); and *State ex rel. Commission v. General Telephone Company*, 285 N.C. 671, 208 S.E.2d 681 (1974) (General II), for the proposition that excess capacity cannot statutorily be charged to ratepayers. The Attorney General reads these cases too broadly. They do not hold that costs incurred for excess capacity cannot be recovered in *rates*—only that such costs may not be charged to ratepayers by including them in the *rate base* upon which the utility is permitted to earn a *return on its investment.*

These three cases cited by the Attorney General all address the issue of what should go into *rate base. General I*, for example, discusses among other issues the Commission's treatment of excess central office equipment which the company purchased. The Court clearly states that the money spent on these excess purchases could not be considered used and useful and, therefore, could not be placed into *rate base. General I*, 281 N.C. at 355, 189 S.E.2d at 728. We have already decided that the approximately $570,000,000 used to build the excess common facilities may not properly be included in *rate base*. The question before us is how to classify these costs since they are not properly included in the rate base. None of these cases cited by the Attorney General addresses the issue of the proper treatment of these costs if they are not to be included in the rate base.

In *Thornburg II*, we held that the Commission did not err in authorizing CP&L to continue to recover a portion of cancellation costs of the abandoned Harris Plant as operating expenses through amortization. *Thornburg II*, 325 N.C. at 481, 385 S.E.2d at ---. In that case, CP&L argued that it was proper for the Commission to authorize inclusion of the cancellation costs as an operating expense since CP&L's decision to construct the Harris Plant and the decision to cancel Units 2, 3, and 4 were approved by the Commission. We held that the recovery of these costs through the operating expense component was, like the recovery of exploration costs in *Utilities Commission v. Edmisten, Attorney General*, 294 N.C. 598, 242 S.E.2d 862 (1978), consistent with the purpose of the Public Utilities Act as set forth in N.C.G.S. § 62-2. Here the Commission concluded that CP&L's utilization of the cluster design resulting in excess common facilities was prudent in 1971, in 1974, and thereafter. It further found that "the additional burden assumed by Unit 1 (the common facilities burden) in anticipation of reducing the costs of the follow-on units" was "approximately $570,000,000." The Commission also "clearly recognized the extent of CP&L's total investment in common facilities to serve Harris Units 2, 3, and 4 as reflected in the Canatom report and Witness Schlissel's testimony," but decided "that it was appropriate to treat only a 'reasonable portion' of the company's total investment in those common facilities as cancellation costs." A fair reading of the Commission's findings and conclusions is that the $570,000,000 represents cancellation costs attributable to abandoned Harris Units 2, 3, and 4. This is in essence the same as the cancellation costs held to be appropriately amortized as operating expenses in *Thornburg II*. Therefore, the Commission should have treated approximately $570,000,000[2] as cancellation costs of abandoned Harris Units 2, 3, and 4 to be recovered as operating expenses through amortization. *See Thornburg II*, 325 N.C. 463, 385 S.E.2d 451 (1989).

Our decision concluding that these costs are correctly treated as cancellation costs of abandoned units finds support in a 1983 U.S. Department of Energy study entitled *Nuclear Plant Cancellations: Causes, Costs, and Consequences*, cited by the Commission in its order in the instant case. In that publication, abandonment

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2. This figure may be adjusted should the Commission determine that some portion of the property, as contended by CP&L, was in fact used and useful. The Public Staff, on oral argument, quantified this adjustment at $350,000.

costs are defined as "the total cost recognized by traditional utility accounting practices which would have been avoided if the project had never been undertaken." A fair reading of the findings and conclusions of the Commission in this case makes it clear that if Harris Units 2, 3, and 4 had never been undertaken, CP&L would have avoided the approximately $570,000,000 in costs for the common facilities to serve the abandoned Units 2, 3, and 4. The Commission having found that the decision permitting the incurring of these costs was prudent, it is appropriate that these costs be treated as cancellation costs of the abandoned units and recovered as operating expenses through amortization. *Thornburg II*, 325 N.C. 463, 385 S.E.2d 451.

In conclusion, we hold that the Commission's order of 5 August 1988 granting partial increase in rates and charges and its order of 1 September 1988 denying reconsideration are affected by an error of law, and for that reason:

1. We reverse the Commission's decision to include $389,442,000 in rate base;

2. We affirm the Commission's decision excluding from rate base $180,558,000 cancellation costs associated with abandoned Harris Units 2, 3, and 4 and treating that amount in a manner consistent with the other CP&L cancellation costs; and

3. We remand this case to the Commission with instructions to remove the approximately $389,000,000 from the rate base and include it with the approximately $181,000,000 to be treated as cancellation costs.

[4] Since our decision results in the removal of approximately $389,000,000 from the rate base, N.C.G.S. § 62-133(b)(1), it will be necessary for the Commission, on remand, to determine whether a new rate of return must be fixed in accordance with N.C.G.S. § 62-133(b)(4) in order that the rates fixed by the Commission will be fair to CP&L and to the consumer as required by N.C.G.S. § 62-133(a).

The orders of the Commission are:

Affirmed in part, reversed in part, and remanded.

Justice MITCHELL dissenting.

The majority recognizes that the Commission adopted its treatment of the costs associated with the Harris Plant common facilities for reasons of "equity." As Justice Martin has explained in his dissenting opinion in *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451 (1989), in which I joined, the Commission is not a court of equity and has no equitable powers. Nor do our statutes permit the Commission, or this Court for that matter, to exclude from the rate base any costs prudently incurred in constructing a used and useful electric generating plant. The result reached by the Commission, like the result reached by the majority of this Court, may be fair, equitable or simply a reasonable way to do things. However, neither the result reached by the Commission nor the result reached by the majority of this Court complies with our statutes regulating public utility ratemaking.

As I read the record on appeal, the Commission did not conclude that any of the common facilities were not used and useful in the generation of electric power at the Harris Plant. Indeed, it does not appear that any party to these proceedings contended before the Commission that the common facilities were not used and useful. Instead, the dispute before the Commission involved whether Carolina Power & Light Company (hereinafter "CP&L") had incurred costs associated with the common facilities prudently, not whether any facility of the plant was used and useful.

The Commission made findings and concluded that the costs incurred in building the Harris Plant were prudently incurred, a conclusion with which the majority of this Court agrees. Nevertheless, although no one appears to have raised the issue, the Commission further concluded that some of the common facilities were "excess common facilities." Even if it is assumed—erroneously in my view—that the Commission had the authority to treat part of the prudently incurred costs for the used and useful common facilities as "excess," I do not believe that its findings and conclusions in this regard were supported by the evidence presented.

CP&L offered evidence, which appears to have been uncontroverted, that none of the fuel handling building is unused, because portions of it not presently needed for fuel handling are being used to house other plant facilities. The Technical Support Center is a computer-equipped area located in the fuel handling building that is kept available for use by engineering and technical support

personnel in the event of a plant emergency. Under Nuclear Regulatory Commission (hereinafter "NRC") regulations, this center must be housed in a building with eighteen-inch-thick reinforced concrete walls. CP&L would have had to construct such a building at the Harris Plant for the Technical Support Center, had space not been available in the fuel handling building. Although other portions of the common facilities were larger than absolutely necessary, uncontroverted testimony was introduced by CP&L to the effect that the larger facilities would "be of great benefit in the event of an emergency requiring quick repairs on a large scale" at the Harris Plant, a nuclear powered electric generating plant within thirty miles of the State Capitol at Raleigh.

Further, CP&L offered uncontroverted evidence that after the decision not to complete other nuclear units at the Harris Plant had been made, it sought and obtained studies to determine whether portions of the common facilities could be eliminated. These studies revealed that while it would be physically possible to delete portions of the common facilities, they would respond differently to seismic stresses. If CP&L made such changes, it would be required to perform new seismic studies to satisfy the NRC that the modified facilities at the nuclear plant would not be damaged in the event of an earthquake. Such studies could have revealed that major modification of plant equipment and supports already in place would be necessary in order to ensure seismic stability of the modified facilities.

Based on such information, CP&L determined that it would be cheaper to build the common facilities as originally designed and use any extra space for other plant-related purposes than to delay construction yet again during times of rapidly rising construction costs while it initiated and carried out the procedures necessary to gain NRC approval for smaller facilities. Given the long history of regulatory delay in the approval and construction of the various phases of the Harris Plant—well documented in the Reports of this Court over a period of almost two decades—it is to be doubted that evidence supporting any other rational decision was available. In my view of the record, none was introduced. I conclude that the evidence before the Commission would not support a determination that any of the used and useful common facilities at the Harris Plant, or any of the prudently incurred costs of such facilities, were "excess."

In my view, the Commission has no authority in law to exclude any portion of the prudently incurred construction costs of used and useful facilities from the rate base. N.C.G.S. § 62-133(b)(1) requires that the Commission determine in every general rate case "the reasonable original costs of the public utility's property used and useful . . ." in providing the service rendered to the public. Such costs constitute the utility's rate base. Under N.C.G.S. § 62-133(b)(4) and (5) the Commission must set rates which will allow the utility to earn a fair return on its rate base. The use of the phrase "reasonable original costs" in N.C.G.S. § 62-133(b)(1) seems to me to require that costs for the construction of the used and useful facilities of a completed nuclear power plant be included in the rate base when, as here, those costs have been determined to have been prudently incurred. Therefore, I conclude that all such costs incurred in the construction of the Harris Plant common facilities must be included in the rate base.

For the foregoing reasons, I believe that the Commission erred in excluding a portion of the costs of common facilities from the rate base and that this Court has compounded that error by excluding all such costs from the rate base and treating them as cancellation or abandonment costs. Therefore, I dissent.

Justice MARTIN dissenting.

At the outset, I do not find that the evidence, viewed upon the whole record test, supports the findings by the Commission that the use of the cluster design by CP&L was prudent. N.C.G.S. § 62-94(b)(5) (1982). When the contradictory evidence and the inferences therefrom are considered, the finding of prudence is just not supported by competent, material and substantial evidence. It would serve little purpose to marshall the evidence again, but any ordinary citizen, working to pay his light bill, knows that choosing a construction design which results in the building of excess facilities costing $570,000,000 is not a prudent action—especially when your design engineers have recommended against it. CP&L compounded this error by refusing to seize the opportunity to redesign the facility in 1975.

I agree with the majority that excess facilities, as here, cannot be considered "used and useful" under the law. Again, I agree that no part of the $570,000,000 can be included in the rate base but dissent from the majority's allowing these costs to be recovered

as operating expenses through amortization. *See State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 385 S.E.2d 451, Martin, J., dissenting (1989).

I find that the proper disposition of the $570,000,000 is to classify the amount as excess plant or plant held for future use rather than cancellation costs. As plant held for future use, if all or any part of the present excess facility or plant becomes "used and useful" in the future, it can be placed into the rate base at that time with the consequent benefits to CP&L and its stockholders. If past history is any prologue to the future, this method should allow CP&L to recoup these expenses in a reasonable time and do so within the existing statutory law.

FRANCES PRATT KISER v. WINFORD J. B. KISER

No. 499PA88

(Filed 9 November 1989)

1. **Jury § 1 (NCI3d)— right to jury trial—constitutional guarantee**

Art. I, § 25 contains the sole substantive guarantee of the right to trial by jury under the N. C. Constitution while Art. IV, § 13 ensures that the right as defined in Art. I will be available in all civil cases, regardless of whether they sound in law or equity.

Am Jur 2d, Jury § 10.

2. **Jury § 1 (NCI3d)— right to jury trial—prerogatives existing in 1868**

The right to trial by jury under Art. I, § 25 will be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted.

Am Jur 2d, Jury § 17.

3. **Jury § 1 (NCI3d)— right to jury trial—creation by statute**

A right to trial by jury can be created by statute even though the right is not constitutionally protected.

Am Jur 2d, Jury § 30.

4. Jury § 1 (NCI3d); Divorce and Alimony § 30 (NCI3d) — equitable jurisdiction — no constitutional right to jury trial

There is no right under Art. I, § 25 of the N. C. Constitution to trial by jury on questions of fact arising in an equitable distribution proceeding where the right to bring an action for equitable distribution did not exist prior to 1868 but was created by the legislature in 1981, and the equitable distribution statutes did not provide for a right to a jury trial.

Am Jur 2d, Divorce and Separation §§ 342, 870; Jury §§ 30, 32.

5. Jury § 1 (NCI3d); Divorce and Alimony § 30 (NCI3d) — equitable distribution — no right to jury trial

There is no right under Art. IV, § 13 of the N. C. Constitution to a jury trial on questions of fact in an equitable distribution proceeding since Art. IV, § 13 does not create a substantive right to trial by jury in addition to that found under Art. I, § 25 but merely establishes the form and procedure for the trial of all civil actions, including the procedure of having issues of fact decided by a jury in what were formerly equitable proceedings.

Am Jur 2d, Jury §§ 15, 17, 32.

Justice WEBB dissenting.

ON plaintiff's petition for discretionary review prior to determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31(b), of an order granting defendant's motion for a jury trial entered by *Vaden, J.*, on 3 October 1988 in District Court, GUILFORD County. Heard in the Supreme Court 10 April 1989 and 11 September 1989.

Walter W. Baker, Jr. and Jeffrey L. Mabe for plaintiff-appellant.

Joe D. Floyd; Schoch, Schoch and Schoch, by Arch Schoch, Jr. and Michael W. Sigler, for defendant-appellee.

MARTIN, Justice.

This case raises the question of whether there is a right to trial by jury in an equitable distribution action under the North Carolina Constitution. We answer the question in the negative.

In brief, the facts show that the plaintiff filed a complaint requesting an absolute divorce from her husband and equitable distribution of all marital property. In his answer, the defendant requested a jury trial to resolve issues of fact concerning several matters in controversy, including valuation and acquisition of certain property, intent to make a gift to the marital estate of certain property, and alleged dissipation of marital assets.

In response, the plaintiff moved for an order denying trial by jury. The trial court ruled in favor of the defendant's motion, thus permitting the jury trial. Notice of appeal was immediately given by the plaintiff. This being a case of first impression with this Court and because of the important legal questions involved, this Court agreed to hear the case on discretionary review prior to determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31(b).

An examination of the historical development of the right to trial by jury in this state is helpful in understanding the constitutional guarantee as it exists today. North Carolina has had three constitutions during the course of its history. Sanders, *A Brief History of the Constitutions of North Carolina*, in *North Carolina History* 795 (J. L. Cheney, Jr. ed. 1981). The first constitution, which was promulgated in 1776, contained a provision expressly preserving the right to trial by jury. That provision, article I, section 14, declared:

> That in all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.

N.C. Const. of 1776, art. I, § 14.

This constitution did not include a separate Judicial Article as does the current constitution, but rather left the organization of the court system in the hands of the legislators. Sanders, *A Brief History of the Constitutions of North Carolina*, in *North Carolina History* 795 (J. L. Cheney, Jr. ed. 1981). Although most American jurisdictions did not recognize a right to trial by jury in equity cases at that time, the North Carolina legislature expressly provided such a right by statute in 1782. 1782 N.C. Sess. Laws ch. 11, § 3. *See* Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. Rev. 157 (1952-53); *cf.* Chesnin and Hazard, *Chancery Pro-*

cedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791, 83 Yale L.J. 999 (1974) (demonstrating the use of jury trials in eighteenth century courts of equity). Prior to the passage of that statute, the legislature had denied equity jurisdiction entirely to judges because of the sentiment that all issues of fact in North Carolina should be tried by jury and the belief that this right to a jury trial would be infringed upon if a judge was permitted to sit as the trier of fact in a court of equity. 1 Ashe, *History of North Carolina* 714 (1908). History shows that the legislature finally bent to pressure from attorneys to establish equitable jurisdiction in the superior courts in 1782, but only after expressly establishing a statutory right to trial by jury in equity cases brought in those courts. 1782 N.C. Sess. Laws ch. 11, § 3; Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. Rev. 157, 159 (1952-53). Under that statute, North Carolina courts routinely provided binding jury verdicts for questions of fact arising in cases in equity. Van Hecke, *Trial by Jury in Equity Cases; see, e.g.*, *Strudwick v. Ashe*, 7 N.C. 207 (1819); *Williams v. Howard*, 7 N.C. 74 (1819); *Thigpen v. Balfour*, 6 N.C. 242 (1813); *Jordan v. Black*, 6 N.C. 30 (1811); *Jackson v. Marshall's Adm'r.*, 5 N.C. 323 (1809); *Smith v. Bowen*, 3 N.C. 296 (1804); *Mourning v. Davis*, 3 N.C. 219 (1802); *Scott v. McDonald*, 3 N.C. 98 (1799).

The citizens of North Carolina ratified their second constitution in 1868. With only a few grammatical changes, that constitution retained the language found in article I, section 14 of the Constitution of 1776 regarding substantive rights to a jury trial. N.C. Const. of 1868, art. I, § 19. In the time between the drafting of the original constitution and the drafting of the Constitution of 1868, however, procedures regarding the right to trial by jury in equity cases had undergone changes in North Carolina. *See generally* Van Hecke, *Trial by Jury in Equity Cases*, 31 N.C.L. Rev. 157, 159-60 (1952-53). In 1823, the legislature replaced the statutory right to trial by jury in equity cases with a statutory right to an advisory jury only in those cases.[1] Despite this statutory change, however, equity cases continued to be tried before a binding jury through the

1. 1823 N.C. Sess. Laws ch. 35. This statutory authorization of advisory juries stood until 1873 when this Court ruled in *Lee v. Pearce*, 68 N.C. 76 (1873) that after article IV, section 1 of the Constitution of 1868 abolished the distinction between law and equity, all issues of fact in causes of action existing at that time would be entitled to be tried by jury. *See also Worthy v. Shields*, 90 N.C. 192 (1884); *Chasteen v. Martin*, 81 N.C. 51 (1879).

device of a feigned issue. *See generally* Chesnin and Hazard, *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 Yale L.J. 999 (1974). Through this procedure, the jury in the law courts would determine the feigned issue, thus deciding the factual question in the underlying equity case as well.

In addition to the substantive right to a jury trial found in article I of the original constitution, the Constitution of 1868 contained a Judicial Article which included a section addressing jury trials. That section, article IV, section 1, stated:

> The distinction between actions at law and suits in equity, and the forms of all such actions and suits shall be abolished, and there shall be in this State but one form of action, for the enforcement or protection of private rights or the redress of private wrongs which shall be denominated a civil action. . . . Feigned issues shall be abolished and the fact at issue tried by order of court before a jury.

N.C. Const. of 1868, art. IV, § 1.[2]

This Court consistently held that article IV, section 1 of the Constitution of 1868 was drafted with the clear intent of abolishing burdensome procedural differences between cases tried in equity and those tried at law. *See, e.g., Worthy v. Shields*, 90 N.C. 192 (1884); *Chasteen v. Martin*, 81 N.C. 51 (1879); *Lee v. Pearce*, 68 N.C. 76 (1873). In that respect this Court held in *Lee*:

> The provision in our present Constitution, by which the distinction between actions at law and suits in equity is abolished, and the subsequent legislation affects only the mode of procedure, and leaves the principles of law and equity intact. . . . [I]n other words the principles of both systems are preserved, the only change being, that these principles are applied and acted on in one court and in one mode of procedure.

Id. at 79-80. Accordingly, this section created no additional substantive rights to trial by jury in all civil cases, but rather assured that the jury trial rights substantively guaranteed by article I, section 19 (now article I, section 25) would apply equally to ques-

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2. Article IV, section 1 of the Constitution of 1868 was amended in 1962 to delete the archaic language referring to feigned issues and reorganized as article IV, section 11. 1961 N.C. Sess. Laws ch. 313.

tions of fact arising in cases brought in equity as well as cases brought at law.

Our third and current constitution, which was ratified in 1970, also contains two sections addressing trial by jury. Article I, the Declaration of Rights section, addresses the substantive constitutional right to trial by jury in civil cases in almost the exact language found in the original Constitution of 1776, stating:

> *Right of jury trial in civil cases.* In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

N.C. Const. of 1971, art. I, § 25.

In addition to preserving this substantive right to trial by jury under article I, the current constitution again reiterates the abolition of procedural distinctions between cases brought in equity and those brought at law in article IV, the judicial section of the constitution. Section 13 of article IV, which parallels article IV, section 1 (later article IV, section 11) of the Constitution of 1868 states in relevant part:

> (1) *Forms of Action.* There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury.

N.C. Const. of 1971, art. IV, § 13(1).

[1] Thus, article I, section 25 contains the sole substantive guarantee of the important right to trial by jury under the state constitution while article IV, section 13 ensures that the right as defined in article I will be available in all civil cases, regardless of whether they sound in law or equity.

[2,3] The right to trial by jury under article I has long been interpreted by this Court to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted. *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 309 S.E.2d 183 (1983); *N.C. State Bar v. Dumont*, 304 N.C. 627, 286 S.E.2d 89 (1982); *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981); *In re Wallace*, 267 N.C. 204, 147 S.E.2d 922 (1966); *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E.2d 201 (1943);

Belk's Department Store, Inc. v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943); *Railroad v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890). Conversely, where the prerogative did not exist by statute or at common law upon the adoption of the Constitution of 1868, the right to trial by jury is not constitutionally protected today. *See, e.g., In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 309 S.E.2d 183 (no jury trial right where sovereign immunity would have prevented the suit at common law); *In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (no jury trial right in case involving parental rights); *In re Annexation Ordinances*, 253 N.C. 637, 649, 117 S.E.2d 795, 804 (1961) ("The right to a trial by jury is not guaranteed in those cases where the right and the remedy have been created by statute since the adoption of the Constitution [of 1868]"); *Utilities Commission v. Trucking Co.*, 223 N.C. 687, 28 S.E.2d 201 (no jury trial right in petition for trucking franchise certificate); *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (no jury trial right for controversy over tax valuation); *Unemployment Compensation Comm. v. Willis*, 219 N.C. 709, 15 S.E.2d 4 (1941) (no jury trial right in cases involving administration of the tax laws); *Hagler v. Highway Commission*, 200 N.C. 733, 158 S.E. 383 (1931) (no jury trial right under the Workmen's Compensation Act); *McInnish v. Bd. of Education*, 187 N.C. 494, 122 S.E. 182 (1924) (no jury trial right for discretionary administrative decision regarding site for school building); *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921) (jury of six constitutionally acceptable in insanity hearing); *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2d 57 (1985) (no jury trial right for equitable distribution action). Where the cause of action fails to meet these criteria and hence a right to trial by jury is not constitutionally protected, it can still be created by statute. N.C.G.S. § 1A-1, Rule 38(a) (1983) ("The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.").

[4] The right to bring an action for equitable distribution of marital property did not exist prior to 1868, but was newly created by the General Assembly in 1981 with the passage of 1981 N.C. Sess. Laws ch. 815. Prior to the passage of this act the distribution of assets upon divorce depended on the application of other rules of law. Hence, there is no constitutional right to trial by jury on questions of fact arising in a proceeding for equitable distribution of marital assets under our longstanding interpretation of article I, section 25 and its predecessors, but rather any right to

jury trial would have to be created by the express language of the act itself. No such right is contained in the equitable distribution statutes. Rather, the only reference to jury trial rights in the statutes says merely, "[n]othing in G.S. 50-20 or this section shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina." N.C.G.S. § 50-21(c) (1987).

[5] The parties are apparently in agreement that there is no right to trial by jury in an equitable distribution action under article I, section 25 of the North Carolina Constitution, nor in the express language of the statute itself. The defendant, however, believes that a constitutional right can be found separately under article IV, section 13. Relying on the language of that section, the defendant reasons that an equitable distribution action is a civil action within the meaning of article IV, section 13 and therefore a right to have issues of fact tried before a jury should attach. It is the defendant's contention that article IV, section 13 contains a wholly separate substantive right to trial by jury in addition to that found under article I. Therefore, the defendant contends that the long line of precedent under article I, section 25 disallowing jury trial rights where the right did not exist prior to 1868 would be irrelevant in a case such as this claiming a right under article IV, section 13.

In support of this contention, the defendant turns to *Faircloth v. Beard*, 320 N.C. 505, 358 S.E.2d 512 (1987). Defendant urges this Court to construe *Faircloth* broadly as holding that article IV, section 13 creates a constitutional right to trial by jury in all civil cases arising from controversies affecting private rights and redressing private wrongs. This we decline to do. As Justice Holmes wrote in *Springer v. Philippine Islands*, 277 U.S. 189, 209, 72 L. Ed. 845, 852 (1928) about the Constitution of the United States, section 25 of our Declaration of Rights is one of the "great ordinances of the Constitution."[3] Other provisions of our federal

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3. The introduction to article I of the North Carolina Constitution of 1971 reflects the special status of the fundamental rights protected therein:

DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare . . . .

N.C. Const. of 1971, art. I.

Constitution are of a less exalted quality. Such is article IV, section 13 of the North Carolina Constitution. It concerns details of governmental administration deemed worthy of a place in the organic document, but of a less fundamental nature than the subject matter of article I, section 25. Article IV, section 13 announces no great principle of government but touches upon the mechanics and administration of the court system in the trial of what were formerly equity cases. *Lee v. Pearce*, 68 N.C. 76 (holding that article IV, section 1 (now section 13) affects only the mode of procedure for law and equity cases). The title of section 13 of article IV, "Forms of action; rules of procedure," indicates the administrative purpose of the section. The section unifies legal and equitable actions into a single form of action. The "right to have issues of fact tried before a jury" manifests that this new single form of action is subject to article I, section 25. Unlike article I, section 25, this provision is not a declaration of a right to jury trial in civil cases. *See* N.C. Const. of 1971, art. I, sec. 25. The difference in the natures of these two provisions requires that different rules of interpretation be applied to them. The "great ordinances" are interpreted as evolving responsively to the felt needs of the times, whereas lesser provisions are not broadly or expansively applied. *See State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940).

We hold that article I, section 25 and article IV, section 13 must be read in conjunction with one another. Article IV, section 13 merely establishes the form and procedure for the trial of *all* civil actions, including the procedure of having issues of fact decided by a jury in what were formerly equity proceedings. In order to determine whether there exists a constitutional right to trial by jury of a particular cause of action, we look to article I, section 25, which ensures that there is a right to trial by jury where the underlying cause of action existed at the time of adoption of the 1868 constitution, regardless of whether the action was formerly a proceeding in equity.

Our decision today does not disturb the result in *Faircloth*. In *Faircloth*, this Court considered whether a right to trial by jury existed in a shareholders' derivative suit and held that such a right did exist. Although the right to bring a shareholders' derivative action was not statutorily recognized until 1973, 1973 N.C. Sess. Laws ch. 469, § 12, there was a common law right to bring a shareholders' derivative suit in courts of equity long before that time. *See, e.g., Hawes v. Oakland*, 104 U.S. 450, 26

L. Ed. 827 (1881); *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 15 L. Ed. 401 (1856); *Coble v. Beall*, 130 N.C. 533, 41 S.E. 793 (1902); *Moore v. Silver Valley Mining Co.*, 104 N.C. 534, 10 S.E. 679 (1889); *Foss v. Harbottle*, 67 Eng. Rep. 189 (1843); *see generally* R. Magnuson, 1 *Shareholder Litigation* § 8.01 (1984) (detailing the historical development of shareholders' derivative actions at common law); R. Robinson, *N.C. Corporations Law and Practice* §§ 14-1—14-9 (3d ed. 1983) (explaining the common law rules surrounding early shareholders' derivative suits in North Carolina). This Court held in *Lee v. Pearce*, 68 N.C. 76, that as a result of article IV, section 1 of the Constitution of 1868 (now article IV, section 13 of the Constitution of 1971), the right to trial by jury established by article I, section 19 (now article I, section 25) would apply to all civil cases where the cause of action existed in 1868, regardless of whether the case was founded historically in equity or at law. Thus, under the reasoning of our case law interpreting article I, section 25 and article IV, section 13, there was an article I right to trial by jury in a common shareholders' derivative suit upon the adoption of the Constitution of 1868.

Unlike the common law right to bring a shareholders' derivative suit, however, no right to bring an action for equitable distribution of marital property existed prior to the adoption of the equitable distribution statutes, N.C.G.S. §§ 50-20 and 50-21, in 1981. Therefore, there is no right to trial by jury for such an action under the Constitution of North Carolina. The plain language of the equitable distribution statutes themselves creates no new right to a trial by jury. Accordingly, the decision of the trial court is reversed, and this cause is remanded to the District Court, Guilford County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice WEBB dissenting.

I dissent. I begin by referring to article IV, section 13 of the Constitution of North Carolina, which says in pertinent part:

> There shall be in this State but one form of action for the enforcement of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury.

I do not believe this section needs any interpretation in its application to this case. It plainly says that in this case, which is an action to enforce a private right to equitable distribution, the parties have a right to have issues of fact tried by a jury.

The majority has filed an opinion supported by much reasoning and history, as I suppose it must, if it is to hold that this constitutional provision which says that in a civil action to enforce a private right "there shall be a right to have issues of fact tried before a jury" does not mean a party may have issues of fact tried before a jury. One difficulty for me with the majority reasoning and history is that I believe it is irrelevant to the resolution of this case. If there is one principle which is well established in the interpretation of our Constitution it is that if the meaning is plain we do not go beyond the plain meaning. *Elliott v. Board of Education*, 203 N.C. 749, 166 S.E. 918 (1932). I do not see how the meaning of article IV, section 13 could be any more plain and I believe we have erred in ignoring it.

It may be that it is better not to try equitable distribution actions before juries. I do not believe this justifies us in revising the Constitution to reach this result. Judicial tyranny will be the consequence if we do not know and observe our limits.

The majority makes much of what it says is the procedural nature of article IV of our Constitution as opposed to the substantive rights enumerated by article I. I do not agree with this dichotomy, but if there is such a distinction, nowhere does the majority tell us why this should make a difference. If article IV deals only with procedure, the procedure requires that the parties be entitled to a jury trial in civil actions to enforce private rights and redress private wrongs.

After quoting *Lee v. Pearce*, 68 N.C. 76 (1873), which says that under our Constitution the abolishment of the distinction between law and equity affects only the mode of procedure and leaves the principles of law and equity intact, the majority says, "[a]ccordingly, this section created no additional substantive rights to trial by jury in all civil cases, but rather assured that the jury trial rights substantively guaranteed by article I, section 19 (now article I, section 25) would apply equally to questions of fact arising in cases brought in equity as well as cases brought at law." I do not believe such an inference arises "accordingly" or at all. The language from *Lee v. Pearce*, upon which the majority relies, was

not written in regard to the question of whether there should be a jury trial but as to what remedies were available in a fraud case.

As I read the majority opinion, it takes a great deal of liberty with *Lee v. Pearce*. That case involved an action to set aside a deed on the ground it was procured by fraud. The plaintiff was granted a new trial because of errors in the charge. This Court discussed at length the rules regarding fraud as they existed in the common law courts and in chancery, and how these rules should be applied when they were enforced by our courts after the Constitution required that they be applied by our courts. The only reference I can find to jury trials in that opinion is in the last paragraph where it was said the Constitution required a jury trial in that case. I cannot find anything in that opinion which supports the assertion in the majority opinion in this case which says, "[t]his Court held in *Lee v. Pearce*, 68 N.C. 76, that as a result of article IV, section 1 of the Constitution of 1868 (now article IV, section 13 of the Constitution of 1971), the right to trial by jury established by article I, section 19 (now article I, section 25) would apply to all civil cases where the cause of action existed in 1868, regardless of whether the case was founded historically in equity or at law."

It is true, as the majority says, and as we said in *Faircloth v. Beard*, 320 N.C. 505, 358 S.E.2d 512 (1987), that there have been many cases which interpret article I, section 25 and say that a party is entitled under our Constitution to a jury as a matter of right only if the right existed at common law or by statute when the Constitution of 1868 was adopted. I cannot explain all these cases. Many of them do not involve private rights or wrongs. None of them interpret article IV, section 13. At any rate I believe we should adhere to our statement in *Faircloth* that "[i]f we were to say that these cases hold Article IV, Sec. 13 does not apply in determining a right to a jury trial we would be amending the Constitution by eliminating this section." *Id.* at 508, 358 S.E.2d 514. I believe we have today amended the Constitution of North Carolina.

In order to reach the result we want in this case we have overruled the reasoning of *Faircloth v. Beard*, 320 N.C. 505, 358 S.E.2d 512, the first time an opportunity has arisen. This can hardly contribute to confidence in the stability of the law as applied by this Court. The majority says the defendant asks us to construe *Faircloth* broadly. The defendant has done no such thing. He asks

us to construe *Faircloth* as it was written, a unanimous opinion by this Court, and we have declined to do so. The majority has even adopted the remarkable proposition that some parts of the Constitution should be subject to different rules of construction than other parts. If this is to be the law it could come back to haunt us. At any rate the majority has not interpreted article I, section 25 expansively, as it says it must, but restrictively.

I vote to affirm the order of the District Court of Guilford County.

STATE OF NORTH CAROLINA EX REL. S. THOMAS RHODES, SECRETARY, DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT v. VIVIAN ANNE SIMPSON

No. 525PA88

(Filed 9 November 1989)

1. **Appeal and Error § 6.9 (NCI3d)— interlocutory order granting jury trial—immediate appeal**

An interlocutory order that denies a motion to deny a demand for a jury trial affected a substantial right and is immediately appealable.

Am Jur 2d, Appeal and Error § 85.

2. **Jury § 1 (NCI3d)— right to jury trial—necessity for existence in 1868**

The right to a jury trial under Art. I, § 25 of the N. C. Constitution applies only to actions respecting property in which the right to a jury trial existed at common law or by statute at the time of the adoption of the Constitution of 1868.

Am Jur 2d, Jury § 17.

3. **Jury § 1 (NCI3d); Waters and Watercourses § 7 (NCI3d)— action to enjoin dredge and fill of marshland—no right to jury trial**

There was no right under Art. I, § 25 of the N. C. Constitution to a jury trial in an action instituted by the State pursuant to the Coastal Area Management Act of 1974 and the Dredge and Fill Act of 1969 to enjoin dredge and fill development

of marshland by a private property owner since the State's allegations would not have supported actions at common law for damage to real property or to abate a nuisance, and the action brought by the State did not exist at common law or by statute at the time of the adoption of the Constitution of 1868.

Am Jur 2d, Jury §§ 17, 32, 44.

Justice WEBB concurring in the result.

ON appeal by plaintiff of a constitutional issue pursuant to N.C.G.S. § 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, affirming an order granting defendant a jury trial, entered by *Tillery, J.*, on 25 June 1987 in Superior Court, CARTERET County. *State ex rel. Rhodes v. Simpson*, 91 N.C. App. 517, 372 S.E.2d 312 (1988). Heard in the Supreme Court 11 September 1989.

Lacy H. Thornburg, Attorney General, by J. Allen Jernigan, Assistant Attorney General, for the State-appellant.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by Thomas S. Bennett, for defendant-appellee.

Conservation Council of North Carolina, by John D. Runkle, General Counsel, amicus curiae.

MEYER, Justice.

At issue is the right of a defendant to a jury trial in an action brought by the State to enforce wetland protection provisions of the Coastal Area Management Act of 1974 (CAMA), N.C.G.S. §§ 113A-100 to -128 (1983 & Cum. Supp. 1985), and the Dredge and Fill Act of 1969, N.C.G.S. § 113-229 (1983). The trial court granted defendant's demand for a jury trial over the State's objection. The Court of Appeals affirmed, construing only article I, section 25 of our state Constitution. The Court of Appeals held that this action constituted a controversy at law such as existed at the time of the adoption of the 1868 Constitution and that the action affects property, thus entitling defendant to a jury trial. On appeal, defendant argued solely that article I, section 25 entitled her to a jury trial, basing her reasoning on that of the Court of Appeals. We hold that CAMA and the Dredge and Fill Act are recent creations of the legislature such that the provisions

of article I, section 25 of the state Constitution do not apply. Accordingly, we reverse.

The General Assembly adopted the Dredge and Fill Act in 1969 and CAMA in 1974 to protect valuable coastal resources that had gone unregulated previously. *See* N.C.G.S. § 113A-102 (1983). The Coastal Resources Commission in 15 NCAC 7H .0200 has designated coastal wetlands (marshland) as an area of environmental concern pursuant to N.C.G.S. § 113A-113(a) and (b)(1). Coastal wetlands receive the "highest priority" of protection, 15 NCAC 7H .0205(c) (1985), because "[w]ithout the marsh, the high productivity levels and complex food chains typically found in the estuaries could not be maintained," 15 NCAC 7H .0205(b) (1985). *See Adams v. Dept. of N.E.R.*, 295 N.C. 683, 692-93, 249 S.E.2d 402, 407-08 (1978).

During a routine flight on 17 September 1985, Natural Resources and Community Development (NRCD) personnel observed a placement of fill materials on about five thousand square feet of property owned by defendant. Defendant's property is located in Carteret County near Stella, adjacent to Cales Creek, which is a tributary of the White Oak River. Saw grass (*Cladium jamaicense*), bulrush (*Scirpus* spp.), salt grass (*Distichlis spicata*) and cord grass (*Spartina alterniflora*) vegetate the site. The presence of this vegetation in part defines "coastal wetlands" protected under the statute. N.C.G.S. § 113A-113(b)(1) (1983).

On 30 January 1986, NRCD served defendant with a notice of violation requiring her to cease and desist her fill activity and to restore the coastal wetlands destroyed by filling activity. Defendant refused to comply. In a follow-up notice, NRCD served a notice of continuing violation. This notice included notice of a civil assessment to the effect that "[e]ach day that the area goes unrestored will be considered a separate violation with separate assessments of up to $2500 to be levied on a *per day basis*." *See* N.C.G.S. § 113A-126(d)(1) and (2) (1983). Following defendant's continued refusal to restore the area, NRCD referred the matter to the Attorney General, who instituted this action.

The State alleged in a verified complaint that the defendant placed fill material on lands subject to regulation under the provisions of CAMA and the Dredge and Fill Act without first obtaining a permit. The State sought mandatory injunctive relief for the removal of the fill material. The State did not seek enforcement of the civil penalties.

Subsequent to the filing of her answer, defendant demanded trial by jury. By order filed 10 August 1987, Judge Tillery denied the State's motion to deny defendant's demand for a jury trial, which, in effect, granted a jury trial to defendant. The State appealed to the Court of Appeals, which consolidated this matter for hearing with *State ex rel. Rhodes v. Gaskill*, 91 N.C. App. 639, 372 S.E.2d 746 (1988), *appeal dismissed per curiam as moot*, 325 N.C. 424, 383 S.E.2d 923 (1989). The Court of Appeals affirmed the trial court's ruling in favor of defendant's demand for trial by jury. The State appealed as of right pursuant to N.C.G.S. § 7A-30(1) on the ground that the case involved a substantial question arising under the state Constitution. Because this case raised a substantial question under the North Carolina Constitution and because the case involves legal principles of major significance to the jurisprudence of this State, we also granted the State's petition for discretionary review.

[1] We note as an initial matter that although this appeal is of an interlocutory order, it is properly before the Court. An interlocutory order that denies a motion to deny a demand for jury trial affects a substantial right and is immediately appealable. *Faircloth v. Beard*, 320 N.C. 505, 507, 358 S.E.2d 512, 514 (1987).

[2] Article I, section 25 of the Constitution of 1970 (formerly article I, section 19 of the Constitution of 1868), provides:

> In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

This Court has construed the predecessor to section 25 to apply only to actions respecting property in which the right to jury trial existed either at common law or by statute at the time of the adoption of the 1868 Constitution. *Railroad v. Parker*, 105 N.C. 246, 11 S.E. 328 (1890). For causes of action created since 1868, the right to a jury trial depends upon statutory authority. *Groves v. Ware*, 182 N.C. 553, 558, 109 S.E. 568, 571 (1921). In the absence of statutory authority, there is no right to the trial of a case before a jury where the legislature created the cause of action after adoption of the 1868 Constitution. *North Carolina State Bar v. Dumont*, 304 N.C. 627, 641, 286 S.E.2d 89, 97 (1982).

The statutory scheme of CAMA envisions a permit process for projects such as defendant's, subject to review by a court sitting

without a jury. *Adams v. Dept. of N.E.R.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414. CAMA provides for a trial by jury only where a party owning land affected by a final decision of the Coastal Resources Commission petitions the superior court alleging a taking. N.C.G.S. § 113A-123(b) (1983). There is no other statutory authority in CAMA nor in the Dredge and Fill Act granting a right to trial by jury.

[3] Thus, the question before us is whether an action brought by the State to enjoin dredge and fill development of marshland by a private property owner existed at common law or by statute at the time of the adoption of the 1868 Constitution. Only if such an action existed at that time need we determine whether the remedy sought is one at law respecting property. *See Kaperonis v. Highway Commission*, 260 N.C. 587, 133 S.E.2d 464 (1963) (condemnation proceeding not a cause of action at common law); *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943) (dispute as to real estate tax valuation did not support right to jury trial at common law).

Our review of the cases suggests that prior to the legislative enactment of CAMA and the Dredge and Fill Act, a landowner had the unrestricted right at common law to dredge, fill and "reclaim" marshland on his property, even if the result was less beneficial to adjoining owners. *Richardson v. Boston*, 60 U.S. (19 How.) 263, 269, 15 L. Ed. 639, 642 (1857). *See also Parmele v. Eaton*, 240 N.C. 539, 83 S.E.2d 93 (1954); *Kelly v. King*, 225 N.C. 709, 36 S.E.2d 220 (1945); *Perry v. Morgan*, 219 N.C. 377, 14 S.E.2d 46 (1941); *Insurance Co. v. Parmele*, 214 N.C. 63, 197 S.E. 714 (1938). Absent the statutory authority conferred by CAMA and the Dredge and Fill Act, the State would not have had authority to seek an injunction of defendant's activity. Indeed, there would have been no cause of action and the State's suit would have been subject to dismissal at common law. We think it relevant to this point that until the adoption of CAMA and the Dredge and Fill Act, this State (like so many others) historically considered marshland a wasteland and generally encouraged its fill or drainage. *See* Earnhardt, *Defining Navigable Waters and the Application of the Public Trust Doctrine in North Carolina: A History and Analysis*, 49 N.C.L. Rev. 888, 888-92 (1971).

In holding that this action is one that "has always been accompanied by a right to trial by a jury," the Court of Appeals analo-

gized this action to "an action for damage done to real estate" and to "the ancient action to abate a nuisance." *Simpson*, 91 N.C. App. at 519, 372 S.E.2d at 314. While intuitively appealing, closer reflection shows these analogies miss the mark.

Under the complaint as filed, the State would have had no action for trespass to land. The State did not allege title to or a possessory interest in the marshland. Without such an allegation, there is no right to sue in trespass. *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). Assuming, without deciding, that the State had an action at common law had the defendant deposited fill in waters or on lands held in trust for the public, *see State ex rel. Rohrer v. Credle*, 322 N.C. 522, 369 S.E.2d 825 (1988), the State made no allegation here that the marsh was so held. Thus, at common law and contrary to the interpretation of the Court of Appeals, the State's allegations would not have supported an action for damage done to real estate.

Nor would the complaint here have stated an action at common law to abate a public nuisance. This Court described a common law public nuisance thus:

> "Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance . . . ."

State v. Everhardt, 203 N.C. 610, 618, 166 S.E.2d 738, 742 (1932) (quoting F. Tiffany, *Clark's Handbook of Criminal Law* § 115 at 345 (2d ed. 1902)). Prior to adoption of the current statutes, this Court would not have considered the dredging or filling of privately owned marshland a public nuisance. Historically, the State promoted dredge and fill activity such as defendant's, for the State generally considered such marsh areas agricultural wasteland teeming with malarial mosquitoes. Through a series of legislative actions, the General Assembly vested title to the State's "swamplands" in the Literary Fund (later the State Board of Education) to help establish public education. 1837 N.C. Sess. Laws ch. 23; 1881 N.C. Sess. Laws ch. 200. The State generally defined swamplands as lands "too wet for cultivation and requiring drainage to fit them for that purpose." *Beer v. Lumber Co.*, 170 N.C. 337, 340, 86 S.E. 1024, 1025 (1915). The legislature expressed as a public purpose of these earlier statutes the promotion of swamp drainage and

cultivation. *Id.* Thus, at common law an action for nuisance would not lie against a North Carolina property owner charged with dredging or filling his or her own swampland.

The Court of Appeals reads *Bowman v. Malloy*, 264 N.C. 396, 141 S.E.2d 796 (1965), for the proposition that "a landowner charged with making a public nuisance of his property is entitled to a jury trial if timely demand" is made. *Simpson*, 91 N.C. App. at 519, 372 S.E.2d at 314. This is not an accurate reading of *Malloy*. In *Malloy*, the State brought an action for maintaining a nuisance as defined in N.C.G.S. § 19-1 (maintaining a place for purposes of assignation, prostitution, gambling, illegal sale of alcoholic beverages, etc.). In addition to an action in abatement, the State sought to padlock the premises and sell all furniture, fixtures, and personal property on the premises. The action in *Malloy* was not a mere action for abatement of a nuisance; it was criminal in nature, based on N.C.G.S. § 19-1, and worked a confiscation and forfeiture of property. As such, the defendant in that case was entitled to a jury trial. *See Sinclair, Solicitor v. Croom*, 217 N.C. 526, 8 S.E.2d 834 (1940).

Under CAMA and the Dredge and Fill Act, no forfeiture or confiscation of property is possible. The action is civil, not criminal. The relief sought in this case is defendant's compliance with permit requirements and restoration of the marshlands. The State did not seek enforcement of the penalty provisions. Had defendant participated in the permit process and had the Coastal Resources Commission refused a permit by final order, defendant might have had a right to a jury trial upon proper allegation that the final order of the Commission constituted a taking. N.C.G.S. § 113A-123(b) (1983). Here, defendant's answer merely denies that her property was subject to the permit process. Such a defense does not in any sense allege a taking and so affords her no statutory right to a jury trial.

The reference by the Court of Appeals to the decision of *Tull v. United States*, 481 U.S. 412, 95 L. Ed. 2d 365 (1987), is not apposite. *Tull* decided that a defendant charged with violation of 33 U.S.C. §§ 1251-1319, the Clean Water Act, had a right under the seventh amendment of the United States Constitution to a jury trial on the issue of liability in a suit for civil penalties. *Tull*, 481 U.S. 412, 95 L. Ed. 2d 365. However, "[t]he seventh amendment of the United States Constitution, guaranteeing jury trials in federal

courts, is not applicable to state courts." *In re Clark*, 303 N.C. 592, 606 n.8, 281 S.E.2d 47, 57 n.8 (1981). *E.g., New York Central R.R. Co. v. White*, 243 U.S. 188, 61 L. Ed. 667 (1917); *Letendre v. Fugate*, 701 F.2d 1093, 1094 (4th Cir.), *cert. denied*, 464 U.S. 837, 78 L. Ed. 2d 122 (1983).

The panel below reads *Tull* as concluding that the federal statutory action to restrain the filling of wetlands existed at common law as an action to abate a nuisance. The *Tull* Court reached no such conclusion. Rather, it only found such an action a useful analogy in determining whether the relief sought was equitable or legal. The *Tull* Court found that had the government sought injunctive relief, including restoration, free of the legal claims, no jury trial would have been necessary under the seventh amendment. *Tull*, 481 U.S. at 425-27, 95 L. Ed. 2d at 377-79.

Because we find that an action such as that which the State brought in this case neither existed at common law nor by statute at the time of the adoption of the Constitution of 1868, we need not address the Court of Appeals' determination that the action is one at law respecting property.

In conclusion, we hold that the trial court erred in granting defendant's demand for a jury trial in a proceeding seeking mandatory injunctive relief under CAMA and the Dredge and Fill Act. Moreover, the Court of Appeals erred in affirming the trial court. Accordingly, we reverse and remand this case to the Court of Appeals with instructions to remand to the Superior Court, Carteret County, with orders to deny defendant's demand for jury trial and for further proceedings consistent with this opinion.

Reversed and remanded.

Justice WEBB concurring in the result.

I agree with the result reached by the majority and with most of its reasoning. Nowhere in the majority opinion, however, is any mention of Article IV, Sec. 13 of the Constitution of North Carolina which provides in part:

> There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury.

I do not believe this section requires a jury trial because this is an action by the State to protect a public interest. If it were an action to protect a private right or redress a private wrong, I believe Article IV, Sec. 13 would apply. I feel the majority should take note of this part of the Constitution in its opinion.

STATE OF NORTH CAROLINA v. JOHN SILVER MURDOCK

No. 152A88

(Filed 9 November 1989)

1. **Jury § 5 (NCI3d)— excusal of petit jurors—statutory procedure not followed—no error**

The trial court did not err in a prosecution for murder, rape, and first degree sexual offense by denying defendant's motion challenging the procedure used in Rowan County to excuse or defer potential jurors from the petit jury panel where it was clear that the district court judge failed to strictly comply with the statute governing the excusal of jurors, but those irregularities did not constitute error. N.C.G.S. § 9-6.

Am Jur 2d, Jury §§ 120, 121, 123.

2. **Criminal Law § 1138 (NCI4th)— sexual offense—aggravating factor—crime committed to avoid or prevent arrest**

The trial judge did not err when sentencing defendant for second degree sexual offense by finding in aggravation that the sexual offense was committed for the purpose of avoiding or preventing a lawful arrest for the murder of the victim where the trial court found that defendant left another residence nearby; went to his grandmother's residence; used substantial force against her which resulted in her death; and committed the sexual offense in order to cover up his wrongdoing and prevent his detection by planting the suspicion that someone other than he had entered the residence and committed the crimes. The court expressly overruled *State v. Thompson*, 66 N.C. App. 679, and held that the language in N.C.G.S. § 15A-1340.4(a)(1)(b), like N.C.G.S. § 15A-2000(e)(4), is intended to include situations where defendant's motivation in committing the second offense was to avoid subsequent detection

and apprehension for the underlying crime and was not to be limited solely to situations where defendant committed the second offense to avoid an immediate arrest or to escape from custody.

Am Jur 2d, Criminal Law § 527; Rape § 114.

APPEAL by defendant from judgments sentencing defendant to life imprisonment for his conviction of first-degree murder and a consecutive term of forty years for his conviction of second-degree sexual offense, imposed by *DeRamus, J.*, at the 9 November 1988 session of Superior Court, ROWAN County. Heard in the Supreme Court 11 October 1989.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by M. Patricia DeVine, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

We find the defendant's assignments of error to be without merit and conclude that his trial and sentencing were free of prejudicial error.

Our decision does not require an extensive recital of the facts. In brief, the evidence showed that on 14 September 1986 the body of Janie Brown Murdock, aged ninety-six, was discovered in the bedroom of her small apartment. Her face, neck and arms were battered and covered with blood and she was undressed from the waist down. An autopsy performed by Dr. Cheryl Thorne, assistant medical examiner for the state, revealed that the bruises and other injuries to the victim's head were insufficient, without more, to have caused unconsciousness; that the pattern and location of lacerations on the arms were consistent with "defense wounds"; that the scrapes and abrasions around the vaginal area were consistent with "an attempt to place a blunt object into the vagina"; and that the presence of blood in the lungs and internal hemorrhaging in the neck and larynx indicated probable strangulation.

Further evidence showed that defendant, John Silver Murdock, aged thirty, was the grandson of the victim and had visited her on the evening of 13 September 1986. Based on information obtained from neighbors and family members, the police asked defend-

ant to come to the police station for questioning. After several patently false explanations, defendant confessed the following: that his grandmother tripped while getting up to turn down the volume on the television; that she did not respond to his ministrations and did not appear to have a pulse; that she was bleeding from her mouth and nose; that he was afraid that family members would suspect that he had killed her; that he dragged her to the bedroom and placed her on the bed; that he made it look like a sexual assault to help convince family and friends that he was not responsible; that he threw his t-shirt away because it was covered in blood; and, that he had not sexually or physically assaulted his grandmother.

Defendant was charged with first-degree murder, first-degree rape and first-degree sexual offense. The jury found him guilty of first-degree murder and second-degree sexual offense and not guilty of rape. At the conclusion of the penalty phase of the trial, the jury unanimously recommended that defendant be sentenced to life imprisonment on the murder conviction.

The recommendation of the life sentence was based on the fact that the jury found that the mitigating circumstances outweighed the aggravating circumstances. The jury found in aggravation that the murder was especially heinous, atrocious or cruel, N.C.G.S. § 15A-2000(e)(9), but did not find that the murder was committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4). The jury found as mitigating circumstances that the murder was committed while the defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); that the capacity of the defendant to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6); that the capacity of the defendant to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6); and that prior to arrest the defendant voluntarily acknowledged wrongdoing in connection with the events surrounding the death of Janie Brown Murdock to a law enforcement officer, N.C.G.S. § 15A-2000(f)(9).

Accordingly, the judge sentenced defendant to life imprisonment on the first-degree murder conviction and imposed a consecutive forty year sentence on the second-degree sex offense conviction. Defendant's motion to bypass the Court of Appeals on the sex offense conviction was allowed on 5 December 1988.

I.

[1] By his first assignment of error, defendant contends that the trial court erred in denying his motion challenging the procedure utilized in Rowan County to excuse or defer potential jurors from the petit jury panel. We find no merit in this contention.

On 9 November 1987, defendant filed a written motion challenging the jury panel for that week's criminal session of superior court for Rowan County. In his motion, defendant alleged that prospective jurors were excluded or deferred from the jury panel by district court Judge Robert M. Davis for reasons other than compelling personal hardship of the prospective juror or because the service of such prospective juror would be contrary to the public welfare, health or safety in violation of N.C.G.S. § 9-6.

The pertinent statute states, in part:

> (a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility *should* be granted only for *reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety.* (b) Pursuant to the foregoing policy, each chief district court judge shall promulgate procedures whereby he . . . shall receive, hear and pass on applications for excuses from jury duty. . . . (c) A prospective juror excused by a judge in the exercise of the *discretion conferred by subsection (b)* may be required . . . to serve . . . in a subsequent session. (emphasis added).

N.C.G.S. § 9-6 (Cum. Supp. 1988).

Extensive testimony was introduced by defendant on voir dire concerning the procedures actually followed by the district court judge in excusing potential jurors. It was alleged that Judge Davis granted all requests regardless of the reason, authorized his wife to sign his name to the requests in certain situations, failed to have an independent recollection about what transpired regarding any of the excuses signed by his wife, and denied being instructed not to have someone else sign the juror excuses or deferrals for him.

After considering the testimony, superior court Judge DeRamus entered his findings and conclusions as follows: "that the defendant has failed to show any corrupt intent or systematic discrimination

in the compilation and composition of the jurors on the panel"; "that no preferences were made to any particular group of jurors"; and that "the Court does not find them [excuses or deferrals] to rise to a level that would tend to show some corruption or taint of any significant proportion on the jurors who are actually present and here ready to serve and there is nothing to indicate that the jury that is here is not a good cross representation of the community or is in any way—the jury that is here as a panel is anything other than a representative jury in Rowan County."

Thus, in denying defendant's motion, Judge DeRamus correctly interpreted the proper standard set forth in *State v. Vaughn*, 296 N.C. 167, 250 S.E.2d 210 (1978), *cert. denied*, 441 U.S. 935, 60 L. Ed. 2d 665 (1979). There, defendant moved to quash the indictment on grounds that qualified jurors were disqualified from serving on the grand jury. The trial court denied the motion on the basis that no showing had been made that qualified persons were being categorically disqualified and this Court agreed. Even if the proper showing had been made, this "would not require a dismissal of the indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list." *State v. Vaughn*, 296 N.C. at 175, 250 S.E.2d at 215.

While *Vaughn* specifically dealt with the selection process of the grand jury, this holding has been found to apply to the procedures utilized in selecting petit jury panels as well. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986); *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811 (1986).

In the instant case, while it is clear that the district court judge failed to strictly comply with the statute governing the excusal of jurors, we do not agree that these alleged statutory irregularities constitute error. "This Court has held that deviations from the statutory norm do not automatically constitute reversible error absent an express statutory provision to the contrary." *State v. Johnson*, 317 N.C. at 379, 346 S.E.2d at 616. Furthermore, from *Vaughn* it follows that even if defendant had made a showing of a statutory violation, he is not entitled to a new trial because the evidence tends to negate any corrupt intent, discrimination or irregularities which affected the actions of the jurors actually drawn and summoned. "[O]ur reports are replete with decisions sustaining the validity of indictments against the charge that the statutory procedures were violated in the compilation of the jury

list, the ground of the decision in each case being that the statute was directory and a departure from it does not render the grand jury unlawful, and its actions void, in the absence of a showing of corrupt intent in the compilation of the list or of the presence upon the grand jury of a member not qualified to serve." *State v. Yoes and Hale v. State*, 271 N.C. 616, 638-39, 157 S.E.2d 386, 404 (1967). Defendant's motion was properly denied.

Although the actions of the trial judge did not result in error, it is not inappropriate to suggest that district court judges excuse jurors only in keeping with the language and the spirit of the statute. N.C.G.S. § 9-6 sets forth the proper procedure for excusing or deferring jurors from the jury list.

II.

[2] Defendant next contends that in the second-degree sexual offense conviction the trial court erred in finding as an aggravating factor that the sexual offense was committed for the purpose of avoiding or preventing a lawful arrest for the murder of Janie Brown Murdock pursuant to N.C.G.S. § 15A-1340.4(a)(1)(b). We disagree.

N.C.G.S. § 15A-1340.4(a)(1) provides, in part, that if "the offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody," then that offense may be considered as an aggravating factor. Relying on *State v. Thompson*, 66 N.C. App. 679, 312 S.E.2d 212 (1984), defendant asserts that the statutory language "avoiding or preventing a lawful arrest" was never meant to describe a situation in which a defendant may have sought to avoid detection or otherwise "cover up" or "distract from" his involvement in one crime by perpetrating another.

In *Thompson*, the Court of Appeals considered a noncapital case where defendant was convicted of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. In sentencing on the armed robbery conviction, the trial court applied N.C.G.S. § 15A-1340.4(a)(1)(b) and found that the assault was an aggravating factor because it "was committed after the armed robbery had been completed" and "was committed in an effort to escape or to prevent lawful arrest." The Court of Appeals reversed the trial court, noting:

> The record does not disclose that defendant was threatened with arrest at the time he committed the offense. Nor do

> we believe he can be said to have committed the offense in an effort to escape, since he was not restrained in any way at the time. Thus there was no evidence that would support the court's finding in this regard.

Id. at 682, 312 S.E.2d at 214. The Court of Appeals by its narrow interpretation would appear to limit this factor *only* to cases where defendant is attempting to escape from custody or to avoid a legal arrest by a police officer or other apprehending official.

In reaching this conclusion, however, the Court of Appeals failed to consider this Court's numerous holdings regarding the parallel aggravating circumstance for capital cases as enumerated in N.C.G.S. § 15A-2000(e)(4). *See State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *petition for cert. filed*, --- U.S.L.W. --- (U.S. Feb. 21, 1989) (No. 88-6684); *State v. Green*, 321 N.C. 594, 365 S.E.2d 587 (1988), *cert. denied*, --- U.S. ---, 102 L. Ed. 2d 235 (1988); *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *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. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979). These cases unmistakably indicate that when dealing with capital crimes, this Court has construed the provisions contained in N.C.G.S. § 15A-2000(e)(4) to apply where there is evidence that "one of the purposes behind the offense was the desire by the defendant to avoid detection and apprehension for some underlying crime as opposed to submitting it only if the killing took place 'during' an escape from custody or lawful arrest situation." *State v. Oliver*, 309 N.C. at 350, 307 S.E.2d at 320. There is no compelling reason why the felony aggravating factor set forth in N.C.G.S. § 15A-1340.4(a)(1)(b) should be more narrowly construed than its capital crime counterpart. Therefore, we expressly overrule *Thompson*. We hold that the language in N.C.G.S. § 15A-1340.4(a)(1)(b), like N.C.G.S. § 15A-2000(e)(4), is intended to include situations where defendant's motivation in committing the second offense was to avoid *subsequent* detection and apprehension for the underlying crime. It is not to be limited solely to situations where defendant committed the second offense in an effort to avoid an *immediate* arrest or to escape from custody.

In the present case, the trial court found that defendant left another residence nearby, went to his grandmother's residence and thereafter used substantial force against her which resulted in her death. The Court further found that defendant committed the

sexual offense in order to cover up his wrongdoing and prevent his detection by planting the suspicion that someone other than he had entered the residence and committed the crimes. Presumably, defendant was operating under the notion, however misguided, that witnesses seeing him enter his grandmother's residence might suspect him of robbery but would not consider him capable of sexually assaulting his own grandmother.

The trial court correctly concluded that one of defendant's purposes behind the sexual assault of his grandmother was the desire to avoid detection and apprehension for the prior assault upon her which resulted in her death. Therefore, under our interpretation of N.C.G.S. § 15A-1340.4(a)(1)(b), defendant's actions were properly submitted to the jury as an aggravating factor in his sentencing hearing.

Defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. WINFRED ED BRIDGES

No. 96A88

(Filed 9 November 1989)

Constitutional Law § 31 (NCI3d)— indigent defendant—funds for fingerprint expert

The trial court erred in denying an indigent defendant's pretrial motion for funds to hire an independent fingerprint expert in a first degree murder case where defendant made a threshold showing of specific need for such expertise and demonstrated that such testimony would be of material assistance in preparing his defense by showing that fingerprint evidence was the only direct evidence linking defendant to the offense; the experts who testified as to the preparation and identification of the latent prints found at the crime scene were witnesses for the State, not independent parties; and, without the assistance of a fingerprint expert, defendant would be unable to assess adequately the conclusion of the State's

experts that the latent prints from the crime scene correlated to his own fingerprints.

Am Jur 2d, Criminal Law § 1006.

Justice MITCHELL dissenting.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment sentencing him to death, entered by *Hight, J.*, at the 19 January 1988 Criminal Session of Superior Court, GRANVILLE County, upon defendant's conviction of murder in the first degree in the perpetration of a felony. Heard in the Supreme Court 12 October 1989.

Lacy H. Thornburg, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

Floyd B. McKissick, Sr., and Stephen D. Kaylor for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of robbery with a firearm and of murder in the first degree in the perpetration of a felony. He was sentenced to death for the murder conviction. We conclude that the trial court erred in denying defendant's pretrial motion for funds to hire an independent fingerprint expert. For this reason, we order a new trial.

At approximately 2:00 p.m. on 17 May 1987, a customer entered the Lake Side Grocery on Highway 15 in Granville County and discovered the body of its proprietor lying on the floor behind the counter. A forensic pathologist later determined that the victim had died from small-caliber gunshot wounds to the head and chest. The cash register was open and the floor was littered with debris, including a wallet belonging to the victim and what appeared to be its scattered contents. An unplugged wall clock was stopped at approximately 1:43 p.m. An electrically operated alarm system, which evidently had been pulled off the wall near the clock, was found in a sink in an adjacent room. A sign on the entry door was hung so as to indicate the store was "Closed."

Evidence that the victim had been robbed consisted of the testimony of the victim's grandson that his grandfather customarily kept large amounts of cash in his billfold, rather than in the cash

register, and the testimony of a customer who had purchased a box of salt with a twenty-dollar bill around 1:30 p.m. that day. Neither the cash register nor the billfold found on the floor of the grocery contained a twenty-dollar bill or any other cash.

The bulk of the evidence linking defendant to the murder was circumstantial. An acquaintance testified that on 17 May, on her way to visit a resident of the trailer park across the highway from the store, she had seen defendant walking down the highway toward the store between 1:15 and 1:30 p.m. She saw defendant again, still in the general vicinity of the store, after she left the park fifteen or twenty minutes later. Defendant later introduced contradictory alibi testimony of his uncle and cousin.

The only direct evidence of defendant's involvement in the victim's death was three thumbprints which the State's expert witnesses identified at trial as defendant's. One print was lifted from the "Open/Closed" sign on the entry door; the other two were lifted from the back of a medical insurance card found lying near the victim's wallet. Prior to trial defendant had filed two motions regarding any fingerprint impressions taken from the crime scene. The first, based on N.C.G.S. § 15A-903(e) (1988), requested scientific examination of the prints by defendant's own expert; the second, under N.C.G.S. § 7A-454 (1986), requested funds to hire an expert for such an examination. At a pretrial hearing Judge James R. Strickland expressly denied the second motion and in effect denied the first. The motions were reiterated midtrial, albeit somewhat obliquely, along with a motion to suppress the fingerprint evidence, and again were overruled. We hold that under the particular facts of this case it was error to refuse funds for the expert examination of this evidence.

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the United States Supreme Court held that a defendant is constitutionally entitled to the assistance of a court-appointed psychiatrist in the preparation of a defense when he has made "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor" in his defense. *Id.* at 74, 84 L. Ed. 2d at 60. In *State v. Johnson*, 317 N.C. 193, 199, 344 S.E.2d 775, 779 (1986), this Court considered synonymous "a showing" that the issue is "a significant factor," and "a threshold showing of specific necessity" or of "particularized need," the last of which has figured frequently in the jurisprudence of this State as a measure

of the appropriateness of providing the assistance of an expert. *See, e.g., State v. Artis*, 316 N.C. 507, 512-13, 342 S.E.2d 847, 850-51 (1986).

This Court's post-*Ake* cases have held further that, in addition to making such a threshold showing, the defendant must demonstrate either that without expert assistance he will be deprived of a fair trial, or that there is a reasonable likelihood that it will *materially* assist him in the preparation of his case. *E.g., State v. Penley*, 318 N.C. 30, 52, 347 S.E.2d 783, 796 (1986). This additional requisite accords with the United States Supreme Court's subsequent refinement of *Ake* that there is no deprivation of due process when the trial court exercises its discretion to find that defendant's showing consists of "little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985). *See Artis*, 316 N.C. at 512-13, 342 S.E.2d at 851.

In *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988), this Court recognized that the showing demanded under *Ake* and its North Carolina progeny was "a flexible one[,] . . . designed to ensure that the indigent defendant 'has access to the raw materials integral to the building of an effective defense.' " *Id.* at 344, 364 S.E.2d at 657 (quoting *Ake*, 470 U.S. at 77, 84 L. Ed. 2d at 62). Accordingly, this Court examined that defendant's motion for funds for a fingerprint expert and identified three circumstances that together met the requisite threshold showing of specific necessity. First, "[d]efendant showed that absent a fingerprint expert he would be unable to assess adequately the State's expert's conclusion that defendant's palmprint was found at the scene of the attack." *Id.* Second, he "demonstrated that . . . this testimony by the State's expert was crucial to the State's ability to identify defendant as the perpetrator of the crimes charged against him." *Id.* Third, the defendant in *Moore* showed that his ability to communicate and reason was impaired by mental retardation, thus impeding his ability to assist his counsel in making a defense. *Id.* This last finding clearly satisfied the second-tier criterion of *Ake* and *Caldwell*, demonstrating that the expert assistance shown to be necessary by the first two circumstances would be of material value in preparing a defense.

The first two circumstances stated in *Moore* also underlie defendant's showing of specific necessity in this case. Additionally,

together they "demonstrate that defendant would have been 'materially assisted in the preparation of his defense' had the trial court granted his motion." *Moore*, 321 N.C. at 345, 364 S.E.2d at 657 (quoting *Penley*, 318 N.C. at 52, 347 S.E.2d at 796). First, the experts who testified as to the preparation and identification of the latent prints found at the crime scene were witnesses for the State, not independent parties. *See Moore*, 321 N.C. at 346, 364 S.E.2d at 657-58; *cf. Penley*, 318 N.C. at 52, 347 S.E.2d at 796 (funds requested for additional pathologist although pulmonary specialist testified for defense). Without his own expert to examine the items found at the crime scene and to compare any latent prints to his own impressions, defendant was unable to assess adequately the conclusion of the State's experts that the latent prints from the crime scene correlated to his own fingerprints. Second, fingerprint evidence was the only direct evidence linking defendant to the offense. This evidence was thus critical to the State's ability to identify defendant as the perpetrator of the crimes with which he was charged. The importance of this circumstance to a demonstration that an expert would have "materially assisted in . . . [a] defense" cannot be overstated: "[W]hen, because of lack of funds, a defendant is unable to rebut expert testimony with expert assistance of his own, the defendant's chances of persuading the jury to reject the expert's conclusions are 'devastated.' " *Moore*, 321 N.C. at 346 n.4, 364 S.E.2d at 658 n.4 (quoting *Ake*, 470 U.S. at 83, 84 L. Ed. 2d at 66).

While it is within the trial court's discretion to "approve a fee" for the appointment of an expert witness to testify for an indigent defendant, N.C.G.S. § 7A-454 (1986), it is error of constitutional magnitude to refuse such funds when the defendant has made a "threshold showing of specific need" and when expert assistance is of material importance to his defense or its absence would deprive him of a fair trial. These requisites are met when it is apparent that the fingerprint evidence is crucial to the State's proof that defendant is the perpetrator of the charged offense and when denial of a motion for funds precludes an indigent defendant from seeking the assistance of an independent expert in assessing that evidence.

Defendant made timely motions for the assistance of a fingerprint expert. For the reasons stated herein, we conclude that he made a threshold showing of specific need for such expertise and demonstrated that such testimony would be of material assistance

in preparing his defense. Because the trial court erred in denying those motions, and because we cannot say that error in precluding defendant from expert examination of critical inculpatory evidence was harmless beyond a reasonable doubt, N.C.G.S. § 15A-1443(b) (1988), defendant is entitled to a new trial. "[A] State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake*, 470 U.S. at 79, 84 L. Ed. 2d at 63.

In view of this disposition and of the improbability that the numerous other errors assigned will recur upon retrial, we find it unnecessary to address defendant's remaining arguments.

New trial.

Justice MITCHELL dissenting.

The majority holds that the defendant demonstrated at trial that a fingerprint expert appointed at public expense would be of material assistance to him in preparing his defense, and that the trial court, therefore, erred in failing to appoint one. Although many types of experts will be of material assistance to an indigent defendant in preparing his case and should be appointed by the trial court in proper situations, I have previously explained to the best of my ability:

> The taking and analysis of fingerprints is largely a mechanical function, although admittedly one which requires some training and experience. Basically, the analysis of fingerprints involves comparing the latent print taken from the scene of the crime with a known print of the defendant to determine whether there are points of similarity. Once a given number of points of similarity are observed, the expert draws the conclusion that the two prints were made by the same person.
>
> It has been my experience that all of the steps involved in fingerprint analysis can be readily demonstrated to a jury in such a manner that the jurors are able to determine for themselves whether the points of similarity are in fact similar. Likewise, the jurors are as capable as the expert of counting the number of points of similarity. There simply is nothing so mysterious or difficult about fingerprint analysis and comparison as to prevent the ordinary lay juror from determining

whether the procedure has been performed correctly and the expert has reached the right conclusion, once the technique is explained and pointed out to the juror. For this reason, a defendant can properly defend himself against such evidence—if in fact he will ever be able to defend himself—by the simple expedient of thorough cross-examination of the State's fingerprint witness. *See State v. Corbett*, 307 N.C. 169, 297 S.E.2d 553.

State v. Moore, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring in result, joined by Meyer, J.).

The lesson for our trial judges from the majority's holdings in this case and the *Moore* case is that they must appoint fingerprint experts at public expense to assist indigent defendants in all cases in which the State relies upon fingerprint evidence and there were no eyewitnesses to the crime for which the defendant is charged. Perhaps this would be a desirable result in an ideal world. Given the limited financial resources available to our courts, however, the appointment of experts to aid criminal defendants in preparing a defense should be reserved for those cases in which it is reasonably likely to be necessary to ensure that the defendant receives a fair trial. In my view, this clearly is not such a case.

I dissent from the majority's holding that the trial court erred in failing to appoint a fingerprint expert and that the defendant must have a new trial as a result.

JACKIE BROOKS WEAVER v. A. DOYLE EARLY, JR., MARGARET CHURCH WEAVER MARSH AND WYATT, EARLY, HARRIS, WHEELER & HAUSER

No. 581PA88

(Filed 9 November 1989)

Abatement and Revival § 8.1 (NCI3d)— domestic action—sale of property by attorney—subsequent claim against attorney

The trial court properly dismissed plaintiff's claims against defendant attorney and his law firm arising from a court-ordered sale of property by defendant attorney where, at the time the complaint in this case was filed, there was pending in Guilford County District Court a civil action in which the

court had ordered defendant Early to dispose of certain property and use the proceeds in a certain way, defendant Early was accountable to the District Court of Guilford County for his actions in selling the property, and plaintiff may enforce all of the rights he has in regard to the sale of this property by a motion in the cause in the District Court.

Am Jur 2d, Abatement, Survival, and Revival §§ 5-7, 35, 40.

ON defendants' petition for discretionary review of an unpublished opinion of the Court of Appeals, 92 N.C. App. 115, 373 S.E.2d 890 (1988), affirming in part and reversing in part a judgment entered by *Beaty, J.*, at the 12 January 1987 Civil Session of Superior Court of GUILFORD County and remanding the case to that court. Heard in the Supreme Court 14 September 1989.

This is an action in which the plaintiff has alleged ten claims. All the alleged claims grew from an action for alimony and child support brought by the defendant Margaret Church Weaver Marsh against her former husband who is the plaintiff in this action. A. Doyle Early, Jr. was Mrs. Marsh's attorney in that action. Mr. Early is a member of the law firm of Wyatt, Early, Harris, Wheeler and Hauser, which is a defendant in this case.

In his complaint the plaintiff contends that the defendant Early did not properly handle the sale of certain real and personal property which he was directed to sell by the District Court of Guilford County and use the proceeds to provide child support for the children of the marriage. The plaintiff alleged (1) Mr. Early breached a fiduciary duty to the plaintiff in the way he handled the sale of the assets; (2) the defendant Early and his law firm breached a fiduciary relationship with the plaintiff by placing a bid on certain real estate which the plaintiff and his wife owned and that the defendant Marsh conspired with the other defendants in doing so; (3) the defendants falsely imprisoned the plaintiff by withholding evidence of the disposal of certain property during a hearing on a contempt citation which resulted in the plaintiff's being incarcerated for six days for failing to abide by a court order to pay alimony pendente lite; (4) the defendant Marsh unlawfully disposed of certain personal property which the district court had allowed her to keep pending an order for equitable distribution and the other defendants had breached a fiduciary duty by failing to report this to the court; (5) the defendants converted certain personal property

belonging to the plaintiff and unlawfully disposed of certain real property which the plaintiff owned; (6) the defendant Marsh converted certain personal property in which the plaintiff had a marital interest; (7) that the defendant Early and his law firm were liable for abuse of process because they had attempted by legal action to collect an award of attorney fees against him, when they did not have a right to do so, for the purpose of negotiating with the plaintiff not to file an action against them and not to file a complaint with the grievance committee of the North Carolina State Bar; (8) that all the actions alleged by the plaintiff were done willfully and maliciously with the intent to cause great emotional distress to the plaintiff and they did cause such emotional distress to him; (9) the defendants conspired to conceal from the plaintiff and the court that they had wrongfully disposed of real and personal property owned by the plaintiff which caused him to be incarcerated for six days; and (10) the defendant Early and his law firm were negligent in disposing of property in which the plaintiff had an interest.

The plaintiff prayed for compensatory damages in the amount of $2,400,000 and punitive damages in the amount of $11,800,000 against the defendant Marsh. He prayed for unspecified compensatory and punitive damages in excess of $10,000 as the evidence might show against the other defendants. The superior court allowed the defendant Marsh's motion to dismiss all claims against her pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) and (6). The superior court allowed the motions of the other defendants to dismiss pursuant to Rule 12(b)(1) and (6) all claims except claims seven and eight which were the claims for abuse of process and for the intentional infliction of emotional distress. The plaintiff took a voluntary dismissal without prejudice to the two claims which were not dismissed and appealed to the Court of Appeals as to all the other claims.

The Court of Appeals affirmed the dismissal of all claims against the defendant Marsh. It also affirmed the dismissal of the claim against the other defendants for false imprisonment. As to the six remaining claims against the defendant Early and his law firm the Court of Appeals reversed. We granted a petition for discretionary review by the defendant Early and his law firm.

Lovekin & Ingle, by Stephen L. Lovekin, and Jackie Brooks Weaver, pro se, for plaintiff appellee.

Petree, Stockton & Robinson, by Ralph M. Stockton, Jr., Jeffrey C. Howard and Robert H. Lesesne, for defendant appellants.

WEBB, Justice.

The plaintiff did not appeal so that the dismissal of the claims against Mrs. Marsh and the dismissal of the claim for false imprisonment against the other defendants are not before us. The six remaining claims against Mr. Early and his law firm are based on what the plaintiff contends was malfeasance in the way Mr. Early had handled the sale of property which he had been ordered to sell by the District Court of Guilford County. The Court of Appeals said, "[w]hile all of these allegations concern matters related to the domestic proceedings in district court, we believe they allege independent, cognizable civil actions over which the superior court has subject matter jurisdiction." We differ with the Court of Appeals.

It is the rule in this state that the pendency of a prior action between the same parties for the same cause in a state court of competent jurisdiction abates a subsequent action in another court of the state having like jurisdiction. *Sales Co. v. Seymour*, 255 N.C. 714, 122 S.E.2d 605 (1961); *Pittman v. Pittman*, 248 N.C. 738, 104 S.E.2d 880 (1958); *McDowell v. Blythe Brothers Co.*, 236 N.C. 396, 72 S.E.2d 860 (1952); *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952); *Moore v. Moore*, 224 N.C. 552, 31 S.E.2d 690 (1944); *Johnson v. Smith*, 215 N.C. 322, 1 S.E.2d 834 (1939); and *Atkins v. Nash*, 61 N.C. App. 488, 300 S.E.2d 880 (1983). These cases say that the ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of a prior action is whether the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded. This rule has been applied not only when there is a prior civil action pending which is identical to the subsequent action but also when there is a prior action in which a party could by motion in the cause achieve what he is attempting to achieve in the subsequent action. *Byerly v. Delk*, 248 N.C. 553, 103 S.E.2d 812 (1958), and *Lumber Co. v. Wilson*, 222 N.C. 87, 21 S.E.2d 893 (1942).

The complaint in this case shows that at the time it was filed there was pending a civil action in the District Court of Guilford County in which the court had ordered Mr. Early to dispose of certain property and use the proceeds of the sale in a certain way. The district court could make this order. *Lambeth v. Lambeth*, 249 N.C. 315, 106 S.E.2d 491 (1959). Mr. Early is accountable to the District Court of Guilford County for his action in selling the

property. The plaintiff may enforce all the rights he has in regard to the sale of this property by a motion in the cause in the district court. The complaint shows there is an identity of parties, subject matter, issues involved and relief demanded between this case and the action in the district court which was pending when this case was filed. This case was properly dismissed in the Superior Court of Guilford County.

For the reasons stated in this opinion we reverse the Court of Appeals as to the matters appealed from by the defendants.

Reversed.

STATE OF NORTH CAROLINA v. LARRY RAY MITCHELL

No. 273A86

(Filed 9 November 1989)

Constitutional Law § 46 (NCI3d)— capital case—new trial—withdrawal of counsel—appointment of new counsel

There was no error in the trial court's findings and conclusions that the two attorneys who represented defendant at his original trial and on appeal have rendered and would render competent and effective assistance to defendant with regard to the charges against him. However, given the gravity of the capital charge against defendant and the representations of his counsel that he will no longer communicate effectively with them, the Supreme Court, in the exercise of the supervisory authority granted it by Art. IV, § 12 of the N. C. Constitution, elects to remand the case to the superior court for entry of an order allowing counsel for defendant to withdraw and for appointment of new counsel and assistant counsel to represent defendant at his retrial.

Am Jur 2d, Criminal Law §§ 967 et seq.

ON certiorari to review an order entered by *Wood, J.*, in Superior Court, SURRY County, on 15 June 1988. Heard in the Supreme Court 11 September 1989.

Lacy H. Thornburg, Attorney General, by John H. Watters, Assistant Attorney General, for the State.

James L. Dellinger, Jr. and Terry L. Collins for the defendant-petitioner.

PER CURIAM.

The defendant was convicted of first-degree murder, armed robbery, aiding and abetting armed robbery and conspiracy and sentenced to death at the 17 March 1986 session of Superior Court, Surry County. This Court granted the defendant a new trial. *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988). Thereafter, on 29 July 1988, counsel who had represented the defendant during his trial and on appeal, James L. Dellinger, Jr., Esq., and Terry L. Collins, Esq. filed a motion to withdraw as counsel for the defendant on the ground that the defendant's animosity toward them and refusal to cooperate with them would, in all probability, render them unable to provide him effective representation at a new trial. The trial court denied the motion of counsel to withdraw on the ground that there was no evidence to support any concern of ineffective assistance of counsel in light of the competent and effective representation counsel had rendered the defendant, including having obtained a new trial on all charges pending against him. We allowed certiorari to review this order of the trial court.

We find no error in the trial court's findings and conclusions to the effect that Mr. Dellinger and Mr. Collins have rendered and would render competent and effective assistance to the defendant with regard to the charges against him. Given the gravity of the capital charge against the defendant and the representations of his counsel that he will no longer communicate effectively with them, however, this Court, in the exercise of the supervisory authority granted it by article IV, section 12 of the Constitution of North Carolina, elects to remand this case to the Superior Court, Surry County, with instructions to enter an order allowing counsel for the defendant to withdraw. The trial court is also instructed to appoint counsel and assistant counsel as provided by law in capital cases to represent the defendant at his new trial.

Remanded with instructions.

BRUCE v. MEMORIAL MISSION HOSPITAL

[325 N.C. 541 (1989)]

TIMOTHY BRUCE, BY AND THROUGH HIS GUARDIAN AD LITEM, DIANE McDONALD, AND MILTON BRUCE, GUARDIAN OF TIMOTHY BRUCE, A LEGALLY INCAPACITATED PERSON v. MEMORIAL MISSION HOSPITAL, INC.

No. 136PA89

(Filed 9 November 1989)

Appeal and Error § 64 (NCI3d) — evenly divided Court — decision affirmed without precedential value

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

Am Jur 2d, Appeal and Error § 902.

ON discretionary review of an unpublished decision of the Court of Appeals, 92 N.C. App. 755, 377 S.E.2d 824 (1989), affirming judgment entered on 1 December 1987 in the Superior Court, BUNCOMBE County, by *Allen, J.*, in accordance with a jury verdict for defendant. Heard in the Supreme Court 10 October 1989.

Tharrington, Smith & Hargrove, by John R. Edwards and Burton Craige, for plaintiff-appellants.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon and Michelle Rippon, for defendant-appellee.

PER CURIAM.

Justice Martin took no part in the consideration or decision of this case. The remaining members of this Court were equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Hochheiser v. N.C. Dept. of Transportation*, 321 N.C. 117, 361 S.E.2d 562 (1987).

Affirmed.

STATE OF NORTH CAROLINA v. MADELINE TAYLOR

No. 92A89

(Filed 9 November 1989)

APPEAL of right by the State pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 92 N.C. App. 577, 375 S.E.2d 174 (1989), vacating a judgment of imprisonment entered upon defendant's conviction for a violation of N.C.G.S. § 14-118.2. Heard in the Supreme Court 11 October 1989.

Lacy H. Thornburg, Attorney General, by David M. Parker, Assistant Attorney General, for the State, appellant.

Leland Q. Towns and Milton F. Fitch, Jr., for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion of Cozort, J.,[1] 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, Pitt County, for reinstatement of the judgment.

Reversed and remanded.

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1. *See also* 1989 N.C. Sess. Laws ch. 144 (clarifies N.C.G.S. § 14-118.2 by adding language which expressly covers the fact situation presented).

EUNICE J. JACKSON v. SHADRACH JONES

No. 180A89

(Filed 9 November 1989)

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 93 N.C. App. 513, 379 S.E.2d 112 (1989), finding no error in a judgment entered by *Brown, J.*, at the 16 May 1988 Session of Superior Court, HALIFAX County. Heard in the Supreme Court on 9 October 1989.

Brenton D. Adams for plaintiff-appellant.

James, Godwin, Wellman & Stephenson, by A. S. Godwin, Jr., for defendant-appellee.

PER CURIAM.

We conclude, as did the dissenting opinion in the Court of Appeals, that the evidence was insufficient to support a finding of contributory negligence. The Court of Appeals' decision to the contrary is reversed and the case is remanded to that court for further remand to Superior Court, Halifax County. We also conclude, in our discretion, that a new trial should be conducted on all issues. *See Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974).

Reversed and remanded.

STATE OF NORTH CAROLINA v. HATEM HAMAD AND DONALD CLAY WELLS

No. 35A89

(Filed 9 November 1989)

APPEAL of right by the State pursuant to N.C.G.S. § 7A-30(2) and on discretionary review of a decision of a divided panel of the Court of Appeals, 92 N.C. App. 282, 374 S.E.2d 410 (1988), granting a new trial to the defendant Hamad and a new sentencing hearing to the defendant Wells. Heard in the Supreme Court 12 October 1989.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the State, appellant and appellee.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant Donald Clay Wells, appellant and appellee.

A. Wayne Harrison and James M. Roberts for defendant Hatem Hamad, appellant and appellee.

PER CURIAM.

Affirmed.

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

BOLICK v. TOWNSEND CO.

No. 346P89

Case below: 94 N.C.App. 650

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

BOLTON CORP. v. T. A. LOVING CO.

No. 335P89

Case below: 94 N.C.App. 392

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

CARSON v. REID

No. 372P89

Case below: 94 N.C.App. 389

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

EWAYS v. GOVERNOR'S ISLAND

No. 389PA89

Case below: 95 N.C.App. 201

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 November 1989.

GRAY v. HOOVER

No. 375P89

Case below: 94 N.C.App. 724

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

G & S BUSINESS SERVICES v. FAST FARE, INC.

No. 338P89

Case below: 94 N.C.App. 483

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 9 November 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

IN RE APPLICATION OF RAYNOR

No. 356P89

Case below: 94 N.C.App. 173

Motion by defendant Raynor to dismiss appeal by several plaintiffs for lack of substantial constitutional question allowed 9 November 1989. Petition by several plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

McLAUGHLIN v. BARCLAYS AMERICAN CORP.

No. 442P89

Case below: 95 N.C.App. 301

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 9 November 1989.

McNAULL v. McNAULL

No. 331P89

Case below: 94 N.C.App. 547

Petition by plaintiff and defendant (Jennie McNaull Simms) for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

NEW BERN POOL & SUPPLY CO. v. GRAUBART

No. 339A89

Case below: 94 N.C.App. 619

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues denied 9 November 1989.

OSBORNE v. ANNIE PENN MEMORIAL HOSPITAL

No. 388P89

Case below: 95 N.C.App. 96

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

RAWLS v. EARLY

No. 358P89

Case below: 94 N.C.App. 677

Petition by several respondents for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

SELLERS v. LITHIUM CORPORATION

No. 334P89

Case below: 94 N.C.App. 575

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. COPPAGE

No. 360P89

Case below: 94 N.C.App. 63

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. EALY

No. 353P89

Case below: 94 N.C.App. 707

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. FENN

No. 288P89

Case below: 94 N.C.App. 127

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. FOSTER

No. 281P89

Case below: 94 N.C.App. 224

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 November 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. HANIBLE

No. 275P89

Case below: 94 N.C.App. 204

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. LAWRANCE

No. 304P89

Case below: 94 N.C.App. 380

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. MAXWELL

No. 466P89

Case below: 96 N.C.App. 19

Petition by Attorney General for temporary stay allowed 30 October 1989.

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

STATE v. MORRISON

No. 380P89

Case below: 94 N.C.App. 517

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 9 November 1989.

STATE v. THOMPKINS

No. 382P89

Case below: 95 N.C.App. 225

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE v. TURNER

No. 337P89

Case below: 94 N.C.App. 584

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 9 November 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

WATSON v. MANGUM, INC.

No. 377P89

Case below: 94 N.C.App. 782

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 November 1989.

STATE OF NORTH CAROLINA v. JACKIE RAY BREWER

No. 503A88

(Filed 7 December 1989)

1. **Criminal Law § 35 (NCI3d)— murder—evidence of guilt of another—excluded—no error**

The trial court did not err in a murder prosecution by excluding evidence that another person was responsible for the death of the victim where, even viewing the testimony in the light most favorable to defendant, it cannot be said to give rise to more than speculation and conjecture of a type which has been excluded consistently under N.C.G.S. § 8C-1, Rule 401. Evidence that another committed the crime for which defendant is charged is relevant and admissible if it does more than create an inference or conjecture and such evidence must point directly to the guilt of some specific other person or persons. The evidence here fails to point to a specific other person as the perpetrator of the crime with which defendant is charged. Moreover, any error is not prejudicial because defendant was able to present his hypothesis to the jury through the testimony of other witnesses.

Am Jur 2d, Homicide § 296.

2. **Criminal Law § 425 (NCI4th); Criminal Law § 88.1 (NCI3d)— murder—witnesses not testifying—questions and arguments—no prejudicial error**

There was no prejudicial error in a first degree murder prosecution in allowing the State to cross-examine defendant about the absence of an accomplice and defendant's six-year-old son as witnesses at defendant's trial and to argue the absence of those witnesses to the jury. Although the State's attempted cross-examination and jury argument with regard to both individuals was inappropriate, defendant's objection was promptly sustained and the court promptly admonished the prosecutor regarding his closing argument. Even assuming error, the direct and circumstantial evidence against defendant was substantial and compelling and the impact of the errors on the jury was not proven by defendant to be prejudicial.

Am Jur 2d, Homicide § 254.

3. Criminal Law § 89 (NCI3d)— murder—testimony concerning reward—not improper comment on credibility of witness

The trial court did not err in a first degree murder prosecution by admitting testimony from the husband of the decedent regarding the reason he gave reward money to a State's witness. Although defendant contended that the testimony constituted an improper opinion as to the State witness's credibility, the reward could in no way be interpreted as a testimonial to the witness's credibility and good character; furthermore, the jury was properly instructed as to the proper inference to be given to the testimony. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Witnesses § 551.

4. Criminal Law § 46.1 (NCI3d)— murder—escape—defendant's state of mind—evidence excluded—no error

The trial court did not err in a first degree murder prosecution by excluding evidence of defendant's state of mind, offered to refute the State's theory that defendant fled the state because he learned he was a suspect, where defendant took advantage of several opportunities to bring out the information and was in fact able to present much of the excluded evidence.

Am Jur 2d, Homicide §§ 319, 448.

5. Criminal Law § 89.9 (NCI3d)— murder—transcript of earlier testimony excluded—no error

The trial court did not err in a first degree murder prosecution by excluding from evidence a portion of the transcript of a State witness's testimony at the earlier trial of a codefendant where evidence to the same effect was otherwise admitted.

Am Jur 2d, Homicide § 393.

6. Criminal Law § 85.3 (NCI3d)— first degree murder—defendant's association with murderers—not prejudicial

There was no prejudice in a prosecution for first degree murder from the trial court's decision to allow the prosecutor to question defendant and a defense witness and to argue to the jury concerning defendant's association with a character who had been convicted of murder and the fact that defendant was known to associate with "murderers." Defendant himself opened the door to questions about the man's past, and the

court sustained defense objections to the prosecutor's line of questions and instructed the jury that defendant may not be convicted on the basis of something he may have done in the past.

Am Jur 2d, Evidence §§ 340, 341, 343.

7. **Criminal Law § 43.4 (NCI3d)— murder—photographs of defendant and codefendant—grotesque and unflattering—no error**

The trial court did not err in a first degree murder prosecution by allowing the State to introduce photographs of defendant and codefendant which allegedly were grotesque and unflattering where the photographs, while less than flattering, could not fairly be characterized as grotesque, defendant made no showing that the photographs in question made the parties look any different from the way they appeared at the day of the crime, and both defense counsel and the court admonished the jury that it was not to make its decision based on appearances or on sympathy.

Am Jur 2d, Evidence §§ 784, 785.

8. **Criminal Law § 89.8 (NCI3d)— murder—impeachment of witness—letter to judge—excluded**

The trial judge did not err in a first degree murder prosecution by prohibiting defense counsel from impeaching a State's witness with a letter the witness had written to a federal judge during a prior incarceration requesting a reduction in his sentence. Defendant extensively cross-examined the witness about his experience with the criminal justice system, specifically his history of plea bargaining, in order to show the witness's possible bias and the excluded letter was merely cumulative.

Am Jur 2d, Evidence § 256.

9. **Criminal Law § 107 (NCI4th)— first degree murder—discovery**

The trial court did not err in a first degree murder prosecution by failing to require the State and a witness's attorney to disclose evidence favorable to the defense where the requested material was inspected by the judge *in camera*, certain materials were in fact provided to the defense, the remaining documents were sealed for appellate review, and the Supreme Court did not discern any abuse of discretion in the exclusion of those documents. Neither the statutory provisions set out

in N.C.G.S. § 15A-903 nor waiver of the attorney-client privilege alters the general rule that the work product or investigative files of the district attorney, law enforcement agencies, and others assisting in preparation of the case are not open to discovery. Also, opposing counsel cannot compel the production of documents under the control of the witness on the stand where the witness does not utilize the writing sought to be produced.

Am Jur 2d, Depositions and Discovery § 444.

10. Homicide § 30.3 (NCI3d)— first degree murder—refusal to instruct on involuntary manslaughter—alibi defense—no error

The trial court did not err in a first degree murder prosecution by refusing to instruct on involuntary manslaughter where defendant was charged with first degree murder arising from the felony of discharging a weapon into occupied property and defendant limited himself to the defense that he was not in the area at any time that night. An intentional shooting at an object can amount to culpable negligence; however, where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser offense. N.C.G.S. § 14-34.1; N.C.G.S. § 15-170.

Am Jur 2d, Homicide §§ 529-531.

11. Criminal Law § 415 (NCI4th)— first degree murder—State's closing argument—no error

The trial court did not err in a first degree murder prosecution by failing to intervene ex mero motu in the prosecutor's argument where defendant contended that the State argued matters clearly intended to prejudice defendant and to elicit passion and sympathy for the victim. The prosecutor's argument, while inflammatory, was not improper to the point of being unduly prejudicial to defendant; defendant addressed the same matters in his argument to the jury, and the court's instructions also included these themes.

Am Jur 2d, Trial §§ 280, 317.

Chief Justice EXUM concurring.

Justice MITCHELL concurring in result.

Justice WEBB joins in this concurring opinion.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by *Rousseau, J.*, at the 31 May 1988 Criminal Session of Superior Court, CATAWBA County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 11 September 1989.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the State.

Robert M. Elliot and Ellen R. Gelbin for defendant-appellant.

MEYER, Justice.

Defendant was originally tried at the 29 February 1988 session of the Superior Court of Forsyth County, Judge Julius A. Rousseau presiding. After a two-week trial, the jury deadlocked and the court declared a mistrial. The court granted defendant's motion for change of venue due to excessive publicity, and the case was retried at the 31 May 1988 session of the Superior Court of Catawba County, Judge Rousseau again presiding.

Defendant was convicted of first-degree murder for the death of Vickie White Calhoun under the felony murder rule. The conviction was for murder committed during the act of discharging a firearm into an occupied building, a felony under N.C.G.S. § 14-34.1. During the sentencing phase, the jury recommended life imprisonment, and judgment was entered accordingly. This is a companion case to *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). The cases were tried separately, and the evidence presented, the theories of the prosecution, certain aspects of the theories of the defense, and the issues submitted to the juries differed in the two cases. In his appeal to this Court, defendant brings forward numerous assignments of error relative to the guilt-innocence phase of his trial. Having performed a careful and thorough review of the record, we conclude that defendant received a fair trial free of prejudicial error.

The State's evidence tended to show that the victim, Vickie White Calhoun, was standing in the living room of her home around 9:10 p.m. on the night of 17 March 1987 when a bullet came through her front window and struck her in the chest, killing her. She

and her husband lived on Tobaccoville Road in Rural Hall, a community in northern Forsyth County, and this was one of several shooting incidents that occurred in the county that night. The Forsyth County Sheriff's Department received reports of nine shooting incidents in all, five of which were accounts of shooting into occupied residences.

The neighboring house on Tobaccoville Road was the residence of Lena Cain, which was about 250 yards from the Calhoun house. Mrs. Cain testified for the State that she was in her living room watching television around 9:12 p.m. when she heard a noisy car drive past her house. Shortly thereafter, a shot came through the storm door and struck a picture on the wall. She then called the Sheriff's Department.

Geraldine McBride and Peggy Golden testified for the State. Their homes were also located on Tobaccoville Road. Mrs. McBride testified that she and her son were driving to a convenience store around 8:30 p.m. on the night of 17 March when they ran out of gas at Mrs. Golden's house, approximately one-half mile from the Cain residence. While Mrs. McBride's son was seeking a telephone, Mrs. Golden joined Mrs. McBride in her car on the road where it had stalled. Oncoming cars were forced to pull into the other lane of traffic to pass Mrs. McBride's vehicle. A few minutes later, while the two women were standing in the road beside the disabled car, Mrs. McBride heard the sound of one gunshot. Mrs. Golden heard two shots about ten seconds apart. The women then testified that a car approached them a few seconds after they heard the gunshots, traveling slowly as it passed them in the opposite traffic lane. Mrs. McBride described the car as a light-colored, medium-sized, four-door vehicle with vertical taillights. When Mrs. McBride was later shown a picture of the Plymouth Valiant defendant had been a passenger in that night, she confirmed that its taillights matched the ones she had observed. She further testified that the car made more noise than it should for the speed it was traveling. She described the passenger in the front seat as a person with "brown bushy, shaggy hair."

The State also presented testimony from Robert Rouch, a truck driver who was traveling north on Highway 52 that night. As he approached the third exit leading to Rural Hall, the Westinghouse Road overpass, he saw a medium-sized vehicle stop on the bridge above his traffic lane. Westinghouse Road merges into and becomes

Tobaccoville Road. As Rouch approached the exit, a shot was fired from the vehicle on the bridge, and the bullet lodged in Rouch's windshield. Rouch transmitted an alert over his citizens band radio and got a reply from Douglas Sells, a fellow truck driver who was at a nearby truck stop. Sells testified that he saw a car near the bridge contemporaneously with the shooting. When he first noticed the car, it was headed toward the bridge. Shortly thereafter, he heard a loud shot and immediately heard Rouch's urgent message. He jumped into his cab. He then saw a car—which he described as being medium sized, shaped like a box, and pale blue in color—pass him going in the direction of Rural Hall. The engine made a loud, sputtering sound.

The State's ballistics evidence tended to show that defendant purchased a revolver from a man named Eddie White on the day before the shootings, 16 March. This gun, the bullets taken from the victim's body and the Cain residence, and a cartridge casing found at the bridge overpass were sent to the State Bureau of Investigation crime lab. There it was determined that the bullets from the victim's body and the Cain house were not fired from the gun which defendant had bought on 16 March. Nor was the spent cartridge casing from this particular gun. The State countered these findings with testimony from an acquaintance, Sheila Marshall, that defendant had another gun, a silver automatic pistol, in his possession earlier on the day of the shootings.

Eddie White testified for the State that he saw defendant on the night of the shootings at approximately 6:00 p.m. Defendant asked White where he could buy bullets for the gun that White had sold him, and White recommended the K-Mart on Peters Creek Parkway in Winston-Salem. White further testified that he saw defendant the next morning, and defendant bragged about the fact that he had gone target shooting the night before. White testified that defendant stated that he had been in Rural Hall at some point during the course of the evening, although he admitted on cross-examination that he had failed to include this piece of information in his initial handwritten statement to the authorities.

Raleigh Wright, a fellow inmate at the county jail at the time defendant was awaiting his trial, testified that defendant had confided in him that he was guilty and that he owned both an automatic pistol and a revolver on the night of the shootings.

State's witness Donald Stout was a codefendant who entered into a plea arrangement in which the State dismissed his murder charge in exchange for his testimony. He provided eyewitness testimony that defendant fired between ten and fifteen shots over the course of the evening from the front passenger seat of a light blue 1972 Plymouth Valiant owned and driven by Lillian Thomas. Stout and three children were the remaining passengers in the car.

Stout testified that he had known defendant for two months prior to 17 March. On that night, at approximately 8:00 p.m., Stout was at Dunkin' Donuts on Peters Creek Parkway in Winston-Salem when defendant asked him if he wanted to "go party." He then joined defendant, Lillian Thomas, and the three child passengers in Lillian Thomas' car. According to Stout, Lillian Thomas purchased marijuana in Rural Hall shortly before 9:00 that evening. Shortly after the three adults finished smoking three marijuana cigarettes, Stout heard a gun discharge and what sounded like a bullet ricocheting off a metal sign. He looked up to see defendant aiming a gun out of the car window. Stout noted that defendant continued shooting a pistol out of the passenger window of Thomas' car for approximately an hour. During this hour, defendant fired twelve to fifteen shots at several houses, at a truck from the Westinghouse Bridge overpass on Highway 52, at an R.V. trailer court, and at numerous stores. In response to the State's request, Stout identified a picture of the Kye residence and testified that Thomas had pulled into the Kye driveway and that defendant had then fired a shot at the house. Stout then testified that defendant had shot at the McGee residence, which he recognized by the satellite dish in the front yard. Most significantly, Stout identified the Calhoun residence from a photograph and stated definitively that defendant "aimed for the lights" as instructed by Lillian Thomas when shooting at this and other houses. He recognized two distinguishing characteristics of the Calhoun home: a stone facade and a round stained glass window.

Defendant testified in his own behalf. His underlying defense was alibi. He asserted that he was not in Rural Hall on the night of the fatal shooting, but was in fact in another part of the county, on Highway 150 between Winston-Salem and Kernersville. When the car was just outside the city limits of Winston-Salem, he pulled a revolver out of his jacket pocket and emptied all five rounds into a street sign. Defendant testified that there were houses in the area, but that they were set back from the road and none

of them were in his line of fire. On the way back to Winston-Salem from Kernersville, defendant again shot at a street sign. There were no houses around; in fact, there was only a lake on the right-hand side of the road. He denied telling Eddie White or Raleigh Wright that he had done the shooting in Rural Hall. Acquaintances who had seen defendant or his companions at various times over the course of the evening also testified for the defense.

[1] Defendant argues thirteen assignments of error. He first contends that the trial court improperly excluded evidence which was relevant to the issue of whether defendant was the person responsible for the death of Vickie Calhoun. Defendant contends that this evidence tended to corroborate his theory that the person who perpetrated the crime was riding in a small white "Honda-like" hatchback vehicle with a red stripe, wraparound taillights, and a third brake light in the back window. It is undisputed by both parties that the underlying theory of the case is that several, if not all, of the shootings which occurred on the night of 17 March were likely to have been committed by a single person or group of persons. The State points to defendant as the perpetrator; defendant's theory is that someone else—a gunman in a small white vehicle—was responsible for the shootings.

Defendant's theory was primarily presented through the testimony of four witnesses. The first of these witnesses was Bobby Kye. He lived on Ridge Road, about four hundred yards off Tobaccoville Road. He was in his living room watching television just before 9:00 p.m. when a car pulled into the driveway next door, sat for a few seconds, and then backed out and drove toward Tobaccoville Road. A few minutes later a different car pulled into his driveway. When Mr. Kye walked to his window to view the car, it backed out of his driveway and sat on the road facing Tobaccoville Road. Kye observed that the car had a short wheel base, the size of a Honda or Toyota. It had taillights that wrapped around to the side of the car and a third brake light in the rear window. Kye then heard a gunshot. He stepped back from the window and glanced out of his storm door. The car had pulled up three to four feet but was still at the end of the driveway. Kye later had the opportunity to view Thomas' impounded vehicle and confirmed that this was not the car he had seen on the night of 17 March because it did not have the same "light structure."

Numa and Angie McGee also testified for the defense. They were residents of Rural Hall who lived on Edwards Road. The road on which the victim resided, Tobaccoville Road, becomes Broad Street in downtown Rural Hall. Edwards Road intersects with Broad Street. The McGees testified that about 9:15 p.m., on the night of 17 March, they heard a siren and turned on their police scanner, which reported a shooting on Tobaccoville Road. They then looked out of their living room window and saw three cars drive past their house. The first car was a dark grey color, the second was a small white car, and the third was a marked Sheriff's patrol car. A few minutes later, the Sheriff's vehicle again drove past their house in the opposite direction. Shortly thereafter, the other two cars followed. The McGees then heard a shot. Mr. McGee testified that he saw a person leaning out of the passenger window of the small white car, pointing a rifle towards Mr. McGee's brother's house next door. He could not tell if the person was a man or a woman. Both cars were brightly lit by a street light. McGee then called the Sheriff's Department. A minute later, his brother called and reported that the shot had gone through the wall of his mobile home.

The fourth witness to testify regarding defendant's theory that a small white car was involved in the Calhoun shooting was Deputy R. E. Carpenter, the officer who responded to the reports of shootings at the Kye and McGee homes. He corroborated each story, repeating the descriptions that were given to him by both Bobby Kye and Numa McGee.

Defendant claims that there were additional incidents about which the trial court excluded testimony that would have tended to further corroborate testimony already given and would also have more completely tied together his theory of the case.

The trial court excluded evidence concerning an incident which occurred at the Quality Mart, a convenience store in the neighboring community of Stanleyville. Two employees were called to testify. The trial court conducted a voir dire hearing to consider the evidence presented and concluded that the State's objection to the evidence should be sustained on the grounds of irrelevancy. The store clerks testified on voir dire that a man came into the store on 17 March between approximately 9:45 and 9:55 p.m. and demanded to use the telephone. When this request was denied, he became verbally abusive and was asked to leave. As he was leaving, he asked the

store clerks whether they were interested in getting his license tag number now or later, and he told them that they would read all about him in the newspaper the next day. He then got into the passenger side of a small grey or white hatchback vehicle with a red stripe down the side and a third brake light in the rear window. The car drove away in the direction of Rural Hall.

Numa McGee testified on voir dire that Deputy Carpenter told him that the small white car he had identified had been eliminated by the Sheriff's Department because the car had previously been stopped that evening in response to Kye's description, and it had been discovered that the driver of the car was a deputy's son.

Deputy Carpenter also testified on voir dire that immediately after he had departed the McGee residence that evening, he had pursued a small white Honda on Edwards Road around 10:00 p.m. during the course of a chase, but had wrecked his car in a curve during the pursuit. He stated that reports from other officers indicated that the car he had been pursuing belonged to the deputy's son and was the car that had been stopped earlier in the evening.

The trial court excluded the above evidence on the ground that it was not relevant to this proceeding. Defendant contends that this was error, stating that under Rule 401 of the North Carolina Rules of Evidence, evidence which points to the guilt of another is relevant to the critical issue of whether defendant committed the offense with which he is charged. He argues that the excluded evidence meets the requirements of Rule 401 in that it has the tendency to make the existence of a fact that is of consequence to the determination of the action—that is, that defendant was the perpetrator of the crime—less probable than it would be without the evidence. N.C.G.S. § 8C-1, Rule 401 (1988). Further, defendant claims that the excluded evidence goes beyond mere conjecture or speculation.

Defendant relies primarily on the recent case of *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), to support his contentions. *McElrath* was a case based solely upon circumstantial evidence in which the defendant was given the opportunity to introduce a map into evidence to prove his claim that his son-in-law was murdered by his fellow companions in a car in which he was seen riding that day, possibly as a result of a failed larceny scheme. The *McElrath* Court, citing Rule 401, granted a new trial as the

result of the exclusion of this evidence tending to implicate others in the victim's death.

Defendant claims that the entire scheme of his theory, properly presented, would have established that nine shootings occurred that night within approximately a forty-five-minute time period and in a geographical pattern indicating that a single person or group of persons was likely to have committed all of the shootings. It is defendant's contention that this evidence, as in *McElrath*, "casts doubt upon the State's evidence that defendant was the killer and suggests instead an alternative scenario for the victim's ultimate demise." *McElrath*, 322 N.C. at 14, 366 S.E.2d at 450.

The State agrees that evidence that another committed the crime for which defendant is charged is relevant and admissible if it does more than create an inference or conjecture in this regard. The State contends that it has been well established by this Court that such evidence must point directly to the guilt of some specific other person or persons. *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981); *State v. Allen*, 80 N.C. App. 549, 342 S.E.2d 571, *disc. rev. denied*, 317 N.C. 707, 347 S.E.2d 441 (1986). We agree. The trial court based its rulings on its interpretation of this Court's decision in *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). The defendant in that case was charged with rape and burglary. Defendant introduced evidence that two other break-ins and sexual assaults were committed in the same manner, on the same night, and near the site of the crimes for which he was charged. The victim of one of the other attacks identified a person other than defendant as the perpetrator. In all three instances it was reported that a light-skinned black male entered the rear of the home and exclaimed, "[h]ey baby," before assaulting her. Although this Court held that the admissibility of evidence of the guilt of one other than the defendant is now governed by the general principle of relevancy, the Court reiterated the rule that such evidence must point directly to the guilt of another specific party and must tend both to implicate that other party and be inconsistent with the guilt of the defendant. *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279-80. *See generally* 1 Brandis on North Carolina Evidence § 93 (2d rev. ed. 1982).

In the case *sub judice*, even viewing the excluded testimony in the light most favorable to defendant, it cannot be said to give rise to more than mere speculation and conjecture of a type which

has been excluded consistently under Rule 401. Defendant contends that the exchange between the clerks at the Quality Mart in Stanleyville and the man in the small white car took place at approximately 9:55 p.m. He further contends that Deputy Carpenter questioned Numa McGee about his observations until about 9:58 p.m., at which time the deputy called in the description given by McGee and received the response excluded by the trial court that the described vehicle had been eliminated as a suspect. Defendant goes on to explain that there is a shortcut road between Highway 66, on which the Quality Mart is located, and Edwards Road, Numa McGee's address. Deputy Carpenter's excluded testimony concerning a car chase involving a white Honda at 10:00 p.m. would have placed the two cars on this back road. Defendant contends that placing these events in geographical and temporal proximity to one another gives them the credibility they need to rise above mere speculation and conjecture. We disagree.

Defendant's scenario is faulty with respect to one significant issue: it fails to point to a specific other person as the perpetrator of the crime with which defendant is charged—the murder of Vickie Calhoun. The most that the excluded evidence tends to establish is that there were two discrete events which took place that night which may or may not have had anything to do with one another and which, more importantly, may have had nothing to do with the crime in question. Defendant speculates that it is possible that the car that was observed by the clerks at the Quality Mart in Stanleyville was the same car that Deputy Carpenter chased on Edwards Road later in the evening. Defendant presented no evidence that the car that left the Quality Mart traveled the entire distance to Rural Hall and then turned right onto Edwards Road. Further, defendant's only hypothesis regarding the identity of the driver of the white car is that it may have been the deputy's son. This tenuous theory is based only upon the fact that the deputy's son's car was detained a couple of times by Sheriff's deputies over the course of the evening because his car was similar to the description given by Bobby Kye regarding the car he had observed. Defendant attempts to bolster this hypothesis through the testimony of Numa McGee that Deputy Carpenter dismissed another deputy's son's vehicle as being the suspect car, despite McGee's conviction that this was indeed the car to focus on.

Defendant's attempt to tie these threads together to point to one particular individual as the perpetrator of the Calhoun killing

unravels, however, when other facts are considered. On the one hand, defendant would have us believe that the person driving the car that Deputy Carpenter chased was another deputy's son. On the other hand, however, defendant is attempting to show that the car involved in the chase was the one that had earlier been observed at the Quality Mart. Significantly, the license plate observed and recorded by the clerks at the Quality Mart, the first three initials of which were "A R E," did not match the license plate of the deputy's son's vehicle, which was "BRW 7039." The fact remains that the only thing that ties the incident at the Quality Mart and the car chase together is the geographical and temporal proximity of the two events. Not only is defendant's excluded evidence irrelevant, but it also confuses the issues involved in violation of Rule 403. One must engage in conjecture and speculation to give the two incidents the kind of significance defendant wishes to attach to them. Even if one assumes that the two events were somehow related and that the white cars were indeed one and the same, this assumption in no way leads to any kind of conclusion that this vehicle must be the same one observed by Numa McGee or Bobby Kye.

Additionally, while both McGee and Kye saw or heard a gun, there was no indication that a gun was present in either of the other two incidents, and while one could argue that the description given by the clerks at the Quality Mart was similar to the description of the person observed by Numa McGee, it is apparent that McGee's description of the driver is vague and inconclusive and could describe any of a number of people. He did not even know if he observed a woman or a man. One of the Quality Mart employees testified further on voir dire that two detectives later visited the store and asked her to view a vehicle they had pulled over on Highway 66. She remembered the car as being a white Honda. The detectives requested that she look at the two men and one woman inside the car to determine if she could identify any of them. While she observed that one of the men had reddish-blond hair, she concluded that he was not the man who had approached her at the convenience store. Defendant engages in mere speculation in tying the two events together.

It requires an even greater leap of logic to place this or any white car in the proximity of the Calhoun residence at the time Vickie Calhoun was killed. The possibility that a passenger in a small white car may have been responsible for killing Vickie Calhoun

requires the sheerest of speculation and conjecture, and is not supported by either substantial or insubstantial evidence. The events defendant seeks to submit to the jury occurred some forty to fifty-five minutes after the Calhoun killing. There is simply nothing in the record to indicate that the perpetrator of this offense was a passenger in a small white car. The holding in *State v. Britt*, 42 N.C. App. 637, 257 S.E.2d 468 (1979), is instructive as to this issue:

> Evidence which tends to show nothing more than that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so, is too remote to be relevant and should be excluded.

Id. at 641, 257 S.E.2d at 471. *See also* Torcia, *Wharton's Criminal Evidence* § 134 at 576 (14th ed. 1985) (Evidence of another person's motive or opportunity may be considered only if that person has been linked to the commission of the crime. Remote conduct of another person, not connected with the crime itself, may not be shown.).

Defendant argues that the jury should be allowed to determine whether the events are sufficiently similar to tie them together and that the weight of Numa McGee's testimony in comparison to the description given by the Quality Mart employees is to be decided by the triers of fact. We disagree. Defendant must first cross that threshold hurdle of relevancy when presenting evidence tending to inculpate another: he must present evidence which not only serves to exculpate himself, but also serves to inculpate another in the offense for which he is charged. He has failed to overcome either burden. Although the *Cotton* case established that the general standard of relevancy under Rule 401 would be applied to cases such as this, it did not change the established policy that such evidence must point directly to the guilt of a specific third party. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible. *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981); *State v. Stanfield*, 292 N.C. 357, 233 S.E.2d 574 (1977).

It is important to distinguish *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442, from the case at bar. The State's case in *McElrath* rested solely upon circumstantial evidence. In that case, defendant successfully argued that his proffered evidence tended both to implicate another specific group of individuals as the perpetrators

and to be inconsistent with his own guilt. Unlike *McElrath*, however, this case is not a "very close case in which there is only circumstantial evidence identifying this defendant, to the exclusion of other persons, as the perpetrator." *Id.* at 14, 366 S.E.2d at 450. The State has presented a significant amount of both direct and circumstantial evidence inculpating defendant.

Assuming *arguendo* that defendant's proffered evidence was erroneously excluded, however, such error was not sufficiently prejudicial to warrant a new trial. Defendant has not carried his burden of showing a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988). Not only did the State present ample evidence to support its theory of the case, defendant was able to present his hypothesis to the jury through testimony to the same effect from witnesses Bobby Kye, Numa and Angie McGee, and Deputy Carpenter.

From substantial evidence introduced at trial, the jury could and apparently did believe that a medium-sized, four-door, light-colored, noisy car, with taillights identical to those of the light-blue, four-door Plymouth Valiant defendant was riding in that night, was present when the shots were fired at the overpass and shortly thereafter at the Calhoun and Cain residences on Tobaccoville Road. The evidence showed that shortly before Vickie Calhoun was shot, Robert Rouch observed a vehicle which fit the description of Thomas' car on the Westinghouse Road bridge. Donald Stout testified that the Thomas vehicle was indeed on the overpass and that defendant shot at a truck. Doug Sells' description of the car that left the bridge, drove down the road, and passed him was very similar to that of the Thomas vehicle. Stout testified that the Thomas vehicle then passed the Calhoun house, at which time defendant fired a shot into the residence. Geraldine McBride testified that she heard the shot and identified the taillights of the vehicle that passed her on Tobaccoville Road immediately thereafter.

There was no evidence placing a small white car near the Calhoun residence at the time Vickie Calhoun was killed. Moreover, Donald Stout directly implicated defendant as the person who shot at the Calhoun residence. Raleigh Wright corroborated Stout's testimony in his recounting of what defendant had confided to him. The State's evidence both directly and circumstantially pointed to defendant as the perpetrator of the offense. The excluded evidence

did not cast any real or substantial doubt upon the State's evidence that defendant fired the fatal shot.

Defendant was able to present the bulk of his theory through the eyewitness testimony of three of his witnesses and the corroborative testimony of a fourth. Bobby Kye testified in great detail regarding what he witnessed the night of 17 March, as did Numa and Angie McGee. All described a small white car, in the shape of a Honda or Pinto, with a red stripe on the side, wraparound taillights, and a third brake light in the rear window. Numa McGee testified that he saw a person with brown shaggy hair hanging out of the passenger side, pointing a rifle at his brother's house. Deputy Carpenter corroborated each account by recounting what Kye and McGee had told him. The State's cross-examination was thorough, but failed to shake the conviction of any of defendant's witnesses regarding what they saw and heard that night. We therefore conclude that the trial court did not err in excluding defendant's proffered evidence and that even if we assume error, such error was harmless. This assignment of error is overruled.

[2] Defendant's second and third assignments of error concern the trial court's decision to allow the State to question and argue the absence of codefendant Lillian Thomas and defendant's son, Jonathan Martin, as witnesses at defendant's trial. Thomas was driving the Plymouth Valiant on the night in question, and Jonathan, who was then six years of age, was a passenger. Defendant contends that the trial court's decision was prejudicial because the prosecutor's comments and arguments were misleading to the jury.

Defendant testified in his own defense. During the State's cross-examination, he was twice asked whether he had subpoenaed Thomas to trial and whether she would be a witness for him. The trial court sustained defendant's objections to each question, but denied defendant's motion for mistrial and his motion *in limine* requesting the court to instruct the State to refrain from any further references to Thomas' absence.

During its argument to the jury, the State argued that defendant's failure to call his son and Thomas as witnesses implied that they would contradict his testimony:

> Now, you know, they want you to accept their three eyewitnesses, the McGee's [sic] and Bobby Kye, and say ours are mistaken. But, you know, *there were some other eyewitnesses out there that night.*

They were the other people in the car. Now where are they? Where is the defendant's son? Where is the driver of that automobile? Now, wouldn't they know what went on? You know, now, when you give the State a fair trial, members of the jury, this is the kind of thing I'm talking about. And you can't expect us to reasonably call the defendant's son and have the defendant's son tell on him. But I submit to you that the defendant should be able the [sic] call his son.

MR. ELLIOT: Object.

THE COURT: Well, sustained. Don't hear any more about it.

MR. SAUNDERS: Now, I don't know that we should be expected to call the driver of the car, either.

MS. GELBIN: Object to that.

THE COURT: Overruled.

MR. SAUNDERS: Somebody should have put her up there and let her be cross examined. Because she was an eyewitness, too.

(Emphasis added.) Defendant contends that this argument misled the jury, and that the trial court's failure to prevent such argument violated this Court's admonition in *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326 (1975):

> It is the duty of the trial court, upon objection, to censure remarks not warranted by either the evidence or the law, or remarks calculated to mislead and prejudice the jury.

Id. at 599, 220 S.E.2d at 338. Although the court recognized prejudice to defendant in its rulings and in its admonishment to the prosecutor in his closing argument, defendant argues that the trial court improperly refused to instruct the jury as to the meaning of its rulings, that is, that defendant's son and Thomas were unavailable as a matter of law and that the jury should not consider their absence in its deliberations. Defendant contends that it is obvious that the purpose of the argument was a bad faith attempt to encourage the jury to believe that if Thomas and defendant's son had testified, they would have contradicted defendant's testimony, when in fact the State was well aware of the fact that, according to defendant, Thomas' substantive testimony at her earlier trial entirely exculpated defendant and that his son Jonathan testified equally favorably to defendant in his voir dire hearing.

The State denies that it acted in bad faith and contends that in order for the prosecutor's questions to be deemed improper, it must appear on the face of the record that such questions were asked in bad faith. *State v. Dawson*, 302 N.C. 581, 276 S.E.2d 348 (1981). Although Thomas' trial testimony was that she had not been in the Rural Hall area on the night of 17 March 1987, she had earlier given investigating officers directions as to the route she drove on the night of the shootings and had specifically pointed out the residences in Rural Hall, including the Calhouns' home, into which defendant shot. Given Thomas' prior incriminating statements which contradicted her trial testimony, as well as the jury's verdict finding her guilty, the State claims that it did, in fact, have a good faith basis for raising and arguing the fact of Thomas' absence as a witness. The State further relies upon this Court's holding in *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977): "The State may fairly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case." *Id.* at 143, 232 S.E.2d at 441. "Ordinarily, the argument of counsel is left largely to the control and discretion of the presiding judge, and counsel is allowed wide latitude in the argument of hotly contested cases." *State v. Miller*, 288 N.C. 582, 598, 220 S.E.2d 326, 338.

With regard to Thomas' testimony, defendant requested that the court instruct the witnesses that no references were to be made to evidence adduced at Thomas' trial and that they were not to mention her presence. A similar request was granted in defendant's first trial, but at this proceeding the judge merely said, "I would caution each side to be cautious about that aspect of the trial." He did not in fact rule on the request for instruction. Defendant now claims that Thomas was unavailable as a witness because, as her appeal was then pending, she had a constitutional privilege not to testify while her fate also hung in the balance. The trial court stated, and we agree, that it was Thomas' responsibility to affirmatively exercise her privilege and that until such time, she was subject to the court's jurisdiction and could be called upon to testify. We note, however, without deciding the point, that many jurisdictions and commentators support the proposition that no inference arises adversely to defendant if the person not called as a witness by the defense is a codefendant or accomplice or has already been convicted of the same offense as that for which defendant is being prosecuted. Torcia, *Wharton's Criminal*

Evidence § 88 at 273-75 (14th ed. 1985). Any possible impropriety in raising such an inference in this case, however, must necessarily be deemed harmless in light of the court's curative actions in promptly stopping any questioning of defendant as to the failure to call Thomas and defendant's son and in cutting off the prosecutor's jury argument in that regard.

Defendant further contends that while it is true that a prosecutor may comment upon the failure of a defendant to call an available and material witness whose testimony would ordinarily be expected to favor the defendant, it must appear from the evidence that the absent witness was *competent* to testify before any inference may be asserted against the noncalling party. Defendant filed a motion *in limine* requesting that his son Jonathan, who was seven years old at the time of trial, be ruled incompetent as a witness. The trial court deferred any ruling pending a voir dire hearing. Although Jonathan testified consistently and favorably to defendant, the court excluded his testimony at the voir dire hearing pursuant to Rule 403. The court felt that due to Jonathan's young age, he was apt to confuse the facts regarding where Thomas' vehicle was on the night in question and whether his father was in fact shooting at signs or at houses that night, and thus his testimony would have no probative value for the State. Defendant claims that the State's references and argument incorrectly and improperly implied that Jonathan was available as a witness, an inference which was inconsistent with the court's ruling on the matter. Examination of the record reveals that during a conference among the attorneys for both sides and the trial judge, the judge confirmed the prosecutor's assumption that although the judge had ruled that Jonathan's testimony had no probative value for the State, it did not follow from that ruling that Jonathan could not be called as a witness. Although this Court has never decided the question, and need not do so here, other jurisdictions have held that it must appear from the evidence that the absent witness was competent to testify before any inference may be asserted against the noncalling party. *See, e.g., State v. Francis*, 669 S.W.2d 85 (Tenn. 1984).

Although we agree with defendant that the State's attempted cross-examination and jury argument with regard to both individuals were inappropriate, we are unable to conclude that the trial court erred in its response. Defendant's objection to the State's line of questioning was promptly sustained, and this Court has held

that the mere asking of a question, followed by a sustained objection, is not prejudicial to a defendant. *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983) (citing *State v. Campbell*, 296 N.C. 394, 250 S.E.2d 228 (1979)). Regarding the inappropriate subject matter in his closing argument, the court promptly admonished the prosecutor, "[d]on't hear any more about it." No curative instruction was necessary, as the import of the court's remark was clear and unequivocal. *State v. Watson*, 294 N.C. 159, 240 S.E.2d 440 (1978). Even assuming *arguendo* that such isolated remarks by the prosecutor were error, their impact on the jury was not proven by defendant to be prejudicial. The direct and circumstantial evidence against defendant was substantial and indeed compelling, and in the context of such evidence, there is no reasonable possibility that had the alleged error not been committed, defendant would have been found not guilty. *State v. Miller*, 288 N.C. 582, 220 S.E.2d 326.

[3] Defendant's next assignment of error concerns the trial court's admission of testimony from James Calhoun, husband of the decedent, regarding the reason why he gave reward money to State witness Donald Stout. During direct examination of Mr. Calhoun, the State asked him why he had been willing to give Stout reward money, and Calhoun answered, over defendant's objection, "[b]ecause I believe that he was trying to help and he still is." Defendant again objected and moved to strike the response, and the trial court instructed the jury as follows:

> Now, you can consider what he believes the reason why he gave money, not whether Stout could help him or not; but just the belief that he gave it to Stout for that purpose.

Defendant contends that Mr. Calhoun's answer constituted an improper opinion as to Stout's credibility and that because Stout's credibility was crucial to the State's case, the trial court committed prejudicial error in admitting the testimony and in failing to strike it. We disagree. Mr. Calhoun's statement could only be perceived as a comment reflecting his belief and hope that the information provided by Donald Stout would be instrumental in convicting the person who took his wife's life. Our review of the trial transcript reveals that Mr. Calhoun offered the reward in the hope of obtaining the name of a witness and the location of the murder weapon. The reward could in no way be interpreted as a testimonial to Stout's credibility and good character. Furthermore, the jury was

properly instructed as to the proper inference to be given to Calhoun's testimony. His statement qualified as proper lay opinion because it was "rationally based on the perception of the witness" and was helpful to an understanding of his testimony, as required by N.C.G.S. § 8C-1, Rule 701 (1988). The trial court's actions were appropriate, and we find no error in them.

[4] Defendant next contends that the trial court erred in excluding defendant's evidence regarding his state of mind, which was offered to refute the State's theory that defendant fled the state because he learned he was a suspect in the case. Defendant argues that he should have been permitted to present the testimony of himself and others which would have shown that he did not know he was a suspect and that his demeanor and conduct were inconsistent with that of a person on the run. Defendant specifically contends that the trial court erred in precluding his cousin, Glenda Byrd, and employer, Terry Reynolds, from testifying that during his stay in Tennessee he did not appear to be concerned about anything and that he even waved at a sheriff's car when it passed his cousin's house. The court also excluded testimony that on the night of his arrest, defendant was aware of the presence of plainclothed police officers but he did not act nervous. Our review of the trial transcript reveals that defendant, apart from this proffered testimony, did in fact present ample evidence in his effort to refute the State's theory of flight. He testified that he left North Carolina with the intent to permanently stay away because he was homesick and depressed about the fact that his relationship with his girlfriend had ended and also because he wanted to turn himself in to Tennessee authorities because of a former parole violation. He further testified that he had been planning to leave North Carolina for approximately a month prior to his departure. He took advantage of several opportunities to bring out the information he now contends it was error to exclude and in fact was able to present much of the evidence excluded in the examination of Ms. Byrd through the testimony of Mr. Reynolds, including the assertion that during defendant's two-week stay, he never said "anything about having any troubles in Winston-Salem." We find no error in this assignment.

[5] Defendant's next assignment of error concerns the trial court's exclusion of a portion of the transcript of Donald Stout's testimony at the earlier trial of Lillian Thomas. Defendant's purpose in seeking to introduce this testimony from the transcript was to impeach

Stout with an allegedly inconsistent statement he previously made under oath regarding what roads he was familiar with. While it is true that former testimony may be used to impeach a witness while he is presently testifying, we find that, in this case, evidence to the same effect was otherwise admitted. The record covering defendant's cross-examination of Stout is replete with defendant's references to Stout's prior inconsistent statements. In fact, Stout admitted on cross-examination that he had stated facts inconsistent with his present testimony in a prior proceeding. We conclude that defendant was afforded wide latitude in his cross-examination of Stout and in fact presented to the jury much evidence to the same effect. We find no error in the trial court's exclusion of a small portion of the earlier trial transcript.

[6] Defendant next assigns error to the trial court's decision to allow the prosecutor to question him and a defense witness concerning defendant's association with a character who had been convicted of murder and the fact that defendant was known to associate with "murderers." Defendant claims that this evidence was irrelevant and that the prosecutor's brief reference to it in his argument was improper and prejudicial. The State counters that defendant himself opened the door to questions about this man's past by referring on two occasions to the fact that defendant wanted to visit him on the night in question because the man "was supposed to be getting out on bond" and that the man's wife had "gone to . . . see about getting him out on bond." Not only did the court sustain defense objections to the prosecutor's line of questions, the court also instructed the jury that a defendant may not be convicted on the basis of something he may have done in the past. We agree with the State that the questions and the reference to their subject matter in the State's argument were nonprejudicial. This assignment of error is overruled.

[7] In his eighth assignment of error, defendant contends that the trial court erred in allowing the State to introduce photographs of codefendant Lillian Thomas and of defendant which were grotesque and unflattering. He claims that the showing of these photographs to the jury was prejudicial because Thomas' identity was not at issue and further claimed that the only illustrative purpose the pictures served was that of providing a contrast between defendant and Thomas on the one hand and Vickie and James Calhoun on the other. We disagree. We have examined the photographs in question, and while we find them to be less

than flattering, they cannot fairly be characterized as "grotesque." Defendant has made no showing that the photographs in question made the parties look different from the way they appeared in March 1987. In addition, both defense counsel in closing argument and the court in its charge admonished the jury that it was not to make its decision based on appearances or on sympathy. We conclude that the admission of these photographs was relevant to prove the identity of Thomas, the alleged driver of the car, and, as such, was not error.

[8] Defendant next claims that the trial court erred in prohibiting his counsel from impeaching State witness Raleigh Wright, defendant's acquaintance in prison, with a letter Wright had written to a federal judge during a prior incarceration requesting a reduction in his sentence. Defendant claims that such evidence tends to show that Mr. Wright knew how to manipulate the criminal justice system, a trait which would serve to lower his credibility with the jury. In reviewing the record, we believe that the excluded letter was merely cumulative and would not have significantly strengthened defendant's impeachment of Wright. Defendant extensively cross-examined Wright about his experience with the criminal justice system, specifically, his history of plea bargaining, in order to show Wright's possible bias and has failed to demonstrate how the omission of this evidence prejudiced him. We find no error in this assignment.

[9] Defendant's next two assignments of error concern his contention that the trial court failed to require the State and Raleigh Wright's attorney to disclose evidence favorable to the defense and that such failure was prejudicial to his case. He claims that certain sealed materials before this Court in the companion case, *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), may reveal exculpatory evidence that was not disclosed to him in violation of the mandate in *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), and he requests that this Court conduct an independent review of the material to determine whether it contains favorable evidence tending to show that other vehicles were involved in the shootings or any evidence tending to support his theory of the case. N.C.G.S. § 15A-903 provides that when a defendant makes a specific request at trial for disclosure of evidence in the State's possession, the judge must, at a minimum, order an *in camera* inspection and make appropriate findings of fact, and if the judge rules against defendant, the evidence should be sealed and placed

in the record for appellate review. *State v. Voncannon*, 49 N.C. App. 637, 272 S.E.2d 153 (1980), *rev'd on other grounds*, 302 N.C. 619, 276 S.E.2d 370 (1981). Defendant additionally argues that the trial court improperly denied him access to the file of the attorney representing Raleigh Wright, which defendant hoped would assist him in impeaching Wright. Defendant argues that because Wright testified, he had waived his right to the attorney-client privilege. However, neither the statutory provisions set out in N.C.G.S. § 15A-903 nor waiver of the attorney-client privilege alters the general rule that the work product or investigative files of the district attorney, law enforcement agencies, and others assisting in preparation of the case are not open to discovery. *State v. Alston*, 307 N.C. 321, 298 S.E.2d 631 (1983). *See* N.C.G.S. § 15A-904 (1988). Internal police reports and memoranda prepared by law-enforcement officers are not made discoverable by this statute. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985). We also note that where the witness on the stand does not utilize the writings sought to be produced, even though the writings are under his control, as was the case with Raleigh Wright's attorney, opposing counsel cannot compel their production. *State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981).

The record shows that the requested material was inspected by Judge Cornelius *in camera* and that certain materials were in fact provided to the defense. In accordance with the proper procedure, the remaining documents were sealed for appellate review. We have reviewed the materials under seal, and we do not discern any abuse of discretion in the exclusion of these documents. Defendant has failed to show any such abuse and is not now permitted to engage in a fishing expedition for exculpatory material.

[10] Defendant also assigns error to the trial court's refusal to instruct the jury on the offense of involuntary manslaughter, which he requested at the charge conference. The trial judge was persuaded by the State's argument that the verdict was limited to either first-degree murder or not guilty, and the jury was instructed accordingly. The State's theory for charging defendant with first-degree murder was that he had committed the offense of discharging a weapon into occupied property, a felony under N.C.G.S. § 14-34.1, and that such offense had resulted in the killing of Vickie Calhoun.

N.C.G.S. § 14-34.1 states, in relevant part:

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> . . . .
>
> (2) A firearm into any building . . . while it is occupied is guilty of a Class H felony.

N.C.G.S. § 14-34.1 (1986).

Defendant contends that he was denied due process of law because the trial court refused to allow the jury to consider the offense of involuntary manslaughter and denied his requested instruction on that offense. He contends that the jury could have accepted that portion of the State's evidence which indicated that he was at the Calhoun residence that night and some of his own evidence suggesting that he was only shooting at street signs and that a stray bullet killed Vickie Calhoun.

Before addressing this assignment of error directly, we must first dispose of a contention by the State which it contends disposes of the issue entirely. The State submits that even if we accept both its evidence and defendant's evidence in the light most favorable to the defense, there was no evidence of an *unintentional* discharge of the weapon such as to entitle defendant to a possible verdict of involuntary manslaughter. We find that the State's argument rests on the invalid premise that in order to entitle defendant to an instruction on involuntary manslaughter, the discharge of a weapon must necessarily be unintentional. This Court made it clear in *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978), that an *intentional* shooting at an object can amount to culpable negligence, which is one of the states of mind required for an instruction on involuntary manslaughter:

> [W]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is . . . accomplished by means of some intentional act. Indeed without some intentional act in the chain of causation leading to death there can be no criminal responsibility.

Id. at 582, 247 S.E.2d at 918. The Court defined culpable negligence as an act or omission evidencing a disregard for human rights and safety. *Id.* at 579-80, 247 S.E.2d at 916-17. *See also State v. Ward*, 286 N.C. 304, 210 S.E.2d 407 (1974); *State v. McGill*, 314 N.C. 633, 336 S.E.2d 90 (1985). Involuntary manslaughter is defined

as "the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976).

Having determined that the assignment is not disposed of because of a lack of evidence of an unintentional shooting, we now address the question of whether defendant was entitled to a charge of involuntary manslaughter on the evidence presented. Defendant contends that involuntary manslaughter is a lesser included offense of felony murder, and he was thus entitled to have the jury consider that offense. The relevant statute is N.C.G.S. § 15-170:

> Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

N.C.G.S. § 15-170 (1983).

This Court adheres to the rule that in a proper case where it is permissible under the indictment to convict defendant of a lesser included offense, the court must still determine that there is evidence tending to support the lesser offense in order to submit it for the jury's consideration. Upon a favorable determination of both issues, that is, that the crime is a lesser included offense and that there is evidence to support it, defendant is entitled to have the instruction on the lesser offense submitted to the jury. *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E.2d 130 (1943). Here, there is no evidence to support the submission of involuntary manslaughter. Defendant contends that since the jury could have believed the State's assertion that he was at the Calhoun residence on the night of 17 March 1987, but also could have believed that portion of his testimony that he was intending to shoot only at street signs (although in an entirely different location), he is entitled to an instruction on involuntary manslaughter. We disagree.

In our review of this Court's previous holdings, we find that where a defendant's sole defense is one of alibi, he is not entitled to have the jury consider a lesser offense on the theory that jurors may take bits and pieces of the State's evidence and bits and pieces of defendant's evidence and thus find him guilty of a lesser

offense not positively supported by the evidence. In *State v. Allen*, 297 N.C. 429, 255 S.E.2d 362 (1979), the defendant denied he was the victim's assailant and introduced evidence to support his defense of alibi and mistaken identity. This Court held that a defendant is not entitled to rely on the possibility that the jury may believe only a part of the State's evidence as a ground for submission of a lesser offense. In that circumstance, there is no positive evidence of a lesser offense and the jury need only decide whether defendant was the perpetrator of the crime charged. *See also State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986); *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954). Our review of the trial transcript reveals that defendant's sole and unequivocal defense was that he was nowhere near the Rural Hall area on the night of 17 March 1987. He does not concede in any way that he might unknowingly have been near the Calhoun residence. We do not address the issue of whether, had there been evidence that defendant shot at a sign and the bullet accidentally ricocheted into the Calhoun home, an instruction on involuntary manslaughter would have been warranted. Defendant testified here that, in a totally different area of the county, he shot twice out of the car at street signs and that both times he was sure that no houses were in the vicinity.

The State's evidence is clear and unequivocal that defendant had the necessary specific intent to be convicted of the felony of discharging a weapon into an occupied residence. Although Donald Stout testified on direct examination that defendant had shot twelve to fifteen times at "quite a few houses" and a trailer court and that he "believed" that defendant shot a traffic sign because he heard a "ping," Stout's later testimony clarifies the events which subsequently occurred:

> Q. Mr. Stout, let me show you what's been identified as State's Exhibit Number three and ask you if you can identify that, please, sir.
>
> A. Yes, sir.
>
> Q. And how can you identify State's Exhibit Number three?
>
> A. Well, a shot was fired at the house. I looked directly at the house, as we were going right in front of it, the boulder wall there with stained glass window. I remember seeing the stain glass window.
>
> . . . .

Q. Do you know whose house that is?

A. Yeah. The Calhoun house.

Q. And when the shot was fired at that house, who fired the shot?

A. Jackie Brewer.

Q. Any of these times that he was firing this gun, did the driver, Lillian Thomas, ever say anything to him?

A. Yes, sir.

. . . .

A. Why don't you aim for the lights.

Q. Did she say that at Mr. Calhoun's house?

. . . .

A. Yes.

Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence supporting a lesser offense, it is not error for a judge to refuse to provide instructions on that lesser charge. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985); *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). Because defendant limited himself to the defense that he was not in Rural Hall at any time that night, the jury's decision was limited to a factual determination of whether defendant was in Rural Hall shooting into houses, as the State contends, or whether he was in the vicinity between Winston-Salem and Kernersville shooting at street signs, as defendant asserts. We conclude that the two instructions that were given were proper and that an instruction on the offense of involuntary manslaughter was not warranted by the evidence. Defendant's assignment of error is overruled.

[11] Defendant's final assignment of error regards the trial court's decision to permit the State to argue in its closing argument matters which defendant contends were clearly calculated to prejudice defendant and elicit passion and sympathy for the victim. He first argues that the State improperly focused the jury's attention on emotional issues such as grief, anger, vengeance and sympathy, rather than the contested facts of the case. Secondly, he contends that the State's characterization of one of the defense witnesses as "a professional witness for the defendant" was not based on

the evidence. Finally, defendant argues that the trial court erred in allowing the State to read a principle of law concerning acting in concert which suggested that witness Donald Stout was not at risk of prosecution simply because of his presence in the car.

The State counters that defendant did not object to the prosecutor's remarks and that the argument was not so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. We agree. The standard of review is one of "gross impropriety." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). The prosecutor's argument, while inflammatory, was not improper to the point of being unduly prejudicial to defendant. Counsel is given wide latitude in the argument of hotly contested cases. Counsel may argue the law, the facts in evidence, and all reasonable inferences to be drawn therefrom. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989) (citing *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)). We note that defendant addressed these same matters in his argument to the jury. Not only did defendant admonish the jury in his closing argument not to decide the case based on sympathy, but he also elaborated on his interpretation of the legal concept of acting in concert. The court's instructions also included these themes. We find that there was no error in the trial court's failure to intervene *ex mero motu* in the prosecutor's argument.

We conclude that defendant received a fair trial free of prejudicial error.

No error.

Chief Justice EXUM concurring.

I believe it was error to exclude the testimony of the Quality Mart employees, Ruby Vaughn and Joan Overby, as well as the testimony of Deputy Carpenter regarding his pursuit of a small, white Honda CRX. Since much evidence of similar import was admitted, I see no reasonable possibility that there would have been a different result at trial had this evidence been admitted as well. I therefore concur in the result reached by the majority.

The excluded evidence was admissible for the same reasons that the testimony of Bobby Kye, Numa and Angie McGee was admissible and, indeed, was admitted at trial. The excluded evidence

tended to "cast doubt" on the State's case, *State v. McElrath*, 322 N.C. 1, 12, 366 S.E.2d 442, 448 (1988), and it also tended to show that someone other than defendant committed the crime. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987).

State's witness Donald Stout testified that defendant shot at the Kye, Calhoun, Cain and Curtis McGee homes from Lillian Thomas' 1974 light blue, four-door Plymouth Valiant with vertical taillights and no third brake light in the rear window. Bobby Kye and Numa and Angie McGee testified that the shots fired at the Kye and Curtis McGee homes came from a small light-colored or white car with a sloped back, wraparound taillights, and a third brake light in the rear window.[1] Kye testified that the shooting at his home occurred between 8:55 and 8:58 p.m. The McGees' testimony indicated that the shooting at Curtis McGee's home occurred between 9:20 and 9:40. If, as both the State and defendant seem to argue, the person who shot at the Kye and McGee homes is the person who shot at the Calhoun home, the testimony of Kye and the McGees casts doubt on Stout's testimony that defendant was doing the shooting, and it points directly to someone other than defendant as being guilty of the Calhoun homicide.

The excluded testimony is of like import and tends to corroborate the testimony of Kye and the McGees. The two Quality Mart employees, Ruby Vaughn and Joan Overby, would have testified, had they been permitted, that a man with shaggy hair who was riding in a small white or silver car with a red stripe on the side, wraparound taillights and a third brake light in the rear window arrived at the Quality Mart in Stanleyville between 9:40 and 9:55. The man came into the store intoxicated and demanded to use the phone. When refused, he behaved rudely. When asked to leave, he inquired whether they wanted to get his license plate number now or later, and said they would be reading about him in the papers the next day. He then got back in the passenger side of the car and headed in the direction of Rural Hall.

The Quality Mart in Stanleyville is approximately three miles from the McGee residence, and two buildings across the road and adjacent to the Quality Mart also had shots discharged into them. Clearly, then, the incident at the Quality Mart was close temporally

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1. These witnesses' testimony variously described the car or cars as small "Honda-like" or "Pinto-like" vehicles.

to the Kye and McGee shootings and close geographically to the sites of those shootings. The car in which the man was riding fitted the description of the car seen by Kye and the McGees. From this evidence the jury could conclude that the man seen at the Quality Mart was the man who shot at the Calhoun, Kye and McGee homes. This, consequently, is evidence tending to cast doubt on the State's case and to show someone other than defendant committed the Calhoun homicide.

The other evidence that was excluded was the testimony of Deputy Carpenter relating to a car chase that occurred shortly after the Quality Mart incident. Had he been permitted, Deputy Carpenter would have testified that he left the McGee residence at 9:58 after investigating the shooting there. He headed toward Rural Hall when he saw a small, white Honda CRX with a red stripe down the side and a third brake light in the rear window. Noting that it was similar to the car described to him by Bobby Kye thirty minutes earlier and by the McGees moments before, Deputy Carpenter turned around, activated his blue light, sounded his siren and pursued the Honda. The Honda did not respond to the blue light or siren. Deputy Carpenter continued the pursuit until his patrol car crashed in a curve about three-tenths of a mile past the McGee residence. The Honda drove out of sight up the dirt portion of Edwards Road into Stokes County.

Again, Deputy Carpenter's testimony tends to show that a car matching the description of the car observed by Kye, the McGees and the Quality Mart employees was in the area close to the time of the shootings, including the Calhoun shooting. This car fled from the deputy and did not respond to his flashing blue lights or siren. This car did not match the description of the car in which defendant was riding. A jury could reasonably conclude that this was the car from which the shots were fired at the Kye, McGee and Calhoun residences. Thus, Deputy Carpenter's testimony also tends to cast doubt on the State's case and points directly to the guilt of another party.

The excluded testimony was clearly relevant. Rule 401 provides:

> "Relevant evidence" means evidence having *any tendency* to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C.G.S. § 8C-1, Rule 401 (emphasis added). The use of the word "any" in the statute erects a very low relevancy threshold. "The relevance standard to be applied is relatively lax." *McElrath*, 322 N.C. at 13, 366 S.E.2d at 449. "[T]he standard in criminal cases is particularly easily satisfied. 'Any evidence calculated to throw light upon the crime charged' should be admitted by the trial court." *Id.*, quoting *State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E.2d 110, 118, *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1984).

Evidence tending to point to the guilt of another is always relevant and admissible, provided that it "does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party." *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279. "The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy." *Id.* at 667, 351 S.E.2d at 280.

Evidence which "casts doubt upon such a fundamental part of the State's case—namely, that defendant was in fact the perpetrator of the crime" is relevant and admissible. *McElrath*, 322 N.C. at 12, 366 S.E.2d at 448.

As I have demonstrated, the excluded evidence both cast doubt upon the State's case against Brewer and pointed directly to the guilt of someone else. It was, therefore, relevant and admissible under Rule 401, *McElrath* and *Cotton*.

Though I believe the evidence was relevant and admissible, I do not believe its exclusion was reversible error. Defendant was able to present to the jury through the Kye and McGee testimony his theory that another person was responsible for the shootings. This testimony was based on the witnesses' observing a car immediately after shots were fired from it. If this evidence did not raise a reasonable doubt as to defendant's guilt in the minds of the jurors, I am relatively confident that the excluded evidence would not have succeeded in doing so. Indeed, the evidence excluded here was admitted in the companion case of *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). Thomas, nevertheless, was found guilty of first degree murder on the theory that she, as the driver of the car, acted in concert with Brewer.

Justice MITCHELL concurring in result.

The majority holds that the trial court properly refused to instruct on the lesser offense of involuntary manslaughter, because

there was no evidence of involuntary manslaughter. For reasons which I have fully discussed in my dissenting opinion in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), involuntary manslaughter is not a lesser *included* offense of first-degree murder, when, as here, first-degree murder is submitted to the jury based *solely* upon the felony murder theory; this is true without regard to what the evidence may tend to show. *Because* the trial court—for whatever reason—permitted this case to go to the jury for its determination of whether the defendant was guilty of first-degree murder *only under the felony murder theory*, no instruction on lesser homicide offenses would have been proper. I concur only in the result reached by the majority.

Justice WEBB joins in this concurring opinion.

STATE OF NORTH CAROLINA v. LILLIAN JANE THOMAS

No. 109A88

(Filed 7 December 1989)

1. **Homicide § 30.3 (NCI3d)— first degree murder—felony murder—involuntary manslaughter not submitted—error**

The trial court erred in a first degree murder prosecution by not submitting to the jury the lesser-included offense of involuntary manslaughter where the murder charge arose from the felony of discharging a firearm into an occupied structure. That the State elected to prosecute defendant solely on a felony murder theory does not abrogate defendant's entitlement to have the jury consider all lesser-included offenses supported by the indictment and raised by the evidence.

Am Jur 2d, Homicide §§ 94, 498, 531.

2. **Homicide § 21.9 (NCI3d)— first degree murder—lesser included offense of involuntary manslaughter—sufficiency of evidence**

There was sufficient evidence in a first degree murder prosecution to support a conviction for involuntary manslaughter where the jury could reasonably have found from the evidence that defendant's continuing to drive while another person

repeatedly discharged his gun amounts to a disregard for the rights and safety of others that proximately caused the victim's death.

Am Jur 2d, Homicide § 94.

Justice MITCHELL dissenting.

Justice WEBB joins in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-27(a) from conviction and judgment entered thereon imposing a sentence of life imprisonment for the murder in the first degree of Vickie White Calhoun, *Cornelius, J.*, presiding, at the 25 November 1987 Criminal Session of Superior Court, FORSYTH County. Heard in the Supreme Court 15 February 1989.

Lacy H. Thornburg, Attorney General, by Barry S. McNeill, Assistant Attorney General, for the State.

Danny T. Ferguson for defendant-appellant.

EXUM, Chief Justice.

Defendant was tried on a bill of indictment charging that defendant "unlawfully, willfully and feloniously and of malice aforethought did kill and murder Vickie White Calhoun." The case was prosecuted as a first degree felony murder on the theory that the murder of Vickie White Calhoun occurred during the perpetration of the felony of discharging a firearm into an occupied structure in violation of N.C.G.S. § 14-34.1. The jury was instructed that it could return verdicts of guilty of first degree felony murder or not guilty. Upon the return of a verdict of guilty the jury at a separate sentencing proceeding recommended, and the trial court imposed, a sentence of life imprisonment. The question presented is whether the trial court erred in failing to submit to the jury the alternative verdict of guilty of involuntary manslaughter. We conclude this was error entitling defendant to a new trial.

I

Evidence presented at trial tended to show that Vickie Calhoun and her husband lived in the northern part of Forsyth County at 1197 Tobaccoville Road, Rural Hall. On the night of 17 March 1987, she was standing in the living room of their house talking

to her husband when a bullet came through the front window. The bullet struck Vickie Calhoun in the chest, pierced her heart and killed her.

Nine separate shooting incidents in northern Forsyth County during this evening were reported to the Forsyth County Sheriff's Department. The State's evidence tended to show as follows with regard to these shootings: Defendant and Jackie Ray Brewer engaged together in an hour-long shooting spree beginning at approximately 9 p.m. on 17 March 1987, during which defendant drove her 1972 four-door Plymouth Valiant around northern Forsyth County while Jackie Brewer was shooting a .22 caliber pistol from the front passenger's seat. Brewer fired between ten and fifteen shots, hitting a truck and four houses and killing Vickie Calhoun.

Defendant and Brewer met on the afternoon of 17 March when Brewer agreed to check the brakes on defendant's car. Brewer had a chrome-colored pistol with him, and had recently purchased a black .22 caliber revolver from a friend named Eddie White. White stated at trial that he, defendant and Brewer had a conversation on 17 March, during which White told Brewer the best place to buy ammunition was K-Mart. White testified that defendant offered to buy the ammunition because Brewer did not have a valid driver's license.

Donald Stout testified for the State pursuant to a written agreement. Stout had been arrested and charged with the murder of Vickie Calhoun at the end of March 1987, and was released on bail one month later. He was imprisoned again in late July after failing to make a court appearance, and he subsequently began to send messages from jail to the law enforcement officers investigating the murder. The agreement was that in return for Stout's testimony at defendant's and Brewer's trials, the State would release him from jail and dismiss the murder charge against him.

Stout testified that Brewer introduced defendant to him at the Dunkin' Donuts on Peters Creek Parkway in Winston-Salem on the evening of 17 March 1987. Defendant was there with her two small sons, and Brewer had his six-year-old son with him. Brewer, Stout and defendant decided to buy marijuana in Rural Hall and left Dunkin' Donuts between 8 and 8:30 p.m. Defendant drove. Brewer and his son sat in the front passenger's seat. Stout sat in the rear passenger seat with defendant's two children. Stout

could not remember the route defendant took from the Mount Airy exit on Interstate 40 to where she purchased marijuana in Rural Hall. He did recall that defendant was within two miles of Tobaccoville Road, where the victim Vickie Calhoun lived, when she bought the marijuana. Defendant purchased three "joints," and she, Stout and Brewer smoked them as they drove around with the three children.

Stout further testified that shortly after they finished smoking the marijuana he heard a gun discharge and a bullet ricochet off a metal street sign. Stout stated that Brewer fired the shot. Brewer continued to shoot a pistol out of the window of defendant's car for approximately an hour. During this hour, Stout remembered Brewer firing ten to fifteen shots.

Stout testified that Jackie Brewer fired a handgun aimed at a truck, the Kye residence, the Calhoun residence, the Cain residence, and the McGee residence. Additionally, he testified that before Brewer shot at each residence defendant told Brewer: "Why don't you aim for the lights." Stout also remembered that Brewer fired his gun at a mobile home lot and into some stores. Stout could not remember the directions from which the car approached Brewer's targets, on which side of the street the houses shot at were located, or the order of the shootings.[1]

Defendant presented the following evidence in her defense: Brewer met her on 17 March and went to Kernersville to look

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1. Stout's testimony, upon which much of the State's case rests, contradicts statements Stout gave investigating officers before he was arrested and struck the bargain. On 24 March 1987, Stout told officers that defendant drove out along the countryside where there were no streetlights, and Brewer fired his pistol at some road signs. He did not shoot at houses. When driven to Rural Hall by the investigating officers, Stout—who had seen a picture of the Calhoun residence in the newspaper earlier that week—said that the Calhoun home looked "familiar." Stout told the officers that defendant, Brewer and he had stopped on a bridge on the night of the shooting, but he was not sure of the bridge, or any of their locations that night because he was intoxicated. At trial Stout testified he and a friend had smoked eight to ten marijuana cigarettes on the afternoon of the shooting; additionally, Stout had consumed three or four bourbon drinks and smoked a portion of a "joint" by himself later in the day.

After his arrest, Stout gave his attorneys a written statement in which he said seeing the Calhoun residence in the newspaper prompted his recall of seeing that house "less than five seconds" after hearing a gunshot, but that he did not know whether Brewer was shooting at houses. He heard Brewer and defendant say something about lights.

at her car, a light blue four-door with vertical taillights, no interior dome light, and no third brake light in the rear window. Defendant then drove Brewer to his home in Winston-Salem, where Brewer introduced her to Eddie White. No conversation about buying bullets occurred. Defendant drove her sons and Brewer to the home of Tina and Barbara Pressley, friends who often babysat her children, to ask them to watch her sons. The Pressleys were not home. Defendant then drove Brewer to K-Mart, where Brewer purchased bullets. Defendant did not know Brewer had a gun with him.

Defendant next drove to the Dunkin' Donuts on Peters Creek Parkway in Winston-Salem, where Brewer went inside. He returned with his six-year-old son, Jonathan Martin, and Donald Stout, neither of whom defendant knew. Defendant and her five passengers then returned to the Pressley residence, again finding no one home. At Brewer's request, defendant drove to a residence in Winston-Salem where Brewer tried to sell a small, black .22 caliber revolver. Brewer returned to the car at approximately 9 p.m., when the three adults discussed buying marijuana. Thinking she could purchase marijuana in Kernersville, defendant drove there from Winston-Salem. The car was filled with cigarette smoke, and Brewer rolled down his window. Shortly thereafter, while on Highway 150 driving east toward Kernersville, defendant heard a gunshot. She then heard three or four more shots and the sound of a bullet hitting a road sign. Brewer was discharging a small black revolver out the car's window.

Until she heard the first gunshot, defendant did not know Brewer had a firearm in his possession. After Brewer fired these shots on Highway 150, she asked him to put the gun away, and he did.

After arriving at Spring Brook Apartments in Kernersville, the residence of William Broughton,[2] defendant entered the building and bought three "joints" of marijuana. She proceeded to her own apartment and then drove to The Pantry, a store on Main Street in Kernersville a few blocks away.[3]

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2. William Broughton testified as a witness for the State that defendant was at this apartment between 7 p.m. and 8 p.m. on 17 March.

3. Paul Bailey and Ernest Hodges both testified that defendant was at The Pantry at approximately 9:45 p.m. on 17 March. A private investigator testified that the routes between The Pantry in Kernersville and the McGee residence north of Rural Hall, at which shots were fired after 9:30 on 17 March, varied between 18.5 miles and 21.6 miles and required 24 to over 27 minutes to travel.

Upon leaving The Pantry, defendant drove to her mother's home and back towards Winston-Salem on Linville Road. Near Salem Lake Brewer again discharged a handgun out the window, firing four or five times. Defendant told Brewer to put the gun up and not to use it again. Brewer never fired at houses but only at passing road signs and into woods. They arrived in Winston-Salem without further incident, and at 10:30 p.m. defendant dropped Donald Stout off at Dunkin' Donuts.

Additional testimony offered by defendant tended to show persons in one or more cars other than defendant's discharged firearms in the area of the Calhoun residence during the evening of 17 March 1987. The shootings began at 8:52 p.m. when a bullet was fired at the Shaffner residence and a front window of a nearby business on Reynolda Road, Highway 67, west of Tobaccoville. Eight minutes later Bobby Kye witnessed a compact-sized car with wraparound taillights and a rear-window brake light pull into his driveway on Ridge Road, a short distance northeast from the Shaffner residence. A bullet was fired into Kye's house, and he called the sheriff's department at 9:01 p.m. Shortly after this a truck traveling north on Highway 52 was fired upon from the Westinghouse Road overpass. The overpass is east of the Kye residence, toward Rural Hall. The truck driver saw a vehicle traveling east on Westinghouse Road stop on the overpass. Its dome light came on. Moments later a bullet ricocheted off the hood of the truck and into the windshield. This shooting was reported to the sheriff's office at 9:23 by another driver at a nearby truck stop.

Westinghouse Road merges with Tobaccoville Road east of the overpass toward Rural Hall. The shooting of Vickie Calhoun was reported to the sheriff's department at 9:11, after her husband summoned an ambulance. At 9:14 Lena Cain reported that a bullet was fired into her home. The Cains live about 250 yards east of the Calhoun residence along Tobaccoville Road. Two witnesses who were parked in the road heard a gun being fired; shortly after hearing a second shot, one witness watched a light-colored car drive past the parked cars. The witness could not see the driver and noticed only one other passenger, someone with shaggy hair in the front seat.

Tobaccoville Road runs northeast into Rural Hall. Numa and Angie McGee live just north of Rural Hall on Edwards Road. At approximately 9:45 on the night of Vickie Calhoun's death, Numa

McGee saw three cars traveling north past the McGees' house. A dark car was followed closely by a white car, which in turn was followed closely by a sheriff's patrol car. Angie McGee also saw the white car closely followed by the patrol car. A few minutes later the couple saw the patrol car traveling back toward Rural Hall, and a short time later, both heard a shot and saw the darker car and the white car traveling back in the same direction. Numa McGee saw the white car pass under a street lamp; a person was leaning from the passenger window of the car pointing a rifle at a trailer owned by Numa McGee and occupied by his brother, Curtis McGee. A bullet had been fired through Curtis McGee's trailer, and both Numa and Curtis McGee called the sheriff's department to report the shooting.

Two other shootings on the night of 17 March 1987 were reported; shots were fired into a discount store and recreation vehicle on a sales lot located in Stanleyville, a few miles south of Rural Hall. That night two employees at a gas station in Stanleyville reported a suspicious person to the sheriff's department. Shortly after 10 p.m. a man appearing to be under the influence of alcohol or drugs entered the gas station and demanded to use the telephone. The employees said they could not allow customers to use the phone unless it was an emergency, and the man asked them what they would do if "the damned Yankees came down here and shot and raped you and your sisters and the other women around here"; he then apologized and told them that if they wanted to call the police to go ahead. He asked if they wanted to get his license plate number while he was there or when he left, and told the employees, "You'll read about me tomorrow in the papers." He returned to a small, light-colored hatchback car, entered the passenger side and the car drove off. The vehicle had a red stripe along its side and had a third brake light in the rear window. When a local customer who had listened to his police scanner stopped at the gas station fifteen minutes later and related the descriptions of the shootings and the car involved he had heard, the employees decided the car the man had entered was similar to the one police thought was involved in the shootings, and they called the sheriff.

Bobby Kye testified that after observing defendant's car, which the sheriff's department had impounded, he concluded it was not the car from which shots were fired at his home. Numa McGee testified that the car he saw under the streetlamp after hearing

the shot fired at his brother's trailer was small and white, shaped like a Ford Pinto with a red stripe along its side. Based on photographs they were shown of defendant's car, both Mr. and Mrs. McGee testified defendant's car was not the one they had seen under the light on 17 March. A number of witnesses testified to hearing on police scanners a description of the car believed to be involved in the shootings of 17 March 1987. The description broadcast by the sheriff's department was of a small white car with a red stripe.

Ballistic evidence tended to show that none of the bullets recovered from the shooting sites, including the bullet retrieved from Vickie Calhoun's body, was fired from the black revolver Eddie White sold Brewer on 16 March 1987. This gun was offered by the State as an exhibit at trial and identified by both defendant and the State's witness Donald Stout as the .22 caliber revolver Brewer fired on 17 March 1987. A shell casing found on the Westinghouse Road overpass of Highway 52 was not fired from this gun, nor was this brand of ammunition sold at the K-Mart where Brewer bought bullets. Investigators never recovered the silver gun Eddie White said he saw in Brewer's possession on 17 March. Additional evidence, pertinent to defendant's assignment of error, will be discussed in our consideration of that assignment.

II

In her first assignment of error, defendant contends the trial court erred in failing to charge the jury on involuntary manslaughter. Defendant maintains evidence presented would support a conviction of involuntary manslaughter and that the trial court's failure to submit this alternative verdict is error entitling her to a new trial. We agree.

In ruling on whether to charge the jury on a lesser included offense, the trial judge must make two determinations. The first is whether the lesser offense is, as a matter of law, an included offense of the crime for which defendant is indicted. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982). The pertinent statute, N.C.G.S. § 15-170 (1983), provides:

> Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime.

The second is whether there is evidence in the case which will support a conviction of the lesser included offense. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). In *Weaver* the Court, quoting with approval from earlier cases, said:

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a verdict finding a defendant guilty of a higher degree of the same crime.

Weaver, 306 N.C. at 631-32, 295 S.E.2d at 377.

A.

[1] Involuntary manslaughter is a lesser included offense of the crime of murder as charged in the bill of indictment. This indictment was in the form prescribed by N.C.G.S. § 15-144. "An indictment for homicide in the words of G.S. § 15-144 will support a verdict of murder in the first degree, murder in the second degree, or manslaughter." *State v. Talbert*, 282 N.C. 718, 721, 194 S.E.2d 822, 825 (1973). Involuntary manslaughter is a lesser included offense of second degree murder and voluntary manslaughter. *State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985). If the indictment here will support a verdict of murder in the second degree or manslaughter under *Talbert*, it will under *Greene* also support a verdict of involuntary manslaughter.

That the State elected to prosecute defendant solely on a felony murder theory does not abrogate defendant's entitlement to have the jury consider all lesser included offenses supported by the indictment and raised by the evidence. *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973). In *Williams* the defendant was indicted in separate bills: one charging murder, as here, in the form prescribed by N.C.G.S. § 15-144,[4] and the other charging that a

4. The form of the indictment does not appear in the *Williams* opinion, but it is set out at page 5 of the Record on Appeal in that case. Records & Briefs Fall Term—1973.

firearm was discharged into an occupied building. As here, the State prosecuted the murder solely on a felony murder theory. The jury was instructed only upon this theory, and was given alternative verdicts of guilty of first degree murder, with and without a recommendation of life imprisonment, or not guilty. The jury returned a verdict of guilty of first degree murder with a recommendation of life imprisonment. Defendant appealed, assigning error to the failure of the trial court to submit second degree murder as a lesser included offense of the homicide charged in the bill of indictment. This Court sustained the assignment and ordered a new trial, holding as to the first degree murder conviction that defendant was entitled to have second degree murder submitted as an alternative verdict. We said:

> [Defendant] was entitled to an instruction applying the law to the facts . . . facts sufficient in law to constitute a complete defense to murder committed in the perpetration of the felony created by G.S. 14-34.1. Too, if the fatal shooting . . . occurred inside of his poolroom, and if the jury found beyond a reasonable doubt that defendant fired the shot that killed Herman Adams, the defendant would not be guilty of more than murder in the second degree . . . . The court's failure to instruct as to the applicable law arising on the evidence . . . applies equally to both indictments. For error in this respect, the verdicts and judgments are vacated.

Id. at 75, 199 S.E.2d at 414. *Williams* is clear authority for the proposition that in a felony murder prosecution under an indictment in the form prescribed by N.C.G.S. § 15-144 evidence that defendant did not commit the underlying felony requires an instruction upon whatever lesser included homicides the indictment and the evidence support, and that second degree murder is one of these lesser included homicides. *See also State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

The dissent argues that *Williams* is wrongly decided and has been overruled by *Weaver*. The dissent says the State's election to try a homicide case, and the trial judge's submission of it to the jury, only on a felony murder theory in effect acquits defendant of murder on a theory of premeditation and deliberation and all of its lesser included homicide offenses. Since, according to the dissent, there are no lesser included homicide offenses of first degree felony murder, none should have been submitted here.

We believe *Williams* was correctly decided and has not been overruled by *Weaver*. Indeed, the *Williams* holding is reaffirmed by *Weaver*. *Weaver* adopts the definitional approach to determining what are lesser included offenses but makes clear that the definitions are to be applied to the crimes as charged in the bill of indictment. "G.S. 15-170 . . . provides that a defendant may be convicted on an indictment of (1) the crime charged therein, or (2) a less degree of the crime charged, or (3) an attempt to commit the crime charged, or (4) an attempt to commit a less degree of the crime charged." *Weaver*, 306 N.C. at 638-39, 295 S.E.2d at 380.

The dissent's notion that defendant, while convicted of first degree felony murder, has somehow been acquitted of premeditated and deliberated murder and all lesser homicides which might have been included in this latter offense presupposes that defendant has been charged with, and could have been convicted of, two different crimes—first degree felony murder and first degree premeditated and deliberated murder. Defendant was charged with only one crime, first degree murder; she was convicted of that crime. She has not been acquitted of anything. Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes. *See, e.g., State v. Adams*, 266 N.C. 406, 146 S.E.2d 505 (1966); *State v. Cobb*, 250 N.C. 234, 108 S.E.2d 237 (1959); *State v. Mundy*, 243 N.C. 149, 90 S.E.2d 312 (1955); *State v. Love*, 236 N.C. 344, 72 S.E.2d 737 (1952). When the case is returned for a new trial, defendant under the present indictment will again be subject to trial and conviction for first degree murder on all theories and on all lesser homicides which may be included under any theory and supported by the evidence.

A defendant may always show by the evidence not only his innocence under the theory of prosecution chosen by the State but also his possible guilt of some lesser offense. If this lesser offense is included in the crime charged in the indictment and if there is evidence to support it, the defendant is entitled to have it submitted to the jury. These different theories of defense cannot be abrogated by the State's decision to prosecute nor the trial court's decision to submit the case on only one prosecutorial theory when under the indictment and the evidence adduced another is more favorable to the defendant. To hold otherwise would raise

serious constitutional questions under at least the Due Process Clause in the federal document and its counterpart in our state constitution.

B.

[2] The next question is whether there is here evidence to support a conviction for involuntary manslaughter. Under North Carolina and federal law a lesser included offense instruction is required if the evidence "would permit a jury rationally to find [defendant] guilty of the lesser offense and acquit him of the greater." *Strickland*, 307 N.C. at 286, 298 S.E.2d at 654, quoting *Beck v. Alabama*, 447 U.S. 625, 635, 65 L. Ed. 2d 392, 401 (1980). The test is whether there "is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). Where the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

> It is well settled that "a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternative verdicts." *State v. Palmer*, 293 N.C. 633, 643-44, 239 S.E.2d 406, 413 (1977). On the other hand, the trial court need not submit lesser included degrees of a crime to the jury "when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime.*"

State v. Drumgold, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979), quoting *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E.2d 706, 714 (1972) (emphasis in original). Such conflicts may arise from evidence introduced by the State, *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954), or the defendant. They may arise when only the State has introduced evidence. *Peacock*, 313 N.C. 554, 330 S.E.2d 190; *Williams*, 284 N.C. 67, 199 S.E.2d 409.

The prosecution here for first degree murder rests upon the principle of acting in concert and the felony murder rule. The prosecution's theory is that defendant acted in concert with Jackie Brewer in the commission of the underlying felony of discharging

a firearm into an occupied structure during the course of which the homicide occurred. Under the doctrine of acting in concert when two or more persons act together in pursuance of a common plan or purpose, each is guilty of any crime committed by any other in pursuance of the common plan or purpose. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986). Under the felony murder rule a homicide committed in the perpetration of one of the statutorily specified felonies is first degree murder. N.C.G.S. § 14-7. Discharging a firearm into an occupied structure is a felony which will support a first degree felony murder prosecution. *State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982); *Williams*, 284 N.C. 67, 199 S.E.2d 409. Thus, when persons act in concert to commit the felony of discharging a firearm into an occupied structure each person is guilty not only of that felony but for any homicide committed in its perpetration. "[W]hen two people act in concert to commit a robbery, each person is responsible not only for that crime, but for a murder committed during the course of the robbery." *State v. Reese*, 319 N.C. 110, 141, 353 S.E.2d 352, 370 (1987).

In order to convict defendant here of first degree felony murder the State was required to offer evidence that, among other things, defendant did act in concert with Brewer when he committed the underlying felony of discharging a firearm into the Calhoun residence. If there is conflicting evidence on this aspect of the case, *i.e.*, evidence that defendant did not act in concert with Brewer and, therefore, did not commit the underlying felony, then defendant is entitled to an instruction on whatever degree of homicide less than first degree murder the evidence supports. *Williams*, 284 N.C. 67, 199 S.E.2d 409.

Defendant contends there is conflicting evidence on whether she acted in concert with Brewer in committing the underlying felony of discharging a firearm into the Calhoun residence. She argues the evidence conflicts as to whether she then acted together with Brewer pursuant to a plan joined in by both. She says, further, there is evidence tending to show she committed involuntary manslaughter.

The State disagrees, arguing that the only material evidentiary conflict is whether defendant and Brewer were in the vicinity of the Calhoun residence at the time the fatal shot was fired and whether Brewer fired this shot. The State says its evidence shows

without contradiction that Brewer at defendant's urging fired the fatal shot into the Calhoun residence. The State characterizes defendant's evidence as tending to show only that she and Brewer were in another part of Forsyth County at the time Ms. Calhoun was shot and that Brewer, consequently, did not fire this shot. Under the State's view the evidence was such that the jury could either accept the State's version and find defendant guilty as charged, or accept defendant's version and acquit her; there is no evidentiary middle ground. Thus, the State says the case falls within the principle, well established in our cases, that when the State's evidence establishes without contradiction the offense charged and defendant's evidence shows only alibi, there is no evidence to support submission of lesser included offenses and a defendant should be either found guilty as charged or acquitted. *State v. Allen*, 297 N.C. 429, 255 S.E.2d 362 (1979); *Drumgold*, 297 N.C. 267, 254 S.E.2d 531.

As the evidence discussed below will show, while the prosecution offered evidence that defendant acted in concert with Brewer when he fired into the Calhoun residence, largely through the testimony of Donald Stout, who said defendant instructed Brewer to shoot at the lights burning in the Calhoun home, other evidence introduced by the State conflicted with this testimony. Defendant's evidence that she did not act in concert with Brewer is, for the most part, with reference to her testimony that the shooting was going on in the Kernersville area of Forsyth County. This is the basis for the State's contention that her evidence supports alibi and nothing more. Defendant did, however, introduce some evidence that she did not always know where she was on the night of 17 March, and that she could have been in the Rural Hall area when Brewer was firing his gun under circumstances not amounting to their acting in concert.

Regarding the State's evidence, it elicited the following testimony from Shirley Cummings during its case in rebuttal:

> And then [defendant] proceeded to tell me that she was with a man on Tuesday night. They were riding down a road. The man pulled a gun and shot out of her window. She said she had no idea this man had a gun. She said that she pulled the car to the side of the road. She got a butcher knife out of her glove compartment, put the butcher knife to his throat and told him never to pull a gun or fire a gun around her

> children again; and she took him and dropped him off somewhere, but she didn't say where.

This testimony contradicts the evidence that defendant shared a common purpose or plan with Brewer to fire into the Calhoun residence and tends to show she did not act in concert with him when this shot was fired.

In its case in chief, the State introduced testimony of Detective Warren. He testified that during his investigation defendant agreed to ride with him and an SBI agent to Rural Hall, where defendant identified houses into which Brewer discharged his firearm. While in the area, Detective Warren asked defendant,

> if she remembered them sitting on the bridge, the gun going off, Jack saying "Go. Go. Go," her driving off and entering a sharp curve, a house, a gunshot, a short distance, another gunshot, then going a short distance and a car being broken down on the roadway. That was the sequence of events I gave her . . . . She replied that this sequence of events sounded real familiar and that she remembered leaving the bridge after the gun being fired and going around a sharp curve where her tires squealed and then more shots started.

Detective Warren's other testimony made it clear that the Calhoun residence was the one fired into immediately after defendant drove her car around the sharp curve. Defendant's statements while in Rural Hall during the investigation as recounted by Detective Warren again contradict other evidence suggesting that defendant acted in concert with Brewer by instructing him to "shoot at the lights" as she drove past the Calhoun residence. Detective Warren's testimony tends to show instead that defendant was simply accelerating her vehicle rapidly past the Calhoun residence when Brewer fired into the home.

As to defendant's evidence, the bulk of it tends to show she was not in Rural Hall when Brewer fired his gun from her car window. Defendant did, however, introduce a taped 24 March 1987 conversation between defendant and Detective Mason of the Forsyth County Sheriff's Department. In this conversation Detective Mason asked, "Okay, where was the first time [Brewer] shot now?" Defendant responded, "I call it a back road . . . . It's, it's like [Route] 150, but it wasn't 150. Those are back roads to me." She went on to say, "I don't know where I was at. I don't know what

road it was. It could of been Kernersville, it could of been Winston, it could of been High Point, it could of been anywhere. I don't know . . . . I really don't know." Later Detective Mason asked defendant: "So, in other words, you could have definitely been up there and not known you was up there?" In context "up there" clearly refers to the Rural Hall area. Defendant replied, "Right, but, I, to be very honest with you, I doubt very seriously that I was . . . ." Detective Mason later asked about defendant's knowledge of Brewer's targets when he was shooting: "In other words, when you were driving, you don't actually know what [Brewer] was shooting at do you?" Defendant responded: "No."

Both the State and defendant, then, introduced evidence conflicting with the evidence that defendant shared a common purpose or plan with Brewer that he fire his weapon into the Calhoun residence. Defendant's evidence itself largely, but not exclusively, supports an alibi defense. When all the evidence is considered it may be characterized, from defendant's vantage point, as supporting both an alibi and a refutation of evidence that she and Brewer, wherever they were, were acting in concert.

There was, moreover, evidence that defendant's actions amounted to culpable negligence of the sort that would support a conviction of involuntary manslaughter. Involuntary manslaughter is an unlawful killing proximately caused by either (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *Greene*, 314 N.C. at 651-52, 336 S.E.2d at 89. Culpable negligence is defined as an act or omission evidencing a disregard for human rights and safety. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978).

All the evidence shows that defendant was present when Brewer shot his gun several times from defendant's car window. Don Stout testified that Brewer fired his gun ten or fifteen times. Detective Warren's testimony suggests defendant, after Brewer fired his gun off an overpass, drove rapidly while Brewer fired into several residences, including the Calhoun residence. Defendant told Detective Mason that Brewer fired five times during this first series of shootings, when she did not know where she was and acknowledged she could have been in Rural Hall. She also stated Brewer fired a second series of shots elsewhere. Jonathan Martin's mother testified that the boy told her Brewer fired only at road signs, and that he later pointed out "numerous" signs he remembered from the night of 17 March.

The jury could reasonably have found from the foregoing evidence that defendant's continuing to drive while Brewer repeatedly discharged his gun amounts to a disregard for the rights and safety of others that proximately caused the victim's death. It could, therefore, based on this evidence, have reasonably found her guilty of involuntary manslaughter had that alternative verdict been submitted to it.

The United States Supreme Court has expounded on the importance of permitting the jury to find a defendant guilty of a lesser included offense supported by the evidence by noting that the doctrine aids both the prosecution and the defense. *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392. It aids the prosecution when its proof may not be persuasive on some element of the greater offense, and it is beneficial to the defendant "because it affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." *Id.* at 633, 65 L. Ed. 2d at 400. The Supreme Court has also expressed concern that in a case in which "one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction" despite the existing doubt, because "the jury was presented with only two options: convicting the defendant . . . or acquitting him outright." *Keeble v. United States*, 412 U.S. 205, 212-13, 36 L. Ed. 2d 844, 850 (1973) (emphasis in original).

We share this concern in this case. While some reasonable doubt could have existed regarding whether defendant acted in concert with Brewer when he fired at the Calhoun residence, given the conflicting evidence on this aspect of the case, almost all the evidence points to some criminal culpability on defendant's part. It was important, therefore, that the jury be permitted to consider whether defendant was guilty of the lesser included offense of involuntary manslaughter and not be forced to choose between guilty as charged or not guilty.

We conclude, for the reasons given, that the trial court's failure to instruct the jury on the lesser included offense of involuntary manslaughter is reversible error. The verdict and judgment below are, therefore, vacated and defendant is given a

New trial.

Justice MITCHELL dissenting.

The majority bases its holding that the defendant must be awarded a new trial upon its conclusion that the trial court erred by failing to instruct the jury to consider a possible verdict finding her guilty of involuntary manslaughter. I disagree and, therefore, I dissent.

The bill of indictment charging the defendant with murder was in the form prescribed by N.C.G.S. § 15-144. An indictment in such form will support a verdict finding the defendant guilty of first-degree murder, upon any of the theories set forth in N.C.G.S. § 14-17, or guilty of any lesser offense included within any of those theories. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). The State is not required at any time to elect a theory upon which it will proceed against the defendant on the charge of first-degree murder, and it is proper for the trial court to submit the issue of the defendant's guilt to the jury on all of the theories of first-degree murder supported by substantial evidence presented at trial. *State v. Strickland*, 307 N.C. 274, 292, 298 S.E.2d 645, 657 (1983), modified on other grounds by *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). In the present case, however, the trial court submitted the murder charge for the jury's consideration *only* upon the theory of first-degree murder under the felony murder rule. Both the trial court's instructions to the jury and the written verdict form required that the jury find the defendant guilty of first-degree murder under the felony murder theory or find her not guilty. The jury returned its verdict specifying that it found the defendant guilty of first-degree murder under the felony murder rule.

By limiting the jury to returning a verdict on the first-degree murder charge only under the felony murder theory, the trial court withdrew the other theories of first-degree murder *and* all lesser homicide offenses included within *those* theories from the jury's consideration. Submission of the first-degree murder charge to the jury *only* upon the felony murder theory was the equivalent of a verdict finding her not guilty on the other theories of first-degree murder supported by the indictment upon which she had been placed in jeopardy, including the theory of premeditated and deliberate first-degree murder. *See State v. Adams*, 266 N.C. 406, 146 S.E.2d 505 (1966); *State v. Cobb*, 250 N.C. 234, 108 S.E.2d 237 (1959); *State v. Mundy*, 243 N.C. 149, 90 S.E.2d 312 (1955);

State v. Love, 236 N.C. 344, 72 S.E.2d 737 (1952). Additionally, it was tantamount to a verdict finding her not guilty of all lesser homicide offenses included under the theory of premeditated and deliberate first-degree murder. *See State v. Beach*, 283 N.C. 261, 270, 196 S.E.2d 214, 220 (1973), overruled in part on other grounds by *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). This Court has indicated that second-degree murder, voluntary manslaughter and involuntary manslaughter are lesser offenses included within first-degree murder *when* it is based upon the theory that the murder was premeditated and deliberate. *State v. Greene*, 314 N.C. 649, 336 S.E.2d 87 (1985). Therefore, submission of the first-degree murder charge against the defendant to the jury only upon the felony murder theory had the effect of acquitting her of premeditated and deliberate first-degree murder and its lesser included offenses of second-degree murder, voluntary manslaughter and involuntary manslaughter. The defendant could not thereafter be placed in jeopardy for any of those lesser offenses—offenses for which she had already been acquitted. Therefore, the trial court properly refused to instruct the jury with regard to involuntary manslaughter.

We have, it is true, made statements in prior cases that when the law and evidence justify the application of the felony murder rule, the State is not required to prove premeditation and deliberation and the trial court is not required to submit second-degree murder or manslaughter to the jury *unless* there is evidence to support such lesser offenses. *E.g.*, *State v. Strickland*, 307 N.C. at 292, 298 S.E.2d at 657; *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982); *State v. Rinck*, 303 N.C. 551, 565, 280 S.E.2d 912, 923 (1981); *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976); *State v. Miller*, 219 N.C. 514, 519, 14 S.E.2d 522, 525 (1941); *State v. Donnell*, 202 N.C. 782, 785, 164 S.E. 352, 353 (1932). I believe, however, that such statements originally were intended to apply only to situations in which first-degree murder is submitted to the jury upon, and the trial court instructs the jury upon, *both* the theory of first-degree murder under the felony murder rule *and* the theory of premeditated and deliberate first-degree murder.

Cases such as *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928); *State v. Logan*, 161 N.C. 235, 76 S.E. 1 (1911); and *State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909), form the genesis of our statements that the jury in felony murder cases should not

be instructed on lesser homicide offenses *unless* there is evidence to support them. Each of those early cases, however, were cases in which the first-degree murder charge was submitted to and considered by the jury upon *both* the theory of felony murder and the theory of premeditated and deliberate murder. In each of those cases, submission of lesser homicide offenses included within a charge of *premeditated and deliberate* first-degree murder clearly would have been proper if supported by evidence. The statements in *Newsome*, *Logan* and *Spivey* were correct in the context of the cases in which they were made. I do not believe, however, that the Court intended to imply that first-degree murder based upon the felony murder theory included any lesser homicide offenses. Nor do I construe our reliance upon statements from those early cases in our more recent decisions such as *Strickland*, *Wall*, *Rinck*, *Swift*, *Miller* and *Donnell* as intended to support the proposition that first-degree murder based upon the felony murder theory includes any lesser homicide offense.

Not until the case of *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973), did the statements from our early cases lead—and in my view mislead—this Court into holding that a trial court had erred by failing to instruct on lesser homicide offenses where the first-degree murder charge against a defendant had been submitted to the jury solely upon the theory of felony murder. There, the Court concluded, in essence, that if the jury believed evidence tending to show that the killing did not occur during the commission of a felony, the defendant "would not be guilty of more than murder in the second degree in the absence of proof that *the killing* was intentional and with premeditation and deliberation." *Id.* at 75, 199 S.E.2d at 414. I agree with the conclusion of the Court in *Williams* that the *evidence* there could have supported a conviction for a lesser homicide offense included within first-degree murder *on the theory of premeditation and deliberation.* I believe the Court went astray, however, in holding that the trial court had erred by failing to instruct on such lesser offenses in that case in which the greater offense of first-degree murder was not submitted upon the theory that the murder was premeditated and deliberate and that theory was not before the jury. I believe that, to the extent that it indicated that a charge of first-degree murder based upon the felony murder theory includes lesser homicide offenses, *Williams* was not supported by reason or authority and was wrongly decided. Even if *Williams* was correctly decided on the point at issue, however, it has been effectively overruled by more recent cases.

In *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982), this Court adopted a definitional basis as opposed to a factual or evidentiary basis for determining whether one crime is a lesser included offense of another. In *Weaver* we clearly established that:

> We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E.2d 743, 754 (1978). In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional*, not a factual basis.

Id. at 635, 295 S.E.2d at 378-79. "Since *Weaver* it has been the rule that the determination of whether one offense is a lesser included of another must be based on a strict analysis of the elements of the two offenses." *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987).

When the *definitional* test of *Weaver* is applied—as opposed to the evidentiary or *factual test* apparently applied in *Williams*—it is readily apparent that neither second-degree murder, voluntary manslaughter nor involuntary manslaughter can be lesser included offenses of first-degree murder when, as here, first-degree murder is submitted solely upon the theory of felony murder. First-degree murder based upon the felony murder rule has only two elements: (1) the defendant knowingly committed or attempted to commit one of the felonies indicated in N.C.G.S. § 14-7, and (2) a related killing. N.C.G.S. § 14-17 (1986). *See State v. Reese*, 319 N.C. 110, 145, 353 S.E.2d 352, 372 (1987); *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). Whether the defendant committed the killing himself, intended that the killing take place, or even knew that a killing might occur is irrelevant. *State v. Reese*, 319 N.C. at 145, 353 S.E.2d at 372. More specifically, a killing during the commission or attempt to commit one of the felonies indicated in the statute is murder in the first degree without regard to premeditation, deliberation or *malice*. *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68. Second-degree murder, on the other hand, is defined as an unlawful killing of a human being *with malice* but without premedita-

tion and deliberation. *State v. Greene*, 314 N.C. 649, 651, 336 S.E.2d 87, 88 (quoting *State v. Wrenn*, 279 N.C. 676, 681-82, 185 S.E.2d 129, 132 (1971)). The element of malice which is a part of the lesser offense of second-degree murder *is* an element of the greater offense of first-degree murder, *when* first-degree murder is based upon the theory of premeditation and deliberation. For this reason, we have concluded in cases such as *Greene* that second-degree murder is a lesser included offense of *premeditated and deliberate* first-degree murder. *Id.* Malice *is not* an element of the greater offense of first-degree murder, however, *when* the greater offense of first-degree murder is based solely upon the felony murder theory. Under the definitional test of *Weaver*, second-degree murder has an essential element—malice—which is not an element of first-degree murder under the felony murder theory. Therefore, second-degree murder cannot be a lesser included offense of first-degree murder, *when*, as here, first-degree murder is submitted to the jury based solely upon the felony murder theory. *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375. *See State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982) (holding that no separate offense of felony murder in the second degree is recognized in this jurisdiction).

Further, second-degree murder, voluntary manslaughter and involuntary manslaughter all include another element which is not a part of first-degree murder, *when* first-degree murder is based solely upon the felony murder theory. The offenses of second-degree murder, voluntary manslaughter and involuntary manslaughter each include as a necessary element that the defendant commit an *intentional act* which act *proximately* causes the death of the victim. *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) (involuntary manslaughter); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983) (involuntary manslaughter); *State v. Rogers*, 299 N.C. 597, 264 S.E.2d 89 (1980) (voluntary manslaughter); *State v. Simpson*, 244 N.C. 325, 93 S.E.2d 425 (1956) (second-degree murder); *State v. Ellison*, 226 N.C. 628, 39 S.E.2d 824 (1946) (second-degree murder); *State v. Redman*, 217 N.C. 483, 8 S.E.2d 623 (1940) (second-degree murder); *State v. Holsclaw*, 42 N.C. App. 696, 257 S.E.2d 650, *review denied and appeal dismissed*, 298 N.C. 571, 261 S.E.2d 126 (1979) (second-degree murder and manslaughter). *When* the greater offense of first-degree murder is based solely upon the felony murder theory—as opposed to the theory of premeditation and deliberation—it does not include any element requiring that the act proximately causing the victim's death be a voluntary act by the defendant

or be his act at all. It is true, of course, that to establish first-degree murder under the felony murder rule there can be no break in the chain of events leading from the initial felony to the act causing death, and that the homicide must be part of a series of acts forming one continuous transaction. *State v. Fields*, 315 N.C. 191, 197, 337 S.E.2d 518, 522 (1985) (quoting *State v. Hutchins*, 303 N.C. 321, 345, 279 S.E.2d 788, 803 (1981)). First-degree murder under the felony murder theory, however, does not include the element—an essential element for all lesser homicide offenses—that *the act proximately causing death* be intentional. The underlying felony or attempt to commit a felony supporting the application of the felony murder rule must be intentional, but it is not necessary that the underlying felony or attempt be the act proximately causing death, or that the act actually causing death be itself an intentional act, in order that a killing be first-degree murder under the felony murder rule. *See State v. Avery*, 315 N.C. 1, 337 S.E.2d 786; *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518; *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788; *State v. Wooten*, 295 N.C. 378, 245 S.E.2d 699 (1978); *State v. Squire*, 292 N.C. 494, 234 S.E.2d 563, *cert. denied*, 434 U.S. 998, 54 L. Ed. 2d 493 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976); *State v. Shrader*, 290 N.C. 253, 225 S.E.2d 522 (1976); *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69; *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972). The act proximately causing death may be entirely unintentional or someone else's act in cases of first-degree murder under the felony murder rule, so long as the underlying felony or attempt to commit a felony was intentional. Therefore, the lesser offenses of second-degree murder, voluntary manslaughter and involuntary manslaughter all include as an essential element that the act proximately causing death be the defendant's intentional act, an element not included in the greater offense of first-degree murder under the felony murder theory. Accordingly, no lesser homicide offense may be considered a lesser *included* offense of first-degree murder under the felony murder theory, if the definitional test of *Weaver* is properly applied.

I do not mean to be understood as saying that the trial court could not in any event have instructed the jury on involuntary manslaughter in this case. Assuming *arguendo* that the evidence here would have supported a finding of involuntary manslaughter, the jury could have been permitted to consider that lesser offense,

but only as a lesser homicide offense included within the offense of premeditated and deliberate first-degree murder. The trial court, having elected for whatever reason not to submit premeditated and deliberate first-degree murder or any of its lesser included homicide offenses for the jury's consideration after the defendant had been placed in jeopardy, in effect acquitted her of all of those offenses. She could not thereafter be convicted of any lesser homicide offenses unless they are by definition lesser offenses included within the offense of first-degree murder based upon the felony murder theory, which I believe I have shown they are not. Therefore, I conclude that the trial court did not err in refusing to instruct the jury to consider finding the defendant guilty of involuntary manslaughter as a lesser offense included within first-degree murder based upon the felony murder theory.

Finally, I believe the majority has set a trap for itself. As I have pointed out in this dissent, it is my view that the bill of indictment in this case charged the defendant with the lesser offenses of second-degree murder, voluntary manslaughter and involuntary manslaughter, but only because those lesser offenses were included within first-degree murder based upon the theory of premeditation and deliberation supported by the indictment. As I have also indicated, she has, in effect, been acquitted of premeditated and deliberate first-degree murder and all lesser homicide offenses *included under that theory*. I do not think she can again be placed in jeopardy and made subject to conviction for one of those lesser homicide offenses for which she has been acquitted. I leave such questions for the majority to resolve should the defendant be tried and convicted and those questions raised before this Court at a later time.

For the foregoing reasons, I dissent.

Justice WEBB joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. EUGENE DAVIS, JR.

No. 745A85

(Filed 7 December 1989)

1. Criminal Law § 146.1 (NCI3d); Jury § 7.14 (NCI3d)— peremptory challenges—racial discrimination—failure to object at trial—consideration of issue by Supreme Court

Consideration of the issue of racial discrimination in the prosecutor's use of peremptory challenges normally would be precluded on appeal where defendant made a pretrial motion to prohibit the State from using peremptory challenges in a discriminatory fashion but failed to object to the denial of the motion or to the State's exercise of any specific peremptory challenge of a black juror and failed to object generally at the conclusion of jury selection. However, the Supreme Court elected to consider this issue since defendant was tried prior to *Batson v. Kentucky*, 476 U.S. 79 (1986), was on trial for his life, and attempted to alert the trial court to the issue by his pretrial motion. N.C.G.S. § 15A-1446(a) (1988).

Am Jur 2d, Appeal and Error § 628.

2. Jury § 7.14 (NCI3d)— peremptory challenges—racial discrimination—prima facie case not established

Defendant failed to establish a prima facie case of racial discrimination against black citizens by the State's exercise of peremptory challenges in this first degree murder and common law robbery case where the State excused eight black venirepersons by exercising peremptory challenges and accepted three as jurors; the State excused six white venirepersons by peremptory challenges; three of the first four jurors seated were black; both defendant and the victim were black; the State's questions during voir dire centered on the prospective juror's feelings about capital punishment and the age of the juror or his or her children as compared as to the age of defendant, who was eighteen when the victim was killed and twenty at the time of trial; the venirepersons were brought into the courtroom individually, so neither the State nor the defendant knew how many black citizens were present in the venire or whether a black or white citizen would be examined next; defendant's failure to object to any specific exercise of

peremptory challenges by the State after defendant had raised this issue in a pretrial motion supports an inference that he failed to object, not out of ignorance of the substantive issue, but because he did not in fact believe the State was exercising its peremptory challenges in a discriminatory manner; and defendant failed to demonstrate prejudice because he had exercised only nine of his fourteen peremptory challenges when the twelfth juror was seated and had yet to exercise three of his peremptory challenges when he passed the second alternate and last juror who deliberated in the case.

Am Jur 2d, Jury § 235.

3. **Constitutional Law § 60 (NCI3d); Jury § 7.14 (NCI3d) — peremptory challenges — exclusion of blacks — fair cross section right not violated**

The prosecutor's use of peremptory challenges against black citizens did not deprive defendant of his right to a trial by an impartial jury composed of a fair cross section of the community.

Am Jur 2d, Jury § 235.

4. **Constitutional Law § 60 (NCI3d); Jury § 7.14 (NCI3d) — peremptory challenges — exclusion of blacks — failure to show State constitutional violation**

Defendant failed to establish that the prosecutor's use of peremptory challenges violated Art. I, § 26 of the N. C. Constitution where he failed to show that any of the black citizens in the venire were excluded from jury service on account of their race.

Am Jur 2d, Jury § 235.

5. **Jury § 6.3 (NCI3d) — voir dire — disallowance of questions staking out juror**

A hypothetical question asked a single prospective juror as to whether the juror would consider the fact that defendant had no significant history of any criminal record as important in determining whether to impose the death penalty was properly excluded by the trial court as an impermissible attempt to indoctrinate a prospective juror regarding the existence of a mitigating circumstance.

Am Jur 2d, Jury §§ 203, 289, 290.

6. Constitutional Law § 60 (NCI3d); Jury § 7.11 (NCI3d)— capital punishment views—excusal of jurors for cause

The trial court did not err in excusing two jurors for cause because of their capital punishment views, although the jurors gave conflicting answers to questions concerning those views, where one juror stated at various times that he did not believe in the death penalty, could not vote to impose it, and could not act as an impartial juror in the guilt phase, and the second juror's answers reveal that he wanted to follow the law but thought his views on capital punishment would interfere with the performance of his duties during the sentencing phase. N.C.G.S. § 15A-1212(8) (1988).

Am Jur 2d, Jury §§ 203, 289, 290.

7. Jury § 7.14 (NCI3d)— peremptory challenges—use because of death penalty views

The prosecutor's use of peremptory challenges to exclude potential jurors expressing reservations about capital punishment did not violate defendant's constitutional rights.

Am Jur 2d, Jury § 235.

8. Jury § 6.4 (NCI3d)— voir dire—exclusion of question concerning death penalty—no plain error or prejudice

The trial court did not commit plain error by failing to intervene without objection by defendant when the prosecutor asked a prospective juror whether she could vote to recommend the death penalty "even knowing your decision would mean that defendant might eventually be put to death?" Furthermore, defendant was not prejudiced because voir dire was conducted individually and the prospective juror did not participate in deliberations in this case but was excused during the trial. Amendment I of the U. S. Constitution; Art. I, § 26 of the N. C. Constitution.

Am Jur 2d, Jury § 229.

9. Jury § 7.11 (NCI3d)— opposition to capital punishment—religion as basis—exclusion for cause proper

The exclusion of a prospective juror for cause because of his opposition to the death penalty based on his religious beliefs did not violate constitutional principles regarding the free exercise of religion and the right to serve as a juror

regardless of one's religion. The prospective juror was excused, not because of his choice of religion, but because of his inability to follow the law, and the fact that his religion provided the basis for his views did not alter the propriety of excluding him for cause.

Am Jur 2d, Jury §§ 283, 289.

10. Constitutional Law § 66 (NCI3d)— judge's telephone communications with juror—absence of defendant—harmless error

If it was error for the trial judge to communicate with a juror by telephone outside the presence of defendant, the absence of defendant during the telephone conversations was harmless beyond a reasonable doubt where defendant's counsel was present during both calls; the judge reiterated for the record the content of the calls; the juror with whom the judge communicated was excused and did not deliberate in defendant's case; and the incident took place in the judge's chambers.

Am Jur 2d, Criminal Law § 919.

11. Jury § 9 (NCI3d)— juror with child care problems—replacement with alternate

The trial court in a first degree murder case did not abuse its discretion in removing a juror who had child care problems and replacing her with an alternate juror.

Am Jur 2d, Trial § 1096.

12. Homicide § 18.1 (NCI3d)— first degree murder—sufficient evidence of premeditation and deliberation

The evidence in a first degree murder case allowed a reasonable inference that defendant premeditated and deliberated before killing the victim where it permitted the jury to find that defendant targeted a vulnerable elderly victim, felled her with blows, assaulted her sexually, and manually strangled her until she died.

Am Jur 2d, Homicide §§ 438, 439.

13. Homicide § 25.2 (NCI3d)— proof of premeditation and deliberation—examples in jury instructions—supporting evidence

The evidence supported each of the examples given by the trial court in its instructions regarding proof from which

premeditation and deliberation may be inferred. The victim's weakened condition and defendant's physical integrity on examination constituted evidence of lack of provocation; defendant's conduct in leaving the scene of the assault and callously selling the victim's personal belongings constituted evidence from which premeditation could be inferred; and the nature and extent of the victim's injuries related to the remaining factors listed in the jury charge.

Am Jur 2d, Homicide §§ 439, 501.

14. Robbery § 4.2 (NCI3d)— common law robbery—force or violence element—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant took items from a murder victim's apartment by force and violence rather than as an afterthought following the murder, and thus was sufficient to support defendant's conviction of common law robbery, where the evidence tended to show that the victim's apartment was "a mess" and "in total disarray" although the victim usually kept her apartment neat and clean, and the evidence would permit a reasonable inference that defendant engaged in a purposeful search of the victim's apartment, at least part of which occurred in her presence against her will and by putting her in fear, culminating in removal of a radio and a ring.

Am Jur 2d, Robbery §§ 14, 28.

15. Robbery § 5.4 (NCI3d)— common law robbery—instruction on misdemeanor larceny not required

The trial court in a common law robbery case did not commit plain error in failing to instruct on misdemeanor larceny where the disheveled condition of the victim's apartment, coupled with evidence of violent force displayed by the victim's body, suggest that a robbery rather than a larceny was committed, and where no affirmative evidence was presented that defendant took the victim's belongings only as an afterthought and that the violence committed against her served no intimidating purpose.

Am Jur 2d, Robbery § 75.

16. Criminal Law § 1339 (NCI4th)— first degree murder—aggravating factors—common law robbery and pecuniary gain—prejudicial error in submission of both

The trial court in a first degree murder case committed prejudicial error in submitting both the statutory aggravating factor that defendant was engaged in the commission of common law robbery and the statutory factor that the murder was committed for pecuniary gain where all the evidence in the case showed that defendant committed the robbery for pecuniary gain, *i.e.*, to resell the victim's ring and radio for cash.

Am Jur 2d, Homicide §§ 72, 498, 534.

17. Criminal Law §§ 1160, 1167 (NCI4th)— robbery—victim's age and physical infirmity as separate aggravating factors

The trial court did not err in finding as discrete aggravating factors for common law robbery that the victim was very old and that she was physically infirm. The vulnerability accompanying advanced age is not caused by physical disability alone, but encompasses the slowing of reflexes and lessening acuity of senses which render older citizens relatively defenseless against predators looking for unprotected targets. Evidence that the seventy-year-old victim lived alone in an apartment building for the elderly and that defendant knew the victim well and was thus in a position to assess her vulnerability, discrete from evidence of the victim's physical infirmity, supported the aggravation of the robbery by virtue of the victim's age.

Am Jur 2d, Homicide § 552.

Justice MARTIN dissenting in part.

Justices MEYER and MITCHELL join in this dissenting opinion.

APPEAL of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by *Read, J.*, at the 7 October 1985 Criminal Session of Superior Court, WAKE County. Heard in the Supreme Court 12 September 1989.

Lacy H. Thornburg, Attorney General, by William P. Hart, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was convicted of murder in the first degree and common-law robbery. The jury recommended the death sentence for the murder, and the trial court sentenced accordingly. It imposed a sentence of ten years imprisonment for the robbery. Because we find prejudicial error in the sentencing phase on the murder charge, we remand for a new capital sentencing hearing. We find no error on the robbery charge.

The State's evidence tended to show that the victim, Vivian Whitaker, was murdered in her apartment on 1 March 1984. She was last seen alive as she entered her apartment at 4:00 or 4:30 p.m. Officer Karpovich of the Raleigh Police Department testified that at approximately 8:00 p.m. that evening he received a call to go to the Carriage House Apartments. He was met there by Betty Davis, defendant's mother, who escorted him to the victim's apartment. The door was unlocked and showed no signs of forcible entry. The victim lay face up in the middle of the living room floor. An emergency medical technician ascertained that the victim was dead, and Officer Karpovich secured the scene. The apartment was "in total disarray."

Investigator Parker of the Raleigh Police Department testified that the victim's apartment appeared disheveled, with some items lying on the floor and others turned over. Parker identified several items which were introduced into evidence and later identified as belonging to the victim: a radio, a green cigarette case and disposable cigarette lighter, and a gold ring with seven stones. The cigarette lighter and a pack of Virginia Slims cigarettes were taken from defendant after his arrest on 2 March 1984. Following his arrest, defendant was examined for bruises, scratches, or some other indication that he might have been in a fight. No marks were found on defendant's person.

Doris Brown testified that she lived in the Carriage House Apartments, a building for senior citizens and handicapped persons. She was acquainted with defendant because his mother lived in

the building. On 1 March 1984 at 6:25 p.m., she saw defendant enter the elevator at the Carriage House Apartments. As she stood by the elevators reading the bulletin board, she saw the light over the elevator doors indicate that the elevator went to the fourth floor. The elevator returned to the ground floor without passengers. Defendant's mother lived in Apartment 411 at the time. The victim lived in Apartment 405. Gilbert Brown corroborated his wife's testimony.

Beatrice Randolph lived in Apartment 414 on 1 March 1984. She heard the door to the back stairway exit slam once at 6:30 or 6:45 p.m. On cross-examination, she admitted that she was uncertain about the time the door slammed, and that she had told a police officer earlier that she heard the noise at around 8:30 p.m.

Mrs. Artis Sears lived in Apartment 410, diagonally across the hall from Apartment 411, where defendant's mother, Mrs. Davis, lived. Mrs. Sears testified that she had excellent hearing. On the evening of 1 March 1984 she heard a man and a woman speaking rapidly and excitedly. She recognized the woman's voice as belonging to Mrs. Davis. After five or six minutes of conversation, she heard the back fire exit door slam; she then heard another door, closer to her apartment, open and close and the lock and chain go on the door. She estimated that this occurred between 7:00 and 8:00 p.m.

Mr. Franklin Cherry testified that on 1 March 1984 he was visiting his mother's apartment on the third floor of the Carriage House Apartments. At about 6:15 he heard some noise coming from the floor above. First he heard something vibrating or dragging across the floor. The noise lasted for two or three minutes. Then he heard a lady's voice saying something like, "Stop, stop, go on, go on," or "Stop, help."

Detective Munday of the Raleigh Police Department testified that he retrieved the victim's cigarette case from her apartment the day after the murder. The cigarette case was empty.

Deborah Sanders testified that defendant came to her mother's house after dark on the evening of the murder. He was trying to sell a radio and a ring. Ms. Sanders bought the ring for a dollar and her mother bought the radio. A few days later a police officer took the ring from her. The ring and radio were the same ones identified by Detective Parker. Mrs. Mary Primous testified

she bought the radio from defendant for two dollars. After she learned defendant had been arrested, she called the police and gave them the radio.

Ronald Thorp, the victim's grandson, testified that he saw defendant at the time defendant sold the ring and radio to Mrs. Primous and Ms. Sanders. This was between 8:00 and 9:00 p.m. Defendant was so nervous and shaky that when he wanted to use the telephone, someone else had to dial for him. After Thorp heard about the murder, he contacted the police. Thorp identified the cigarette case introduced into evidence as the one the victim always carried with her. The victim usually kept her apartment neat and clean; it was never disheveled with furniture turned over and items strewn about, as shown in the photographs introduced into evidence.

Agent Hallisey lifted latent fingerprints from various items in the victim's apartment, including a jewelry box, a coffee can lid sitting in the middle of a closet floor, a newspaper found underneath the victim's body, the telephone, and a green cigarette case. The latent fingerprints from the jewelry box and coffee can lid, and two fingerprints and three palm prints from the newspaper, were positively identified as defendant's.

Silas James Johnson testified that the victim had been his girlfriend for fifteen years. He visited her in her apartment every other night. He visited her the day before her murder, but the couple did not engage in sexual relations on that day.

Peggy Graham, the victim's daughter, testified that the cigarette lighter introduced into evidence was one that she bought for the victim. The victim usually smoked Virginia Slims cigarettes. Rufus Whitaker, Jr., testified that he bought the ring for the victim, his mother, that defendant later sold to Deborah Sanders. Another of the victim's sons, James Whitaker, also identified the ring and radio introduced into evidence as belonging to his mother.

Melba Thorp, the victim's daughter, testified that the victim kept some money and jewelry in the coffee can found in a closet. Her mother used a cane to walk because she had suffered a stroke a few years earlier. The stroke left her with a limp. The victim was seventy years old.

Dr. Gordon Legrand, a pathologist, testified that he performed an autopsy on the victim's body. Several abrasions were located

on either side of her neck. A linear abrasion and an area of bruising were located on her left jaw. Two puncture wounds surrounded by bruising were located at the back of the neck, probably caused by fingernails digging into the flesh. The victim's hyoid bone and thyroid cartilage were fractured and the muscles and soft tissue in the neck revealed evidence of trauma. In Dr. Legrand's opinion, these injuries to the neck area were caused by manual strangulation. Sixteen of the victim's ribs were broken and one of the ribs had punctured the left lung, resulting in bleeding into the lining of the lung. Chest muscles had hemorrhaged extensively. The left lobe of the liver was torn away from the rest of the liver, resulting in bleeding into the abdominal cavity. The esophageal opening in the diaphragm was enlarged and torn. All these injuries were caused by blunt trauma, probably three blows. The manual strangulation caused the victim's death, with the traumatic injuries contributing to the death. Judging from the atrophied state of the muscles, Dr. Legrand opined that the victim had been in a weakened condition at the time of her death.

Ms. Jona Medlin testified that vaginal and rectal smears taken from the victim revealed the presence of spermatozoa. In Ms. Medlin's opinion as a forensic serologist, the spermatozoa had been deposited recently at the time of collection.[1]

Defendant did not offer evidence during the guilt phase of his trial, but moved to dismiss the charges of common-law robbery and first-degree murder at the close of the State's evidence. The trial court denied the motion. The jury found defendant guilty of common-law robbery and first-degree murder, basing the latter conviction on theories of both premeditation and deliberation and felony murder.

Following a capital sentencing hearing, the jury found the following aggravating circumstances: defendant was engaged in the commission of common-law robbery, the murder was committed for pecuniary gain, and the murder was especially heinous, atrocious, or cruel.

The jury found twenty-five mitigating circumstances. Among these were the following statutory circumstances: defendant had

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1. The vaginal and rectal swabs were collected by the medical examiner after death but were not analyzed until the trial was underway. Defendant was not indicted or tried on charges of rape or sexual offense.

no significant history of prior criminal activity, the murder was committed while defendant was under the influence of mental or emotional disturbance, defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was impaired, and defendant's age at the time of the murder. The remaining nonstatutory mitigating circumstances pertained to the abuse and neglect defendant suffered during childhood, defendant's good conduct during and since his arrest, defendant's amenability to rehabilitation, defendant's mental condition, and his minimal history of criminal activity.

Upon finding 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, the jury recommended a sentence of death.

JURY SELECTION ISSUES

Defendant first assigns error to the trial court's denial of his motion to prohibit the State from exercising peremptory challenges in a racially discriminatory manner. Defendant asserts that this denial, and the prosecutor's subsequent use of peremptory challenges in an allegedly discriminatory fashion, violated his rights to equal protection and trial by an impartial jury under the sixth, eighth, and fourteenth amendments of the United States Constitution and under article I, sections 19, 24, and 26 of the North Carolina Constitution. We address the equal protection claim first.

[1] Defendant was tried prior to *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), which established that a criminal defendant's right to equal protection of the laws includes a prohibition against the prosecutor's use of peremptory challenges to exclude persons from the jury solely on account of their race. *Batson* applies retroactively to cases pending on direct appeal at the time it was decided, *Griffith v. Kentucky*, 479 U.S. 314, 93 L. Ed. 2d 649 (1987), and thus applies to this case. The State asks that we consider the *Batson* issue procedurally barred because, although defendant filed a pretrial motion to prohibit the State from exercising its peremptory challenges in a racially discriminatory fashion, he did not object to the denial of the motion, nor did he object to the State's exercise of any specific peremptory challenge of a black juror, nor did he object generally at the conclusion of jury selection. Normally, these omissions would preclude consideration of this issue. N.C.G.S. § 15A-1446(a) (1988); *State v. Robbins*, 319 N.C. 465, 488,

356 S.E.2d 279, 293, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). However, as we stated in *Robbins*, "we find it difficult to hold that defendant has waived a right which he did not know existed at the time of trial. Moreover, where the defendant was, as here, on trial for his life, we ordinarily feel compelled to consider his argument." *Id.* In *Robbins*, defendant failed to raise the issue of discrimination in jury selection by objection or challenge; in the present case, defendant raised the issue initially by motion but failed to object to its denial. Defendant thus did more than the defendant in *Robbins* to alert the trial court to the issue, and we therefore elect to consider it. *See* N.C.G.S. § 15A-1446(b) (1988).

A criminal defendant may establish a prima facie case of invidious racial discrimination upon showing the following: first, that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove persons of defendant's race from the venire. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87. Defendant is black, as were eight members of the venire against whom the prosecutor exercised peremptory challenges.

> Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury, on account of their race.

Id. at 96, 90 L. Ed. 2d at 87-88 (citations omitted).

[2] In the present case, viewing the jury as originally impanelled,[2] the parties and the court examined seventy-nine venirepersons before impanelling twelve jurors and three alternates. The court called eighteen black citizens into the jury box and excused seven for cause. The court tendered eleven black citizens to the State. The State excused eight black venirepersons by exercising peremptory challenges and accepted three as jurors. The State excused six white citizens peremptorily. Defendant argues that

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2. One black juror was excused during the trial and replaced by a white alternate. A white juror was excused for medical reasons prior to trial and was replaced by a white alternate. The third alternate did not deliberate in the case.

this evidence establishes a prima facie case of racial discrimination in the State's exercise of its peremptory challenges. We disagree.

The State's questions during voir dire centered on two subjects: the prospective juror's feelings about capital punishment, and the age of the juror, or his or her children, as compared with defendant's age. Defendant was eighteen when the victim was killed and twenty at the time of trial. The State exercised five of its peremptory challenges to excuse white jurors with reservations about capital punishment. It exercised another peremptory challenge to excuse a white female who planned to leave on vacation in two weeks. In addition, a worker's compensation case involving the death of this woman's husband had been tried in the courtroom where the voir dire was conducted, and the woman found this circumstance emotionally trying.

Focusing on the State's use of peremptory challenges to remove black citizens from the venire, the record establishes that the State exercised peremptory challenges against two such citizens, John Stephens and Mildred Richardson, who harbored reservations about voting to impose a death sentence. Robert Jeffreys was excused after stating that he had three grown children and had served on a jury within the last three or four years. The State excused Milton Jones after he stated he had four children ranging in age from sixteen to twenty-one, and that he did not know whether it was his company's policy to pay employees for time spent on jury duty. The State excused Otis Ingram, a twenty-year-old black male, after asking if it would trouble Ingram that he was so close in age to defendant. Ingram said it would not, and the State thereafter excused him peremptorily. Gloria Nwafor worked with mentally retarded patients at Dorothea Dix. The State elicited from her that she had experience with schizophrenic and psychopathic patients, as well as with youth with drug and alcohol problems, before excusing her peremptorily. Norwood Peacock expressed "some doubt" about voting to impose the death penalty, and admitted that having three children whose ages were near that of defendant would bother him. Oscar Myers stated that he had six children living in New York. In considering whether he could vote to impose a sentence of death, Myers stated he "would have to go along with the majority of the jury."

In addition to the facts described above, we consider the following facts and circumstances relevant in discerning whether the record establishes a prima facie case of racial discrimination:

Three of the first four jurors seated were black. As in *Robbins*, the venirepersons were brought into the courtroom individually, so neither the State nor the defendant knew how many black citizens were present in the venire or whether a black or white citizen would be examined next. Both the victim and defendant were black, thus diminishing the likelihood that "racial issues [were] inextricably bound up with the conduct of the trial." *Robbins*, 319 N.C. at 491, 356 S.E.2d at 295. In arguing defendant's pretrial motion, counsel explained that the motion was in the nature of a motion in limine and was not meant to suggest that these prosecutors had a propensity toward racial discrimination. Counsel stated, "I have no reason to believe that Mr. Hart will do this because I have no record of his having done it in the past." This statement, coupled with the State's acceptance of black jurors for three of the first four seats, and viewed in the light of defendant's failure to object to any specific exercises of peremptory challenges by the State, do not raise an inference of racial discrimination. Defendant's failure to press forward with the *Batson* issue after initially raising it supports an inference that he failed to object, not out of ignorance of the substantive issue, but because he did not in fact believe the State was exercising its peremptories in a discriminatory manner.

Finally, we note that when the twelfth juror was seated, defendant had exercised only nine of his fourteen peremptory challenges. When defendant passed the second alternate and last juror who deliberated in the case, he had yet to exercise three of his remaining peremptory challenges. Defendant therefore has failed to demonstrate prejudice. *Robbins*, 319 N.C. at 495, 356 S.E.2d at 297. The relevant facts and circumstances in the record fail to establish a prima facie case of racial discrimination against black citizens during jury selection.

[3] We next address defendant's claim that the prosecutor's use of peremptory challenges against black citizens deprived him of his right to a trial by an impartial jury composed of a fair cross section of the community. The United States Supreme Court has refused to extend fair cross section principles to invalidate the use of either for-cause or peremptory challenges in petit jury selection, characterizing this refusal as "a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury . . . ." *Lockhart v. McCree*, 476 U.S. 162, 174, 90 L. Ed. 2d 137, 148 (1986). The sixth amendment protects defendants by requiring "the presence

of a fair cross section of the community on venires, panels, or lists *from which petit juries are drawn . . . .*" *Taylor v. Louisiana*, 419 U.S. 522, 526, 42 L. Ed. 2d 690, 696 (1975) (emphasis added). The United States Supreme Court has stated, however: "[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* at 538, 42 L. Ed. 2d at 703. We adhere to this reasoning, and we thus overrule this assignment of error insofar as it rests on this ground. *State v. Fullwood*, 323 N.C. 371, 382, 373 S.E.2d 518, 525 (1988).

[4] As a final ground, defendant asserts that the prosecutor's use of peremptory challenges violated article I, section 26 of the North Carolina Constitution, which provides: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." However, as discussed above under equal protection analysis, we are unable to conclude from the record that any of the black citizens in the venire were excluded from jury service on account of their race. Defendant therefore has failed to establish a state constitutional violation. This assignment of error is overruled.

[5] Defendant next argues that the trial court abused its discretion in sustaining the prosecutor's objection to the following question asked of a single prospective juror: "Would the fact that the defendant had no significant history of any criminal record, would that be something that you would consider important in determining whether or not to impose the death penalty?" No evidence of defendant's criminal history had been introduced at this point. The question therefore was hypothetical and the trial court properly could view it as an impermissible attempt to indoctrinate a prospective juror regarding the existence of a mitigating circumstance. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989); *State v. Avery*, 315 N.C. 1, 20, 337 S.E.2d 786, 797 (1985). Defendant has shown no abuse of discretion. This assignment of error is without merit.

[6] Defendant contends that the trial court erred in excusing two jurors for cause because of their views on capital punishment, thereby denying defendant his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution. The standard for determining when a potential juror may be excluded for

cause because of his views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The Court emphasized in *Wainwright* that the standard

> does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26, 83 L. Ed. 2d at 852-53.

The transcript reveals that Leon Newkirk, the first juror, stated that he did not believe in capital punishment. In response to the prosecutor's question whether he would "be unable to vote to recommend the death penalty under any circumstances," he responded affirmatively. In response to the question, "[N]o matter how much evidence the State presented to try to show you how bad a murder was, how aggravated it was, but never would you go back into that jury room and vote to recommend the death penalty," Mr. Newkirk responded, "It depends on how, you know, how, how it was. How it happened and everything. The evidence." The prosecutor again asked him whether he could vote to impose the death penalty, and he responded, "Okay, no." Mr. Newkirk then agreed to the prosecutor's suggestion that he would be unable "to be a fair and impartial juror in the trial stage where we determine the guilt or innocence of the defendant." On rehabilitative questioning by defendant, Mr. Newkirk agreed with counsel's suggestion that he did not "have a problem with [following instructions]

on guilt or innocence." He then agreed that he could "consider all of the aggravating factors that are presented . . . and consider all the mitigating factors." When asked whether he could set aside his personal biases, Mr. Newkirk responded, "I have to stick with my beliefs, my personal beliefs."

Francis McFarland, the second juror, stated from the outset that he would be unable to vote to recommend a death sentence, though he did not believe his views would impair his ability to sit as a juror during the guilt phase of the trial. He agreed that his beliefs would significantly impair his ability to perform the functions of a juror and that "no matter how bad the murder would be or how bad the defendant was," under no circumstances would he ever vote to impose the death penalty. He stated he did not want to be put in the position of having to vote for a death sentence if the State met its burden of proof during the sentencing phase. Under rehabilitative questioning, Mr. McFarland reiterated several times that he would automatically favor a life sentence. Defense counsel then asked:

> Q: In other words, if you even follow the law, you could find some way to avoid the death penalty. Is that a fair statement?
>
> A: Not necessarily. That's a problem with me.
>
> Q: Okay.
>
> A: If the law, if all the parts of those three points are within the law—
>
> Q: Right.
>
> A: —and they point directly to the death penalty, I would have to follow the death penalty, but that would be something that would be against my subjective decision.

The questioning continued in this vein, with Mr. McFarland stating, "I'd have to follow the law but I wouldn't like it at all," and that he was still unsure whether he could vote to impose the death sentence. Finally, the trial court asked Mr. McFarland: "[D]o you feel that [your own personal views about capital punishment] would prevent or substantially impair the performance of your duties as a juror in accordance with your instructions and your oath?" Mr. McFarland responded, "I think it would if it came to that point where I had to make that decision."

The conflicting answers given by these prospective jurors illustrate clearly the United States Supreme Court's conclusion that a prospective juror's bias may, in some instances, not be provable with unmistakable clarity. In such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially. Mr. Newkirk stated at various times that he did not believe in the death penalty, could not vote to impose it, and could not act as an impartial juror in the guilt phase. Mr. McFarland's answers reveal that he wanted to follow the law, but thought his views on capital punishment would interfere with the performance of his duties during the sentencing phase. The trial court did not err in excusing either man for cause because neither could affirmatively agree to follow the law in carrying out his duties as a juror. N.C.G.S. § 15A-1212(8) (1988); *State v. Brown*, 320 N.C. 179, 189-90, 358 S.E.2d 1, 10, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). This assignment of error is overruled.

[7] Defendant next argues that the prosecutor's use of peremptory challenges to exclude potential jurors expressing reservations about capital punishment violated his constitutional rights. Defendant recognizes that this issue has been decided adversely to his position, *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), but asks this Court to reconsider its position in light of *Brown v. Rice*, 693 F. Supp. 381 (W.D.N.C. 1988). We decline this invitation, as we continue to adhere to the view expressed by Justice O'Connor in her concurrence to the denial of certiorari in *Brown v. North Carolina*, 479 U.S. 940, 93 L. Ed. 2d 373 (1986) (O'Connor, J., concurring). She wrote:

> *Batson* does not touch, indeed, it clearly reaffirms . . . the ordinary rule that a prosecutor may exercise his peremptory strikes for any reason at all. . . . It is central to *Batson* that a "person's race simply 'is unrelated to his fitness as a juror.' " . . . There is no basis for declaring that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding.

Id. at 941, 93 L. Ed. 2d at 374 (citations omitted) (quoted in part in *Robbins*, 319 N.C. at 494, 356 S.E.2d at 296-97). Accordingly, we overrule this assignment of error.

[8] Defendant next contends that the trial court committed plain error by failing to intervene, absent objection by defendant, in

response to a question asked by the prosecutor. The prosecutor asked Judy Richardson whether she could vote to recommend the death penalty "even knowing your decision would mean that the defendant might eventually be put to death?" Defendant argues that the wording of this question impermissibly suggested to the juror that a sentence of death might not be carried out, thus diminishing the juror's sense of personal responsibility for the decision whether to execute defendant. However, the cases defendant cites in support of his position are inapposite. *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985), and *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979), both involve sentencing proceeding arguments in which the prosecutor informed the jury that death penalty cases are reviewed automatically by an appellate court. In *State v. Dockery*, 238 N.C. 222, 226, 77 S.E.2d 664, 667 (1953), also cited by defendant, the prosecutor argued to the jury, "There is no such thing as life imprisonment in North Carolina today." None of these cases address the propriety of a single voir dire question, which is the issue here. In any event, defendant can demonstrate no prejudice because Ms. Richardson did not participate in the deliberations in this case, but was excused during the trial due to the illness of her child. Voir dire was conducted individually, so no juror other than Ms. Richardson heard the allegedly impermissible question. We can perceive no plain error and no prejudice to defendant from the asking of this question.

[9] Defendant next argues that the trial court erred in removing a prospective juror for cause based on his opposition to capital punishment on religious grounds. Paul Dunn stated that based on the teachings of the Catholic Church, he would be unable to follow the law and consider voting to impose a death penalty no matter what circumstances the case encompassed. This conviction clearly mandated his removal for cause under the *Wainwright* test discussed above. Nevertheless, defendant argues that because the venireman's opposition to the death penalty stemmed from his religious beliefs, his exclusion from the jury violated constitutional principles regarding the free exercise of religion and the right to serve as a juror regardless of one's religion. U.S. Const. amend. I; N.C. Const. art. I, § 26. We disagree. The transcript establishes beyond peradventure that Dunn was excused, not because of his choice of religion, but because of his inability to follow the law. The fact that the prospective juror's religion provided the basis

for his views did not alter the propriety of excluding him for cause. We find no merit in this assignment of error.

GUILT PHASE ISSUES

Defendant assigns error to the trial court's communication with a juror outside the presence of defendant and to the court's subsequent removal of that juror. After the prosecution had presented all its evidence and the attorneys had completed their closing arguments, court recessed for the evening. The next morning, prior to court reconvening, juror Judy Richardson telephoned the jury pool room clerk to say that her child was ill and she had no child care available for the day. The clerk gave this message to the judge. The judge conferred with counsel, then telephoned the juror from his chambers in the presence of the attorneys for both the defendant and the State. The juror explained that her son had a severe case of poison ivy which prohibited him from attending school, and that she had no one to stay with him that day. The judge asked her to try to find child care and told her he would call back in thirty minutes. He did so, again in the presence of counsel, and the juror stated that she was unable to find anyone to stay with the child. The judge then recapitulated the foregoing events for the record, stating his intention to replace the juror with an alternate, and invited defendant to make his objections.

Defendant moved for a recess of one day to allow the sitting juror to find child care. He emphasized that, during selection of the alternates, his peremptory challenges were nearing exhaustion, and he was unable to scrutinize prospective jurors to the same extent that he had when he passed the sitting juror, who was the first juror picked for the case. Defendant also voiced concern that excusing the sitting juror increased the chance that the third alternate, accepted over his objection after he had exhausted his peremptory challenges, might actually deliberate in the case (he did not in fact deliberate).

The judge denied defendant's motion, stating that the trial had been going on since 7 October, it then being 31 October, and he was

> not inclined to send fourteen jurors back home today without doing anything. We have an alternate available and we have a statutory procedure that provides for this. . . . [The juror] herself stated to me that she has concern that she would be

able to keep her mind on her duty today and I am not going to recess this trial until tomorrow morning to see what the situation is at that time. The child could be worse tomorrow morning for all I know.

[10] We first must determine whether the trial court erred in communicating with the juror by telephone, in the presence of counsel, but outside the presence of defendant. Defendant's constitutional right to confront the witnesses against him dictates that he be present at every stage of his trial; in a capital trial, this right may not be waived. *State v. Huff*, 325 N.C. 1, 30-31, 381 S.E.2d 635, 651 (1989). "[T]his constitutional requirement of defendant's presence at his capital trial protects not only the defendant, but public interests as well . . . . The requirement . . . protects the integrity of the system by preserving the appearance of fairness and by optimizing the conditions for finding the truth." *Id.* at 30, 381 S.E.2d at 651. Assuming the telephone conversation with the juror is properly denominated as a stage of defendant's trial, the trial court had a duty to insure defendant's presence. *Id.* at 30-31, 381 S.E.2d at 651. The error, if any, is subject to harmless error analysis, however. *Id.* at 32, 381 S.E.2d at 653. We hold that if it was error, defendant's absence during the telephone conversations was harmless beyond a reasonable doubt. Defendant's counsel was present during both calls. The judge reiterated for the record the content of the calls. These facts assuage our concern for "optimizing the conditions for finding truth." *Id.* at 30, 381 S.E.2d at 651. Unlike in *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987), defendant's absence did not come at a critical stage in the case when his presence "could have had a reasonably substantial relation to his ability to present a full defense." *Payne*, 320 N.C. at 139, 357 S.E.2d at 612. The juror with whom the judge communicated outside defendant's presence did not deliberate in defendant's case, so any untoward influence resulting from defendant's absence could not have been conveyed to the remaining jurors during deliberations, but was confined to that juror. Because the incident took place in the judge's chambers, the appearance of fairness was not impermissibly compromised. As a practical matter, the trial judge showed commendable concern for safeguarding the integrity of the system and the appearance of fairness by taking the call after consulting with counsel and in the presence of counsel. His failure to insure defendant's presence may be regarded as an example of the "virtually inevitable presence of immaterial er-

ror" which does not require reversal on appeal. *Huff*, 325 N.C. at 32, 381 S.E.2d at 653 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 89 L. Ed. 2d 674, 685 (1986)).

[11] We next consider whether the trial court abused its discretion in removing the juror and replacing her with an alternate. A defendant "is not entitled to a jury of his choice and has no vested right to any particular juror." *State v. McKenna*, 289 N.C. 668, 681, 224 S.E.2d 537, 546 (juror excused peremptorily after being accepted but before jury impanelled), *vacated on other grounds*, 429 U.S. 912, 50 L. Ed. 2d 278 (1976). The trial court's discretion in supervising the jury continues beyond jury selection and extends to decisions to excuse a juror and substitute an alternate. *State v. Nelson*, 298 N.C. 573, 593, 260 S.E.2d 629, 644 (1979) (juror replaced because could not appear on Saturday), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). "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." *Id.* (quoted in *State v. Allen*, 323 N.C. 208, 224, 372 S.E.2d 855, 864 (1988)). We ascertain no abuse of discretion in the judge's decision to replace a juror who had child care problems. This assignment of error is overruled.

[12] Defendant next maintains that the trial court erred in denying his motion to dismiss the charge of first-degree murder, as the evidence was insufficient to allow a reasonable inference of premeditation and deliberation culminating in a specific intent to kill. When the State relies on a theory of premeditation and deliberation for first-degree murder, it must prove as necessary elements of the crime that defendant premeditated and deliberated before killing the victim. *State v. Vaughn*, 324 N.C. 301, 305, 377 S.E.2d 738, 740 (1989). Premeditation means that the defendant thought out the act beforehand for some length of time, however short. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). "Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation." *Id.* "Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *Id.* Among other circumstances to be considered in determining

whether a defendant acted after premeditation and deliberation are lack of provocation by the victim, the dealing of lethal blows after the deceased has been felled, evidence that the killing was done in a brutal manner, and the nature and number of the victim's wounds. *Id.*

In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference from the evidence. *Id.* at 22, 343 S.E.2d at 827. The evidence in this case allows a reasonable inference that defendant premeditated and deliberated before killing the victim. The victim was in a weakened condition prior to her death. A woman's voice was heard calling out in distress from the vicinity of her apartment. The victim was killed by manual strangulation, compounded by blunt traumatic blows causing extensive injury to her internal organs. She was found lying on her back on the floor. Spermatozoa were found in her vagina and rectum. Defendant was examined following his arrest, the day after the murder, for bruises, scratches, or other indications that he had been in a fight; none were discovered. Defendant sold the victim's radio and ring for a total of three dollars within a few hours of the murder. This circumstantial evidence allows a reasonable inference that defendant targeted a vulnerable victim, felled her with blows, assaulted her sexually, and manually strangled her until she died. The trial court did not err in denying defendant's motion to dismiss, and this assignment of error is accordingly overruled.

[13] In a related assignment of error, defendant contends that the trial court's charge to the jury regarding proof from which premeditation and deliberation may be inferred contained examples unsupported by the evidence. The trial court gave the following instruction after defining premeditation and deliberation:

> Neither premeditation or deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the lack of provocation by the victim, conduct of the defendant before, during and after the killing, any use of grossly excessive force, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing, and the manner in which or means by which the killing was done.

The trial court did not err in so instructing, as the evidence supported each of the examples given. Evidence of lack of provocation included the victim's weakened condition and defendant's physical integrity on examination. Defendant's conduct in leaving the scene of the assault and callously selling the victim's personal belongings constitutes evidence from which premeditation can be inferred. As discussed above, the nature and extent of the victim's injuries speak to the remaining factors listed in the jury charge. We overrule this assignment of error.

[14] Defendant assigns error to the trial court's denial of his motion to dismiss the charge of common-law robbery. Defendant's argument under this assignment of error, if successful, would apply with equal force to the State's reliance on common-law robbery as the predicate felony for defendant's felony-murder conviction. Because we find defendant's argument unpersuasive, we overrule both assignments of error.

To withstand a motion to dismiss a common-law robbery charge, the State must offer substantial evidence that the defendant feloniously took money or goods of any value from the person of another, or in the presence of that person, against that person's will, by violence or putting the person in fear. *See State v. Norris*, 264 N.C. 470, 472, 141 S.E.2d 869, 871 (1965). Defendant maintains that the evidence suggests that any items taken from the victim's apartment were taken as an afterthought following the murder; thus, the element of violence or "putting in fear" is unsupported by the evidence. Defendant compares this case to *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980), in which this Court reversed a conviction of robbery with a dangerous weapon. We stated: "The gist of the offense is not the taking but the taking by force or putting in fear. . . . We believe that even construing the evidence in a light most favorable to the State, it indicates only that defendant took the objects as an afterthought once the victim had died." *Powell*, 299 N.C. at 102, 261 S.E.2d at 119.

We noted in *Powell* that the evidence showed the "house had not been ransacked, but was neat and clean." *Id.* at 97, 261 S.E.2d at 116. Here, by contrast, the testimony established that the victim's apartment was "a mess" and "in total disarray." The victim usually kept her apartment neat and clean rather than in the state seen by the investigating officers. This evidence distinguishes the present case from *Powell* and negates defendant's suggestion that

he merely picked up a few objects as afterthoughts. Instead, the evidence permits a reasonable inference that defendant engaged in a purposeful search of the victim's apartment, at least some part of which occurred in her presence against her will and by putting her in fear, culminating in removal of the radio and ring.

There was sufficient evidence to support each element of common-law robbery. Items of some value, to wit a ring and a radio, were taken from the victim's apartment near the time of her murder. The force used to threaten the victim, or place her in fear, was such that ultimately she died from it. A homicide victim is still a "person" within the meaning of the statutory definition of armed robbery so long as "the death and the taking are so connected as to form a continuous chain of events . . . ." *State v. Fields*, 315 N.C. 191, 202, 337 S.E.2d 518, 525 (1985). The same rule must hold for common-law robbery.

[15] In a related argument, defendant asks us to find plain error in the trial court's failure to instruct the jury on misdemeanor larceny, a lesser-included offense of robbery. Defendant neither objected to this omission at trial nor assigned error to it while preparing the record on appeal. We discern no plain error in the trial court's choice of instructions because the evidence was insufficient to support the offense of misdemeanor larceny. Defendant's plea of not guilty to the robbery charge will not suffice to negate the State's evidence supporting the element of force or violence in the perpetration of the robbery. The condition of the apartment, coupled with the evidence of violent force displayed by the victim's body, suggest that a robbery, not a larceny, was committed. Absent affirmative evidence that defendant took the victim's belongings only as an afterthought, and that the violence committed against her served no intimidating purpose, defendant was not entitled to an instruction on misdemeanor larceny. *See State v. Zuniga*, 320 N.C. 233, 261, 357 S.E.2d 898, 916 (plea of not guilty, standing alone, insufficient to negate evidence of premeditation and deliberation; defendant not entitled to second-degree murder instruction), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

SENTENCING PHASE

[16] Following a capital sentencing hearing, the jury found the following aggravating circumstances: defendant was engaged in the commission of common-law robbery, N.C.G.S. § 15A-2000(e)(5); the murder was committed for pecuniary gain, N.C.G.S.

§ 15A-2000(e)(6); and the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). We previously have held that submission of both (e)(5) and (e)(6) in aggravation is redundant, and therefore comprises error, when the evidence shows the supporting robbery in fact was committed for the purpose of pecuniary gain, as compared with one committed for another motive. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 453 (1987).[3] Because all the evidence in this case suggests that defendant committed the robbery for pecuniary gain, *i.e.*, to resell the ring and radio for cash, we hold that submission of both (e)(5) and (e)(6) in aggravation was duplicative and constituted error.

The question remains whether submission of the duplicative (e)(6) factor constituted prejudicial error.

> When there is "a *reasonable possibility* that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify imposition of the death penalty," the test for prejudicial error has been met.

Id. at 240, 354 S.E.2d at 453 (quoting *State v. Irwin*, 304 N.C. 93, 107, 282 S.E.2d 439, 449 (1981) (emphasis in original)). The jury here found twenty-five mitigating circumstances, among them the following four statutory mitigating circumstances: defendant had no significant history of prior criminal activity, the murder was committed while defendant was under the influence of mental or emotional disturbance, defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was impaired, and defendant's age at the time of the murder. Jury deliberations regarding sentencing lasted two full days, indicating that the jury did not reach a unanimous recommendation of a sentence of death easily. We thus cannot conclude that there is no reasonable possibility that the erroneous submission of a duplicative aggravating circumstance affected the jury's sentencing recommendation. Accordingly, we set aside the sentence of death and remand for a new capital sentencing hearing. We thus need not address defendant's remaining sentencing phase assignments of error relating to the murder charge.

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3. We note that this case was tried before we decided *Quesinberry*, and the opinion in that case thus was not available to the trial court here.

[17] As a final assignment of error, defendant asserts that prejudicial error occurred during the sentencing for the common-law robbery conviction. In imposing the maximum ten-year sentence for common-law robbery, the trial court found as discrete aggravating factors that the victim was very old and that she was physically infirm. Defendant argues that the victim's physical infirmity was the sole evidence supporting both aggravating factors, in violation of N.C.G.S. § 15A-1340.4(a), which prohibits use of the same evidence to prove more than one factor in aggravation. We disagree. The vulnerability accompanying advanced age is not caused by physical disability alone, but encompasses the slowing of reflexes and lessening acuity of senses which render older citizens relatively defenseless against predators looking for unprotected targets. We have said:

> A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. . . . "*[V]ulnerability* is clearly the concern addressed by this factor [of the victim's age]."

State v. Hines, 314 N.C. 522, 525-26, 335 S.E.2d 6, 8 (1985) (quoting *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983) (emphasis in original)). The evidence established that the seventy-year-old victim lived alone in an apartment building for the elderly. Defendant knew the victim well, and thus was in a position to assess her vulnerability. This evidence, discrete from that of the victim's physical infirmity, supports the aggravation of the robbery by virtue of the victim's age.

First Degree Murder: Guilt Phase, no error;

Sentencing Phase, new hearing.

Common-law Robbery: no error.

Justice MARTIN dissenting in part.

I remain convinced that the dissent in *State v. Quesinberry*, 319 N.C. 228, 241, 354 S.E. 2d 446, 454 (1987) with respect to the

sentencing issue is a correct statement of the law and therefore dissent from that part of the majority opinion awarding defendant a new sentencing hearing. I concur in the remainder of the opinion.

Justices MEYER and MITCHELL join in this dissenting opinion.

MADISON CABLEVISION, INC. v. CITY OF MORGANTON, NORTH CAROLINA

No. 624PA87

(Filed 7 December 1989)

1. **Taxation § 7 (NCI3d)— public purpose—determination by Supreme Court**

While a legislative determination that an activity or enterprise is for a public purpose is entitled to great weight, the ultimate responsibility for the public purpose determination rests with the Supreme Court.

Am Jur 2d, State and Local Taxation §§ 56-58.

2. **Taxation § 7.1 (NCI3d)— public purpose test**

In order for a particular undertaking by a municipality to be for a public purpose, (1) it must involve a reasonable connection with the convenience and necessity of the particular municipality; and (2) it must benefit the public generally as opposed to special interests or persons. The inability or unwillingness of private enterprise to provide the challenged service is not part of the public purpose test.

Am Jur 2d, State and Local Taxation §§ 42, 44, 47.

3. **Municipal Corporations § 23 (NCI3d); Taxation § 7.2 (NCI3d)— cable television system—ownership and operation by city—public purpose**

Provisions of G.S. chapter 160A, article 16, part 1 which authorize cities to finance, acquire, construct, own, and operate a cable television system do not violate the "public purpose" clause of Art. V, § 2(1) of the N. C. Constitution.

Am Jur 2d, Telecommunications § 2.

4. Constitutional Law § 19 (NCI3d); Monopolies § 2 (NCI3d); Municipal Corporations § 23 (NCI3d)— cable television system—ownership and operation by city—no unconstitutional monopoly

A city's decision to establish a municipal cable television system and to decline to grant cable television franchises to other applicants does not establish a monopoly in violation of Art. I, § 34 of the N. C. Constitution.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 472; Telecommunications § 11.

5. Constitutional Law § 19 (NCI3d); Municipal Corporations § 23 (NCI3d)— cable television system—ownership and operation by city—no exclusive emolument

A city's decision to establish a municipal cable television system and to decline to grant cable television franchises to other applicants does not violate the exclusive emoluments clause of Art. I, § 32 of the N. C. Constitution because (1) the prohibition of this section contemplates a grant by "the community" to others, and a city needs no grant from itself to exercise legislatively authorized powers to operate a public enterprise, and (2) a municipal corporation by definition falls within the exception for corporations providing "public services" and thus cannot violate the provisions of Art. I, § 32.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 472; Telecommunications § 11.

6. Municipal Corporations § 23 (NCI3d); Unfair Competition § 1 (NCI3d)— cable television system—ownership and operation by city—no unfair trade practice

Municipal ownership and operation of a cable television system do not violate the antimonopoly or unfair trade practices provisions of G.S. chapter 75 since the powers conferred upon cities by the North Carolina General Statutes with respect to the provision and franchising of cable television service clearly contemplate that competition may be displaced with respect to this service, and the antitrust provisions of chapter 75 will not be applied to municipalities performing functions delegated to them by the legislature.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 472; Telecommunications § 11.

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of a judgment entered on 6 July 1987 by *Gaines, J.*, in the Superior Court, BURKE County, granting summary judgment for the defendant, City of Morganton. Heard in the Supreme Court 11 May 1988.

Tharrington, Smith & Hargrove, by Wade H. Hargrove, Randall M. Roden, and Michael Crowell, for plaintiff-appellant.

Mitchell, Blackwell, Mitchell & Smith, P.A., by Thomas G. Smith; Settlemyer & Hodges, by Steve B. Settlemyer; and Spiegel & McDiarmid, by Joseph Van Eaton and Barbara S. Esbin, for defendant-appellant.

North Carolina League of Municipalities, by S. Ellis Hankins, General Counsel, amicus curiae.

Adams, McCullough & Beard, by Hugh Stevens, for the North Carolina Press Association, the North Carolina Association of Broadcasters, and the North Carolina CATV Association, amici curiae.

MEYER, Justice.

The posture of this case is somewhat unusual in that the issues presented on appeal to this Court are intermeshed with other issues yet to be decided in an action pending in the United States District Court for the Western District of North Carolina. We thus discuss the posture of the case at some length. The only issues presented to this Court for decision in this case are as follows: (1) whether the provisions of chapter 160A, article 16, part 1 of the North Carolina General Statutes which authorize cities to finance, acquire, construct, own, and operate a cable television system violate the "public purpose clause" of the North Carolina Constitution, article V, section 2(1); and (2) whether the City of Morganton's refusal to grant cable television franchises to private applicants, including the plaintiff, and its decision to build and operate a municipal cable system violate the exclusive emoluments and monopoly clauses of the North Carolina Constitution, article I, sections 32 and 34, or the antimonopoly and unfair trade practices provisions of chapter 75 of the North Carolina General Statutes. We answer both issues in the negative and affirm the entry of summary judgment for the defendant City.

Madison Cablevision, Inc. (hereinafter "Madison Cable"), is a privately owned company currently providing cable television serv-

ice in the City of Morganton pursuant to a twenty-year franchise which expired in October 1986 and which the City has not renewed. Madison Cable continues to provide service pending the outcome of litigation. Madison Cable initially filed an action in the United States District Court for the Western District of North Carolina asserting twelve claims for relief from the actions of the City in refusing to renew Madison Cable's expired franchise or to grant a franchise to any private company, including the plaintiff, and in planning the establishment of a municipally owned and operated cable television system. While the record on appeal before this Court does not contain a copy of the complaint filed in the United States District Court, we learn from an abstention Memorandum and Order entered in that case by United States District Court Judge Woodrow W. Jones on 3 July 1986 that the twelve claims asserted in the federal action sought relief under both federal and state law. The first claim for relief is for a declaratory judgment that Madison Cable's request for franchise renewal is governed by the Cable Communications Policy Act of 1984 (hereinafter "Cable Act"), 47 U.S.C.A. § 546 (West 1984), which provides procedures to be followed by cities for renewal of cable franchises and further provides that denial of an application for renewal shall be made upon adverse findings with respect to certain enumerated factors. The second claim for relief is for judicial review of the City's decision not to renew Madison Cable's franchise pursuant to the Cable Act, 47 U.S.C.A. §§ 546, 555 (West 1984). In its third claim for relief, Madison Cable alleges that rights of freedom of the press and speech guaranteed to it by the United States Constitution and the North Carolina Constitution have been violated. In its fourth claim for relief, Madison Cable alleges a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. Its fifth claim for relief alleges confiscation of property without due process of law in violation of the fifth and fourteenth amendments to the United States Constitution. The sixth and seventh claims for relief allege, respectively, attempted monopolization in violation of section 2 of the Sherman Act, 15 U.S.C.A. § 2 (West 1974), and violation of article I, sections 32 and 34 of the North Carolina Constitution and the monopoly and antitrust laws of North Carolina, N.C.G.S. ch. 75 (1985). The eighth claim for relief alleges deprivation of Madison Cable's constitutional rights in violation of the Civil Rights Act, 42 U.S.C.A. § 1983 (West 1979). In its ninth and tenth claims for relief, Madison Cable alleges common law claims of interference with contractual rela-

tions and breach of contract. The eleventh claim for relief alleges violation of the public purpose requirement of the North Carolina Constitution, article V, section 2(1). In its twelfth claim for relief, Madison Cable alleges that the City's option to purchase the franchisee's cable system at the expiration of the franchise is an unconstitutional, and therefore unenforceable, provision of the franchise agreement.

Defendant City of Morganton (hereinafter "City") filed an answer and a motion for summary judgment. Following submission of briefs and oral argument, United States District Court Judge Woodrow Jones dismissed the first two claims relating to the franchise renewal provisions of the federal Cable Act on the basis that the Act was not applicable because of the effective date of the Act and ruled that he should retain jurisdiction but abstain from deciding Madison Cable's federal claims pending submission of certain nonfederal claims to the courts of the State of North Carolina. Plaintiff was ordered to file its complaint in state court forthwith.

Pursuant to and consistent with Judge Jones' abstention order, Madison Cable filed a complaint in the Superior Court of Burke County, invoking in its prayer for relief only the public purpose and antimonopoly provisions of the North Carolina Constitution and the unfair trade practices provisions of chapter 75 of the North Carolina General Statutes. The City filed its answer to the complaint and also filed a motion for summary judgment as to both claims. Madison Cable filed an "Opposition" with supporting affidavits and its own motion for summary judgment. After arguments on the motions, Judge Gaines ultimately denied plaintiff's motion for summary judgment and granted summary judgment for the defendant City. Plaintiff appealed that order to the Court of Appeals, and this Court allowed defendant's bypass motion on 18 December 1987.

With that statement of the posture of the case, we now move to a statement of the facts on which the issues are to be determined.

As is the case in numerous other North Carolina cities, community antenna television (CATV) service has been provided in the City of Morganton pursuant to a nonexclusive, limited term franchise, subject to a number of public service requirements. The franchise granted Madison Cable the right for a period of twenty years to place wires and appurtenances in the public rights-of-way, but also required Madison Cable, upon termination of the franchise,

to remove its facilities and restore public places to their original condition. The franchise agreement did not give Madison Cable any right to renewal and gave the City an option to purchase the system at the end of the franchise term. The franchise expired in October 1986, but service continues pending the outcome of litigation. Subscribers to plaintiff's service pay a monthly fee based on the level of service selected. A choice of twenty-seven different channels of television programming are presently offered, including the three broadcast networks; independent television stations; news, sports, movie, informational, and entertainment channels, including some pay channels; and commercial advertising services. No studio or cable channel is provided for public origination of local television programming. Such service was available during the early period of the franchise but was discontinued because it was not used by the public.

Because of the approaching 1986 termination date of the twenty-year franchise and because the franchise provided no right of renewal and contained no provisions regarding procedures for renewal, the City in late 1983 began to gather information and develop procedures for the purpose of making a rational decision as to the future of cable television in Morganton. In December 1983, Madison Cable submitted a proposal to the City for renewal of its franchise. The proposal was denied. The City engaged the services of an independent consulting firm and a Washington, D.C., law firm to assist it in its studies. The consulting firm made three studies relating to (1) an analysis of comparable cable system offerings, (2) local communication needs, and (3) the feasibility of a municipal cable system. These studies, which were made available for public inspection, concluded in effect that the cable system then existing in the city was inadequate, that the city needed a modern cable communications system, and that a city-owned and operated system was feasible.

After reviewing the studies, the City of Morganton, on 24 September 1984, issued a request for information ("RFI") to the general public and provided copies to three private cable companies—Madison Cable, Burke Cable Company, Ltd. ("Burke"), and Catawba Valley Cable TV ("Catawba")—which had expressed an interest in providing cable service to the City. The RFI stated that a public hearing would be held on 14 November 1984 for the purposes of:

(a) determining whether the franchise then held by Madison should be renewed;

(b) determining whether other private cable companies were interested in and capable of providing cable service in Morganton;

(c) determining whether Morganton should establish a municipal cable system;

(d) determining whether there was any interest in an overbuild of the cable system then existing in the City; and

(e) determining whether more than one cable system in the City was practical.

The RFI invited comments on the local communication needs study and the feasibility of a municipal system study. Additionally, each responding cable company was invited to submit a proposal describing the cable system it proposed for the City and why such system proposed would be appropriate for Morganton. Madison Cable, Burke, and Catawba all responded to the RFI on 26 October 1984. The public hearing was held as scheduled on 14 November 1984. At the hearing, the cable companies and the public were given an opportunity to present evidence and question the City's consultants. City employees, the president of Rice Associates, and the manager of a municipally owned cable system in Shrewsbury, Massachusetts, also spoke at the hearing. The cable companies were given an opportunity to submit additional evidence after the close of the hearing to respond to issues raised at the hearing and to raise any additional questions.

Madison Cable participated actively in the proceedings. In addition to its response to the RFI, Madison Cable presented prepared statements at the hearing, asked questions of City witnesses, and also provided additional information for the record after the hearing.

Based on the over 1,200-page record developed in this matter, the City Council adopted an ordinance (number 85-58, entitled "The Cable Ordinance of 1985") on 9 September 1985, declining to renew Madison Cable's franchise. The City Council concluded that:

1. [Madison's] franchise should not be renewed. Within 90 days of this Order [Madison] should submit a plan for orderly removal of its equipment from City poles at the end of the franchise term.

2. Burke and Catawba will not at this time be granted franchises for the City of Morganton.

3. The City Staff should begin the steps necessary to enable the City to establish a municipal system.

Should any operator desire to seek a franchise in the future, the Council does not foreclose that possibility. The Council will itself review the overbuild situation again in five years. However, the Council finds that there is little reason to further pursue private ownership options in Morganton at this time.

The Cable Ordinance of 1985 (number 85-58) incorporated a nineteen-page "Opinion of the City Council of Morganton Regarding Cable Television" with its accompanying sixty-six-page appendix. The opinion provides the detailed bases for each of the conclusions reached in Ordinance 85-58 referred to above.

It was as a result of Ordinance 85-58 that Madison Cable brought the action in the United States District Court which resulted in Judge Jones' Memorandum and Order of 3 July 1986 staying the proceedings in that court pending resolution of these state court proceedings.

We note at the outset that apparently among Madison Cable's claims for relief in the action in the United States District Court there was an allegation that rights guaranteed to Madison Cable by the Constitution of North Carolina, article I, section 14, were violated. That section of the state Constitution provides: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse."

As previously noted, the record on appeal does not contain a copy of the complaint filed in the federal suit. Judge Jones' abstention Memorandum and Order dated 3 July 1986 does, however, reflect that "[i]n its third claim for relief Madison alleges violation of rights guaranteed by . . . Article I, Section 14 of the North Carolina Constitution." Whether Judge Jones intended that Madison Cable should attempt to resolve that issue in this state court action is unclear. The City of Morganton contends with substantial persuasion that Judge Jones retained this state issue raised in the federal complaint. Madison Cable, in paragraph 12 of its complaint in this state action, refers to its existing cable television system as "a

medium of expression entitled to the rights and protections of . . . Article I, Section 14 of the North Carolina Constitution" but does not allege in any manner that any such "rights and protections" under this section were violated. In its prayer for relief, Madison Cable does not refer to that section of our Constitution but simply asks the Court to adjudge and declare Morganton's actions to be a violation of the "public purpose," the antimonopoly, and the "exclusive emoluments and privileges" provisions of our state Constitution as well as the unfair trade practices provisions of our General Statutes and further to enjoin Morganton from operating a municipal cable system and from excluding Madison Cable from providing cable service in Morganton. Not only is a violation of article I, section 14 not specifically alleged, it is not presented or argued as a separate issue in Madison Cable's brief. Nor is it addressed in appellee's brief. Plaintiff's brief is devoted to presenting the public purpose, exclusive emoluments, and monopoly constitutional issues and the unfair trade practices statutory issue. While Madison Cable does repeatedly refer in its brief before this Court to article I, section 14, in its arguments concerning the public purpose and monopoly issues, this does not present the issue of what rights, if any, plaintiff has under that section of our Constitution or whether any such rights were violated. Rule 28 of our Rules of Appellate Procedure requires that the brief "define clearly the questions presented to the reviewing court" and states that "[r]eview is limited to questions so presented." N.C.R. App. P. 28(a). No analysis of our state Constitution's guarantees of free expression is necessary to a determination of the issues presented on this appeal, that is, whether the establishment of a municipally operated cable television system violates the public purpose clause or the exclusive emoluments and privileges clause of our state Constitution or our statutes prohibiting unfair trade practices. Because a violation of article I, section 14 is not specifically alleged or separately briefed by the litigants, we do not address the question.

In determining whether the trial judge erred in granting summary judgment in favor of the City of Morganton, we address the two issues brought forward on this appeal. As previously noted, they are: (1) whether the provisions of chapter 160A, article 16, part 1 of the North Carolina General Statutes which authorize cities to finance, acquire, construct, own, and operate a cable television system violate the "public purpose" clause of the North Carolina

Constitution, article V, section 2(1); and (2) whether the City of Morganton's refusal to grant cable television franchises to private applicants, including Madison Cable, violates the exclusive emoluments and monopoly clauses of the North Carolina Constitution, article I, sections 32 and 34, or the antimonopoly and unfair trade practices provisions of North Carolina General Statutes chapter 75. We answer both issues in the negative and affirm the entry of summary judgment for the defendant City.

I.

Madison Cable contends first that the statutes allowing cities to own and operate cable television systems violate the public purpose provisions of our state Constitution. We disagree.

Article V, section 2(1) of our state Constitution provides: "The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away." Although the constitutional language speaks of the "power of taxation," the limitation has not been confined to government use of tax revenues. *In re Housing Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982) (revenue bonds to finance housing for persons of moderate income); *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 199 S.E.2d 641 (1973) (revenue bonds for pollution abatement and industrial facilities); *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E.2d 517 (1973) (revenue bonds to finance construction of private hospital facilities); *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970) (revenue bonds for low-income housing); *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968) (revenue bonds for industrial development); *Nash v. Town of Tarboro*, 227 N.C. 283, 42 S.E.2d 209 (1947) (general obligation bonds for the construction of a hotel).

Although the Morganton City Council has not determined how the proposed city cable system will be financed, we assume it will be, in part at least, by the expenditure of public funds. The parties have briefed and argued the case, and we thus decide it, based on the assumption that funds that are subject to the constitutional restriction of article V, section 2(1) will be spent on the system.

The General Assembly of North Carolina has explicitly authorized cities to establish, own, and operate cable television systems. In N.C.G.S. § 160A-311, the General Assembly defines "public enterprise" as including, among numerous other enterprises, "[c]able

television systems." N.C.G.S. § 160A-312 then provides, in pertinent part, as follows:

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article [restrictions relating solely to municipally owned and operated electrical systems], a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

N.C.G.S. § 160A-312 para. 1 (1979).

N.C.G.S. § 160A-313, governing the financing of public enterprises, provides:

> Subject to the restrictions, limitations, procedures, and regulations otherwise provided by law, a city shall have full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor, and by accepting and administering gifts and grants from any source on behalf thereof.

N.C.G.S. § 160A-313 (1971).

With regard to the authority of cities to grant franchises for the operation of a cable television system and to protect both municipally operated and franchised systems, N.C.G.S. § 160A-319 provides, in pertinent part:

> A city shall have authority to grant upon reasonable terms franchises for the operation within the city of any of the enterprises listed in G.S. 160A-311 . . . . [C]able television franchises shall not be granted for a period of more than 20 years. Except as otherwise provided by law, when a city operates an enterprise, or upon granting a franchise, a city may by ordinance make it unlawful to operate an enterprise without a franchise.

N.C.G.S. § 160A-319 para. 1 (1975).

[1] The initial responsibility for determining what is and what is not a public purpose rests with the legislature; its determinations

are entitled to great weight. *In re Housing Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982); *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960). While the ultimate responsibility for the public purpose determination rests, of course, with this Court, the guiding principles for the Court's review once the legislature has made a public purpose determination are set forth in *In re Housing Bonds*:

> The presumption is in favor of the constitutionality of an act. All doubts must be resolved in favor of the Act. The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.

307 N.C. 52, 57, 296 S.E.2d 281, 284 (citations omitted).

The adoption of these statutes by the General Assembly leaves no doubt whatever that our legislature has determined that the establishment, ownership, and operation of a cable television system by a city is a public purpose within the meaning of article V, section 2(1) of the North Carolina Constitution. Where the declaration of our legislature is clear, as here, we accord that determination great weight. However, although we accord it great weight, it is not conclusive. It is the duty and prerogative of this Court to make the ultimate determination of whether the activity or enterprise is for a purpose forbidden by the Constitution of the state. *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E.2d 517 (1973).

This Court has addressed the question of what constitutes a public purpose on many occasions and has expressed itself on the subject in various ways. "Our reports contain extensive philosophizing . . . on the subject." *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 33, 199 S.E.2d 641, 653. The results of these endeavors is perhaps best summarized in a 1970 opinion of this Court by Bobbitt, C.J.:

> "A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities

> which were once considered exclusively private enterprises, and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity."

Martin v. Housing Corp., 277 N.C. 29, 43, 175 S.E.2d 665, 672-73 (1970) (citations omitted) (quoting *Mitchell v. Financing Authority*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968)).

[2] This Court has not specifically defined "public purpose" but rather has expressly declined to "confine public purpose by judicial definition[, leaving] 'each case to be determined by its own peculiar circumstances as from time to time it arises.' " *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. at 33, 199 S.E.2d at 653 (quoting *Keeter v. Town of Lake Lure*, 264 N.C. 252, 264, 141 S.E.2d 634, 643 (1965)). Two guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality, *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946); and (2) the activity benefits the public generally, as opposed to special interests or persons, *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665. This has been our traditional test, and we continue to adhere to it.

The term "public purpose" is not to be narrowly construed. *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928). It is not necessary that a particular use benefit every citizen in the community to be labeled a public purpose. *Id.* Madison Cable contends that a careful reading of this Court's "public purpose" decisions suggests that the test of whether an enterprise or activity constitutes a "public purpose" is a three-part inquiry: (1) Is the activity one traditionally performed by the government? (2) Is there a public need for the activity? and (3) Is private enterprise unwilling or unable to engage in the activity? Plaintiff contends that unless all three questions can be answered in the affirmative, the activity or enterprise does not constitute a public purpose. The wording Madison Cable uses to formulate its suggested test is taken in

part from *Stanley, Edwards, Henderson v. Dept. Conservation & Development*, 284 N.C. 15, 199 S.E.2d 641, where the Court said: "It is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector." *Id.* at 33, 199 S.E.2d at 653. It is clear that the language was not meant to establish a new and different test. As demonstrated herein, if the ability and willingness of the private sector to provide the challenged service were taken as the test in every case, many if not most of the traditional services provided by municipal government under the public purpose doctrine would now be subject to challenge on constitutional grounds. Today, territorial disputes between municipally owned electric utilities and investor-owned public utilities over service to city residents are not uncommon. Despite the fact that privately owned utilities stand ready and willing to serve municipal residents, no one would seriously argue that this fact alone renders the provision of electric utility service a private, rather than public, purpose. The same holds true for public hospitals, waste disposal, and other similar services.

Moreover, as further demonstrated herein, prior and subsequent to *Stanley*, this Court issued numerous opinions determining the public purpose issue by applying the traditional test. The language in *Stanley* quoted above itself stands without direct citation to previous Supreme Court decisions. The discussion following it pertains to two earlier cases involving revenue bonds issued by public housing authorities in which *a factor* in the public purpose analysis was the unwillingness or inability of the private sector to provide the level of housing services which the legislature had determined to be necessary in the public interest. In the same paragraph, the *Stanley* Court itself discussed *other* important and traditional factors in the determination of public purposes, such as the need for the benefits to pass directly to the public and not to a private intermediary.

The outcome in *Stanley*—and the language so heavily relied on by Madison Cable—clearly turns on the fact that the legislative enactment in question was "[p]atently . . . designed to enable industrial polluters to finance, at the lowest interest rate obtainable, the pollution abatement and control facilities which the law is belatedly requiring of them." *Id.* at 32, 199 S.E.2d at 653. This Court repeatedly stated that the proposed financing violated the public purpose clause because it involved "[d]irect assistance to a private

entity," conveyance of public power to a private agency, and aid to "particular business ventures." *Id.* Thus, the result in *Stanley* ultimately follows from the application of the traditional public purpose test that the ultimate gain to be derived from the governmental undertaking accrues directly to the general public as opposed to a private entity, rather than from the novel "test" proposed by Madison Cable that the private sector must be shown to be unable or unwilling to provide the service. The language in *Stanley* relied upon by Madison Cable is an aberration and must be considered dictum which did not create a rule of decision for future cases.

Later cases from both this Court and the Court of Appeals do not state the test for public purpose in the language of *Stanley* but continue to rely upon and apply the traditional test as stated in, for example, the cases of *Mitchell v. Financing Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968), and *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665. *See, e.g., In re Housing Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982); *North Carolina ex rel. Horne v. Chafin*, 62 N.C. App. 95, 302 S.E.2d 281, *aff'd per curiam*, 309 N.C. 813, 309 S.E.2d 239 (1983), *appeal dismissed*, 466 U.S. 933, 80 L. Ed. 2d 452 (1984).

The rule suggested by Madison Cable would call into question the authority of municipalities to construct, own, operate, maintain, and finance water systems, sewer systems, solid waste collection facilities, public transportation systems, electric systems, gas storage and distribution systems, as well as cable television systems, all of which are authorized by General Statutes chapter 160A, article 16, part 1, and could endanger billions of dollars in outstanding bond issues. It would likewise call into question the authority of municipalities and other local governments to contract for and to regulate such enterprises. All of these enterprises can be and are provided by private companies. If indeed the municipal operation of these enterprises was, as Madison Cable contends, violative of the public purpose provision of the North Carolina Constitution unless private enterprise is "unwilling and unable" to engage in such enterprises, the private bus companies, the private waste disposal companies, the private water companies, the private telephone companies, the private parking companies, etc., could force the municipal systems to shut down by offering to provide the service. We reject this contention and will continue to apply our traditional test.

The argument that local governments may not operate enterprises unless it can be shown that private enterprise is "unwilling or unable" to engage in the proposed activity is essentially a contention that the municipal operations of the enterprise would create an unfair competition. In the case at bar, plaintiff's counsel urged upon oral argument that this Court "should not allow a municipality to compete" with the plaintiff. This Court long ago rejected this argument. Municipally owned and operated enterprises have been permitted to engage in head-to-head competition with privately owned companies. *Power Co. v. Elizabeth City*, 188 N.C. 278, 124 S.E. 611 (1924) (a private company could not restrain a city from establishing a water system on the ground that establishment of a municipal system "would create an unfair competition" even though the private company claimed the competition would destroy its business). *See also Durham v. State of North Carolina*, 395 F.2d 58 (4th Cir. 1968). Similar results were reached consistently in early cases from other states. *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 57 L. Ed. 1101 (1913) (Colorado); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 48 L. Ed. 795 (1904) (Massachusetts); *Skaneateles Water Co. v. Skaneateles*, 184 U.S. 354, 46 L. Ed. 585 (1902) (New York).

Many of the activities which this Court has determined to meet our traditional "public purpose" test clearly do compete with private businesses furnishing the same service. While many of the cases decided by this Court fall into broad categories such as public transportation; hospitals; electric, gas, and telephone utilities; public housing; urban renewal; recreation; and education, the cases demonstrate the great variety of facilities and activities which have been determined to be "public purposes." **Aid to Railroad:** *Wood v. Town of Oxford*, 97 N.C. 227, 2 S.E. 653 (1887); **Airport Facilities:** *Airport Authority v. Johnson*, 226 N.C. 1, 36 S.E.2d 803 (1946) (regional airport); *Turner v. City of Reidsville*, 224 N.C. 42, 29 S.E.2d 211 (1944) (municipal airport); *Goswick v. City of Durham*, 211 N.C. 687, 191 S.E. 728 (1937) (municipal airport); **Railway Terminal Facilities:** *Hudson v. City of Greensboro*, 185 N.C. 502, 117 S.E. 629 (1923); **Port Terminal Facilities:** *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377 (1934); **Grain Handling Facility Financed by Revenue Bonds and to be Leased to a Private Concern:** *Ports Authority v. Trust Co.*, 242 N.C. 416, 88 S.E.2d 109 (1955); **Public Housing Authority Under Federal Housing Acts:** *Mallard v. Hous-*

ing Authority, 221 N.C. 334, 20 S.E.2d 281 (1942); **North Carolina Housing Corporation, Low Income Housing:** *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970); **Moderate Income Housing:** *In re Housing Bonds*, 307 N.C. 52, 296 S.E.2d 281 (1982); **Urban Renewal Project:** *Horton v. Redevelopment Commission*, 262 N.C. 306, 137 S.E.2d 115 (1964); **Municipal Hospital:** *Rex Hospital v. Comrs. of Wake*, 239 N.C. 312, 79 S.E.2d 892 (1954); *Burleson v. Board of Aldermen*, 200 N.C. 30, 156 S.E. 241 (1930); **Public Park:** *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E.2d 702 (1946) (public parks, playgrounds, and recreational facilities are not a necessary expense, although a public purpose, *Atkins v. City of Durham*, 210 N.C. 295, 186 S.E. 330 (1936), will not "be followed as a precedent"); *Twining v. City of Wilmington*, 214 N.C. 655, 200 S.E. 416 (1939) (parks and playgrounds were not a necessary expense for Wilmington, although they were a public purpose); *Yarborough v. Park Commission*, 196 N.C. 284, 145 S.E. 563 (1928) (playgrounds and parks were "necessary expenses" within constitutional limitation on pledging credit without a vote of the people); **Purchase of a Lake and a Generating Plant:** *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E.2d 634 (1965); **Public Auditorium:** *Adams v. City of Durham*, 189 N.C. 232, 126 S.E. 611 (1925); **State Fair:** *Briggs v. City of Raleigh*, 195 N.C. 223, 141 S.E. 597 (1928); **Public Library:** *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904 (1954); **Public Schools:** *Collie v. Commissioners*, 145 N.C. 170, 59 S.E. 44 (1907); **Aid to Establish a Teachers Training School:** *Cox v. Commissioners*, 146 N.C. 584, 60 S.E. 516 (1908); **Education Generally:** *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E.2d 551 (1970) (a state revenue bond issue for loans to residents of slender means to facilitate their post-secondary education); *Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948) (expenditure of tax revenues for a policeman to attend a training course); **World War I Veterans' Loan Fund:** *Hinton v. State Treasurer*, 193 N.C. 496, 137 S.E. 669 (1927); **Voter-Approved Sale of Municipal Bonds for the Construction of an Armory Outside the Corporate Limits:** *Morgan v. Town of Spindale*, 254 N.C. 304, 118 S.E.2d 913 (1961); **Off-Street Parking Under Certain Circumstances:** *Henderson v. City of New Bern*, 241 N.C. 52, 84 S.E.2d 283 (1954); **Municipal Appropriation**

of Non-tax Revenues to the Chamber of Commerce to Advertise the Advantages of Raleigh: *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 923 (1960). These cases also serve to demonstrate the expanding scope of the concept of "public purpose" in a modern society which " 'requires governmental operation of facilities which were once considered exclusively private enterprises . . . and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public.' " *Martin v. Housing Corp.*, 277 N.C. at 43, 175 S.E.2d at 672 (quoting *Mitchell v. Financing Authority*, 273 N.C. at 144, 159 S.E.2d at 750) (citations omitted). It is noteworthy that these cases include municipal ownership of facilities used for communication and recreation (including parks, auditoriums, libraries, and fairs) and any activities which may be said to further the educational interests of the citizens of the state or particular localities.

Instrumentalities of the state have been operating mass communications facilities for many years. Public radio stations are expressly authorized by N.C.G.S. § 143B-426.12. The University of North Carolina operates seven radio stations on its various campuses, including two at the Chapel Hill campus. That statute also establishes a Public Radio Advisory Committee of the North Carolina Agency on Public Telecommunications. The statute provides in part:

> It is the policy of the State of North Carolina that at least one public radio signal shall be made available to every resident of North Carolina . . . .

N.C.G.S. § 143B-426.12 (1979).

N.C.G.S. § 116-37.1 authorizes the Board of Governors of the University of North Carolina to operate the Center for Public Television, and public television programming from the Center reaches virtually the entire population of the state.

In addition to these state university media facilities, chapter 143B, article 9, part 22 of the North Carolina General Statutes provides for the establishment of the North Carolina Agency of Public Telecommunications. N.C.G.S. § 143B-426.10 provides that the North Carolina Agency for Public Telecommunications shall serve as an instrumentality of the State of North Carolina for the accomplishment, inter alia, of the following purposes:

(2) To foster and stimulate the use of telecommunications programming, services and systems for noncommercial educational and cultural purposes by public agencies for the improvement of the performance of governmental services and functions;

. . . .

(6) In addition to and not in place of the programs, projects, and services of The University of North Carolina Center for Public Television (or its functional predecessor), to develop and provide media programs and programming materials and services of a noncommercial educational, informational, cultural or scientific nature;

(7) To undertake innovative projects in interactive telecommunications and teleconferencing whenever such projects might serve to improve services, expand opportunities for citizen participation in government and reduce the costs of delivering a service;

. . . .

(15) To acquire, construct, equip, maintain, develop and improve such facilities as may be necessary to the fulfillment of the purpose of the Part[.]

N.C.G.S. § 143B-426.10(2), (6), (7), (15) (1987).

The state telecommunications agency subleases time on satellites and provides programming as part of an Open Public Events Network ("OPENnet"), which as early as 1984 was carried by seventy cable television systems throughout the state.

Our examination of statutes enacted by our General Assembly reveals a clear legislative intent and expression of the public policy of this state to foster public ownership and operation of both radio and television. Morganton's establishment of a municipal cable system would be entirely consistent with this policy. Invalidation of the legislative authorization for municipal cable television systems on the grounds urged by Madison Cable would call into question the constitutionality of these other statutes authorizing the expenditure of public funds on radio and television stations.

The previously discussed provisions of chapter 160A of the General Statutes authorizing municipalities to own and operate

cable television systems are consistent with the statutes enacted by the United States Congress. The Cable Communications Policy Act of 1984 provides that "a state or franchising authority [here, the City of Morganton] may hold any ownership interest in any cable system." 47 U.S.C.A. § 533(e)(1) (West 1984). Under the federal Act, however, the City Council may not exercise content control over the channels offered but must instead either designate an agency separate from the Council (such as an independent board or commission) to make programming decisions or establish some other mechanism which divorces content control from the operation of the facilities (such as by subscriber vote). *Id.*

[3] We hold that the establishment, financing, construction, operation, and maintenance of a cable television system by a municipality as authorized by General Statutes chapter 160A, article 16, part 1 involve a reasonable connection with the convenience and necessity of the City of Morganton and benefit the public generally, as opposed to special interests or persons, and thus constitute a "public purpose" within the meaning of article V, section 2(1) of the North Carolina Constitution. The determination of whether a particular function or activity constitutes a public purpose is a legal issue to be decided by the court. The trial judge did not err in granting summary judgment in favor of the City of Morganton and in denying summary judgment in favor of Madison Cable on this issue.

II.

[4] Madison Cable next contends that the City of Morganton's refusal to grant cable franchises to private applicants, including Madison Cable, and its decision to operate a municipal system violate the exclusive emoluments and monopoly clauses of our state Constitution and chapter 75 of our General Statutes. We disagree.

Article I, section 34 of the North Carolina Constitution provides in pertinent part: "monopolies are contrary to the genius of a free state and shall not be allowed." Article I, section 32 provides that "no person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." In effect, Madison Cable contends that the City Council's decision to establish a municipal cable system and to decline to grant franchises to other applicants establishes a monopoly and constitutes an exclusive emolument to the City, in violation of these constitutional provisions. We disagree.

We note at the outset that Morganton has not declared or established itself as the "exclusive" supplier of cable television service to its citizens. It has simply failed to renew Madison Cable's expired franchise or to grant a franchise to two other applicants for failure of their proposals to meet community needs. Specifically, it has not foreclosed for any period the possibility that franchises might be granted to other applicants. The City expressly left open the possibility that other cable companies could apply for and obtain a franchise in the future and committed itself to review the overbuild situation five years after it issued its decision to operate a municipal system.

Even where a city grants a nonexclusive right or franchise to another "person or set of persons," it is not a grant of a monopoly within the meaning of the general constitutional prohibition against monopolies. *Thrift v. Elizabeth City*, 122 N.C. 31, 30 S.E. 349 (1898); *see also Durham v. State of North Carolina*, 395 F.2d 58 (4th Cir. 1968). The City of Morganton has neither established nor allowed the establishment of a monopoly for the operation of a cable television system.

[5] Article I, section 32 prohibits the grant of exclusive separate emoluments or privileges to any person or persons by the community unless in consideration for public services. First, the prohibition of this section contemplates a grant by "the community" to others. A city needs no grant from itself to own and operate public enterprises, including operating a CATV system; it does so in its own right pursuant to the authority granted to it by the legislature under General Statutes chapter 160A, article 16, part 1. It needs no franchise or other grant of authority from itself as do nonmunicipal suppliers of the same enterprise.

Second, it is clear that article I, section 32 contemplates that exclusive emoluments or privileges may be granted if "in consideration of public services." Franchises granted to public service companies come directly within the words and meaning of the constitutional exception. *Reid v. R. R.*, 162 N.C. 355, 78 S.E. 306 (1913). We have held that a "municipal corporation, an agency of the State, created for the benefit of the public," by definition falls within the exception for corporations providing "public services" and thus cannot violate the provisions of article I, section 32. *State v. Felton*, 239 N.C. 575, 585, 80 S.E.2d 625, 633 (1954).

Third, the purpose of the constitutional provision was not to prevent "the community" from exercising legislatively authorized powers to operate public enterprises but to prevent "the community" from surrendering its power to another "person or set of persons" by grant of exclusive or separate emoluments or privileges unless they are granted "in consideration of public services." It is not retention of powers but alienation of powers that is prohibited.

For these reasons, the decision of the City of Morganton to provide cable service itself rather than through a franchise does not violate article I, section 32 of our state Constitution.

[6] As noted previously herein, a violation of chapter 75 is alleged in the seventh claim for relief in the federal action, and pursuant to United States District Court Judge Jones' abstention order, Madison Cable included the claim in this state action. We therefore address it, although it is not separately presented and briefed in Madison Cable's brief before this Court.

The title of chapter 75 of our General Statutes is "Monopolies, Trusts and Consumer Protection." Except for its appearance in the title, the word "monopoly" does not appear in the chapter. The chapter relates generally to unfair methods of competition, deceptive trade practices, and unfair trade practices. Monopolies are pertinent insofar as they constitute a "contract, combination in the form of a trust or otherwise . . . in restraint of trade or commerce" which is illegal, N.C.G.S. § 75-1 (1981), or "[u]nfair methods of competition" or "unfair or deceptive acts or practices" in or affecting commerce, N.C.G.S. § 75-1.1 (1977).

Madison Cable contends that the antitrust laws of chapter 75 ought to be read to prohibit Morganton from operating a municipally owned cable system and from denying its application, and those of others, for a franchise. We disagree. Cities are specifically authorized to establish municipally owned cable systems and to protect and regulate such systems once established and "may by ordinance make it unlawful to operate" a competing system without a franchise. N.C.G.S. § 160A-319 (1975). The power to grant or to refuse to grant a franchise is vested solely in the governing body of the city. This power is essentially legislative in nature, and its exercise is discretionary. *Cablevision v. City of Winston-Salem*, 3 N.C. App. 252, 164 S.E.2d 737 (1968). Because cities are authorized to own and operate cable systems and to prohibit others from doing so without a franchise and are not required to issue fran-

chises, it is clear that the legislature contemplated that there would be situations where private corporations would be displaced by municipal cable systems which would operate without competing franchises being issued. In this situation, the legislature cannot be presumed to have intended that conduct so clearly authorized could give rise to state antitrust liability.

Although not necessary to our decision of this issue, it is instructive to note the analogy between exempting a city's conduct from chapter 75 of the General Statutes (the state antitrust statute) and exempting certain municipal conduct under the "state action" exemption of the Sherman Act (15 U.S.C.A. § 1 (West 1974), the federal antitrust statute). Our chapter 75 is based on the Sherman Act:

> [T]he body of law applying the Sherman Act, although not binding upon this Court in applying G.S. 75-1, is nonetheless instructive in determining the full reach of that statute.

Rose v. Vulcan Materials Co., 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973).

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L. Ed. 2d 24 (1985), the United States Supreme Court held that a municipality's conduct with respect to provision of sewage service was protected by the state action exemption to the federal antitrust laws. That exemption was announced in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315 (1943), which held that an agricultural marketing program established by California was immune from scrutiny under the federal antitrust laws. Although municipalities do not automatically enjoy immunity under the state action exemption, *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 70 L. Ed. 2d 810 (1982); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L. Ed. 2d 364 (1978), in *Town of Hallie*, the Court concluded that the municipality's actions with respect to sewage service were immune from federal antitrust attack where the applicable state statute authorized cities to construct and maintain sewage systems. The Court reasoned that

> the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas.

471 U.S. at 42, 85 L. Ed. 2d at 31. The Court reasoned further that, because the anticompetitive conduct was the foreseeable result

of the authorizations granted, the conduct was "state action" and therefore immune from federal judicial scrutiny. *Id.* at 44, 85 L. Ed. 2d at 32-33.

The powers conferred upon cities by the North Carolina General Statutes with respect to provision and franchising of cable television service reflect the clear contemplation that competition may be displaced with respect to this service. In the case of *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 314 N.W.2d 321 (1982), the Supreme Court of Wisconsin concluded that actions which the legislature intended a municipality might take should not be subject to attack under the state's antitrust laws.

We are fortified in our decision on this issue by the reasoning and decision of the United States Supreme Court and the Wisconsin Supreme Court in the *Town of Hallie* cases.

The application of the antitrust provisions of chapter 75 to municipalities performing functions delegated to them by the legislature would have a paralyzing effect on their ability to effectuate important state policies. Where the legislature has authorized a city to act, it is free to carry out that act without fear that it will later be held liable under state antitrust laws for doing the very act contemplated and authorized by the legislature. We hold that municipal ownership and operation of cable television systems does not violate the provisions of chapter 75 of the General Statutes.

III.

Madison Cable contends that the trial judge erred in deciding the case on the motions for summary judgment. We disagree.

The issues presented in this case—whether the establishment of a municipally owned and operated cable television system is a public purpose within the meaning of article V, section 2(1) of our state Constitution and whether Morganton's refusal to grant franchises to private applicants and its decision to build and operate a cable system violate the provisions of article I, sections 32 and 34 of our state Constitution and chapter 75 of the General Statutes—are purely issues of law. No determination of genuine issues of fact was necessary to decide these questions. The trial judge did not err in determining the case on the motions for summary judgment.

In summary, we hold that the provisions of General Statutes chapter 160A, article 16, part 1 which authorize cities to finance, acquire, construct, own, and operate a cable television system, do not violate the public purpose clause of the North Carolina Constitution and that the City of Morganton's refusal to grant cable television franchises to private applicants, including plaintiff, and its decision to build and operate a municipal cable system do not violate the exclusive emoluments and monopoly clauses of article I, sections 32 and 34 of our Constitution or the antimonopoly or the unfair trade practices provisions of chapter 75 of the North Carolina General Statutes. We further hold that the trial judge did not err in allowing summary judgment for the defendant City and in denying summary judgment for the plaintiff Madison Cablevision, Inc.

Affirmed.

IN THE MATTER OF: BASIL RAY LEGG, JR., APPLICANT TO THE FEBRUARY 1987 NORTH CAROLINA BAR EXAMINATION

No. 168A89

(Filed 7 December 1989)

1. **Constitutional Law § 23.4 (NCI3d); Attorneys at Law § 2 (NCI3d) — application to take North Carolina bar examination — lack of character and general fitness — no violation of due process**

The Board of Law Examiners did not deny an applicant due process when it refused his petition to reopen or reconsider a case in order to present newly-discovered evidence where the applicant did not explain why the information could not have been presented to the Board at the time of the hearing; the Board did not abuse its discretion in refusing the applicant's petition to reopen the hearing to introduce testimony from his wife, who had had to leave the hearing early to pick up a child from day care; and there was no violation of due process in the fact that the de novo Board hearing included the two members of the original hearing panel.

Am Jur 2d, Attorneys at Law §§ 13, 20.

2. Attorneys at Law § 2 (NCI3d)— application to take bar examination—denied—findings supported by evidence

The evidence in the whole record supported the Board of Law Examiners' findings that an applicant willfully converted funds owed a private investigator; that omissions from his application were more than inadvertent errors as the applicant suggested during his hearing; and that the applicant's practice of law in West Virginia had demonstrated a pattern of carelessness, neglect, and inattention to detail.

Am Jur 2d, Attorneys at Law §§ 15, 16.

3. Attorneys at Law § 2 (NCI3d)— denial of application to take bar exam—conclusion that applicant lacked moral character and fitness—no error

The Board of Law Examiners did not err by concluding that an applicant to take the North Carolina bar examination lacked the moral character and fitness required for licensing where the record reveals that the applicant failed to show the maturity and discipline that is a fundamental attribute of the good moral character required to practice law in North Carolina and, when the findings are viewed in the aggregate, they reveal a systemic pattern of careless neglect, inattention to detail, and lack of candor that permeates the applicant's character and could seriously undermine public confidence and the integrity of the courts.

Am Jur 2d, Attorneys at Law §§ 15, 16.

Justice WEBB dissenting.

Justice MITCHELL joins in the dissent.

ON appeal as of right pursuant to Rule .1405 of the Rules Governing Admission to the Practice of Law in the State of North Carolina from an order of *Brewer, J.*, entered 13 December 1988 in Superior Court, WAKE County, which affirmed the 16 June 1988 order of the Board of Law Examiners denying the applicant's application for admission to the North Carolina Bar Examination. Heard in the Supreme Court 12 October 1989.

Erdman, Boggs & Harkins, by Harry H. Harkins, Jr., for applicant-appellant.

Lacy H. Thornburg, Attorney General, by John F. Maddrey, Assistant Attorney General, for the Board of Law Examiners of the State of North Carolina-appellee.

MEYER, Justice.

The applicant contests the conclusion of the North Carolina Board of Law Examiners (Board) that he had "not satisfied the Board that he possesses the qualifications of character and general fitness requisite for an attorney and counsellor at law and that he is of such good moral character as to be entitled to the high regard and confidence of the public" and that "[f]or this reason, his application to take the North Carolina Bar Examination should be denied." After examination of the whole record, we affirm the Board's conclusion.

The Board made this conclusion after the Superior Court remanded an earlier Board order dated 30 July 1987. In the 30 July 1987 order the Board affirmed the order of a two-member hearing panel dated 17 April 1987 denying the application to stand for the North Carolina Bar Examination.

Basil Ray Legg, Jr., is an applicant for admission to the North Carolina Bar. He first applied to take the July 1986 North Carolina Bar Examination. However, he sent his application late, and the Board declined to grant his request to file a late application. The Board returned the application and registration fee at his request.

On 14 October 1986, the filing deadline for the February 1987 examination, Legg resubmitted the application he filed for the July 1986 examination. His updated application indicated that he had moved to North Carolina as of 1 October 1986, having purchased a home and taken employment in this state. On 1 December 1986 he filed an amendment providing zip codes and corrected addresses.

The Board permitted Legg to take the February 1987 examination but sealed the results pending a final determination of his fitness and character. At the time he submitted his application, Legg was a licensed attorney in West Virginia. Having graduated from the West Virginia University Law School in December 1983, he was admitted to practice in West Virginia pursuant to its diploma privilege, under which no bar examination is required.

By letter dated 24 March 1987, the Board notified the applicant that he was to appear before a hearing panel to answer questions as to his fitness and character. On 17 April 1987 Legg appeared before the two-member hearing panel. On that date, subsequent to the hearing, Legg submitted an amendment to his application listing the following debts: a $250.00 debt to West Virginia State Senator Odell Huffman; a $316.10 debt to Tom Moses, a private investigator; a $10,000 unsecured "disputed" debt to the estate of Mary Veneri; a $1,000 debt to MasterCard; and a $20,000 margin account secured by stocks and securities held by Merrill Lynch. He incurred the first three debts between mid-September and 1 November 1986 and the last two over "various" dates. None of these debts were listed on his original application although question 17(c) of the application requires applicants to "[l]ist all debts over $200, including student loans, and indicate [their] status." Question 17(d) requires the applicant to state whether "any one ever asserted a claim or demand against [the applicant], which has not been made the subject of any action or legal proceeding."

Legg also amended his answer to question 18, in which he had originally stated that he had never been involved personally in any suit. The April amendment disclosed an October 1985 suit to recover a debt in which Legg prevailed as the defendant. The amendment listed an additional malicious prosecution suit pending, with Legg and his wife the defendants. The amendment also listed a dispute regarding the estate of Mary Veneri, his mother-in-law, in which suit would be filed. Neither of the suits or the dispute were listed on his original application, although question 18 asks "[h]ave you ever been involved in any suits in equity, actions at law, suits in bankruptcy or other statutory proceedings, matters in probate, lunacy, guardianship, or any other judicial proceedings of any nature and kind, except criminal proceedings, personally or as a member of a professional association or corporation?"

Finally, the amendment listed his membership since May 1985 in two professional organizations. His original application indicated no membership in any professional organization, although question 37(b) requires applicants to "give the name and address of each organization whose membership consists primarily of attorneys and of which you are or have ever been a member."

By order dated 17 April 1987, the hearing panel concluded that Legg "has failed to satisfy the Hearing Panel that he possesses

the qualifications of character and general fitness requisite for an attorney and counsellor-at-law and is of such good moral character as to be entitled to the high regard and confidence of the public." On that basis the panel denied Legg's application and ordered that his February 1987 North Carolina Bar Examination be permanently sealed. Pursuant to Board Rule .1203(b), Legg requested a hearing *de novo* before the full Board.

The Board mailed a notice of hearing to the applicant and his attorney on 1 May 1987. The notice set out that specific inquiry would be made concerning three complaints filed with the West Virginia State Bar against the applicant, the five specific debts not listed on the original application, pending litigation involving the applicant, and the applicant's representation of Linda B. White of Princeton, West Virginia. The notice also stated that "[w]hile the Board will make specific inquiry about the matters referred to above, please be advised that inquiry can be made about the answers to any questions set out in the application." The notice also directed the applicant "to bring to this hearing any files, papers, statements of account, cancelled checks and any other documents he may have that relate to the matters of inquiry."

The hearing took place on 15 May 1987 before nine members of the eleven-member Board, including the two panel members who conducted the original hearing. On that day, prior to the hearing, Legg filed a third amendment to his application. This amendment described changes in his MasterCard and Merrill Lynch balances, a new automobile loan and the final satisfaction of a bank loan. The third amendment indicated for the first time a disputed $475.00 debt concerning a legal fee owed his nephew, Tony Veneri, which arose from a case in which the applicant and his nephew were co-counsel. The amendment also indicated for the first time a disputed amount owed to Richard Daisey, a court reporter. Like the previous two amendments, this third amendment was handwritten, though the form states that amendments should be typewritten.

The Board initially questioned the applicant regarding omissions in his answers to question 6 of the application. That question requires applicants to "[l]ist . . . every permanent and temporary residence you have ever had . . . since your 16th birthday." The question also required applicants to give the exact address of each residence.

Legg admitted that his response to the question was incomplete and that it should have included his Louisiana residence during the semester he withdrew from law school and lived with his fiancée. On his application Legg had listed the addresses of his residences during law school (September 1980 through December 1983) as "Various Apartments." He stated to the Board that he incompletely responded to the question because he was "unsure of the extent of the detail required on the application," that he just "assumed that this would be sufficient," that the omissions were "an oversight on [his] part" and that he "did not take the necessary care in filling out this section."

Legg also neglected to list in his response to question 12 a month's employment as a laborer following his graduation from college. He left that position without giving notice because he found the work "too strenuous" and "[a]t the age of 18 or 19 [he] was not disciplined enough to handle those responsibilities."

The Board questioned Legg about those debts omitted from his answer to question 17 in his original application which were the subject of his second amendment. Legg stated that his omission of those debts on the original application was "an oversight." Failure to include debts arising from his practice of law "was because [he] did not remember that part of the question when [he] updated and amended [his] application."

Legg "simply did not think of" the debt due Senator Huffman for the last month's rent on his law office when he submitted his application. Legg testified that he believed he had an understanding with the Senator in which Legg would return to retrieve some telephone equipment and pay the outstanding rent at that time since Huffman "never sent me a bill." After the two-member panel investigated the matter at the hearing, Legg sent the Senator a check in full payment. Legg introduced a letter from Senator Huffman in which Huffman indicated that on 1 May 1987 he had received the balance due on the office rental.

Legg stated that when he filed his October application he had no knowledge of his debt to Tom Moses, the private investigator. Under the West Virginia indigent defense system, the attorney is responsible for paying certain case-related expenses such as court reporting and private investigation. Legg's practice had been to pay for services prior to state reimbursement or, alternatively, after reimbursement. When Legg closed the approximately seventy

active files for which he needed to bill the state prior to his move to North Carolina, he attached to his claim for reimbursement two separate invoices from Moses.

Legg testified that he did not pay Moses from the lump-sum reimbursement checks he received from West Virginia because the checks did not specify which cases they were for or whether they included monies for expenses incurred. He stated that because of pressing family matters, he did not have the time to appropriately keep track of funds owed Moses from two of these approximately seventy files. Legg deposited the reimbursements in his personal account. Because he did not have a "current bill" from Moses, there was nothing "in front of [him] to alert [him]" to the debt to Moses. Legg began paying Moses in installments only after Moses sent a follow-up bill. Legg did not volunteer the matter of this or any other debt to the two-member hearing panel because he did not think that he could file additional amendments once he had taken the Bar examination.

Attached to the same claims for reimbursement as the Moses invoices were invoices for Tichenor Court Reporting Services. At the Board hearing Legg was questioned for the first time about possible outstanding debts relating to these services. Legg testified that he had no occasion to look into his files to determine whether these particular bills remained unpaid. Because he had received no further billings from Tichenor, he was under the impression that he had paid for these services completely. Legg indicated that he did not feel the need to go back through his nearly three hundred files to see if any outstanding problems like those with Mr. Moses existed. Legg suggested that if he owed money to Tichenor it might be the reporting service's fault for not having billed him promptly.

Legg testified that the alleged $10,000 debt to the Veneri estate arose after Legg privately approached Mrs. Veneri, his mother-in-law, for an unsecured loan to make a down payment on a North Carolina house. Mrs. Veneri had loaned him a similar amount some time earlier, which he had repaid. Unlike the earlier loan, there was no promissory note representing the later indebtedness. Legg testified that Mrs. Veneri gave him a cashier's check for the amount of the loan in September 1986, immediately prior to her demise. She requested at the time she gave him the money that he not tell her sons about it because they would think she was showing

favoritism towards her daughter, Legg's wife. When Mrs. Veneri died, Legg said he felt himself bound by his promise to his dead mother-in-law not to disclose the existence of the debt to his brother-in-law, Randall Veneri, the executor of the estate.

Upon discovery of the disbursement, the executor demanded that Legg and his wife sign a statement acknowledging an indebtedness of $10,000 to the estate to be treated as an advancement. The Leggs signed such a statement on 18 September 1986. Legg stated at the hearing that this matter did not cross his mind when he filed his application a month later. He disputed owing anything to the Veneri estate and failed to list this as a debt because the executor treated it as an advancement.

Legg recognized that though the $20,000 debt to Merrill Lynch was technically and legally a debt, he viewed it as a "bookkeeping tool" since it was fully secured with securities. The revolving consumer debt due MasterCard may not have been over $200.00 when he updated his application, but he acknowledged that it may have increased at the time of the two-member panel hearing. He listed the alleged debt to Tony Veneri because his counsel "helped [him] to see that [he] need[s] to look very broadly at what a possible debt could be." Legg explained his omissions as being due to the fact that he interpreted question 17(c) to include only installment debt. Although he "did not keep up with [his] updating of the application as [he] should have," Legg stated he "was concerned with accuracy" when he filled out this portion of the application.

Legg opined that his troubles with the Board were the direct result of an effort by his wife's family to bring discredit upon him. This effort was occasioned by disputes arising over the settlement of the estate of his wife's mother.

Legg neglected to list a 1985 suit by his optometrist to recover a debt. Since he won the case, Legg indicated that he had no reason not to disclose the matter. Question 18 requires applicants to list all suits in which there was personal involvement. The question further requires applicants to furnish "copies of the litigation—bankruptcy, judgments, small claims, etc." The record on appeal does not contain such copies from the 1985 suit.

The Board next questioned Legg regarding his representation of Linda B. White during the course of his West Virginia practice. Legg's representation of Linda White concerned a suit for child

support. After judgment in the case, Mrs. White wrote Legg a letter dated 10 June 1986 requesting that he return the contents of her file. He did so on 28 April 1987 following questioning about the matter during the two-member panel hearing. Legg explained that all the White papers were public records readily available at the courthouse in West Virginia and were not necessary for Mrs. White to prosecute her case further.

Legg next testified about three informal complaints filed with the West Virginia Bar which arose during the eighteen months Legg practiced law. West Virginia reviewers dismissed all three complaints. Legg dismissed as "meaningless dicta" which "disgusted" him a conclusion of law by the West Virginia investigator in one of those matters (the Long matter) that the client's "dissatisfaction with the rate at which Mr. Legg pursued the case alleges, at best, an isolated instance of neglect over which the Committee has no jurisdiction."

Legg offered into evidence seventeen additional certificates of his moral character. He testified that he had never been accused of a breach of trust. He pointed out that when he filed his application for the July 1986 Bar it was correct as to debts.

He admitted that he had been extremely careless in filling out his application to take the February 1987 Bar. He further explained the omissions as human error and lack of maturity. He testified that he "must show more discipline in [his] professional matters" and stated that the first thing he would do if he ever started practicing law again would be to hire an experienced secretary. Legg was the only witness at his hearing.

By order dated 30 July 1987 the Board made findings of fact and concluded that the applicant did not possess the moral character requisite for licensure as an attorney of the North Carolina State Bar. Legg filed a petition for rehearing pursuant to Board Rule .1206. The Board denied the petition. Applicant filed exceptions to the Board's orders pursuant to Board Rule .1401 and appealed to the Superior Court of Wake County. By order dated 24 March 1988 Superior Court Judge D. Marsh McLelland remanded the case to the Board for further proceedings pursuant to Board Rule .1404.

On remand the Board relied on the record already before it. In its new findings of fact, the Board found that each of the appli-

cant's answers to questions 6, 12, 17(c) and 18 "displayed a lack of fairness and candor in dealing with the Board." The Board specifically rejected the applicant's explanation that each and every failure to fully disclose information specifically required by the application was the result of inadvertence. The Board found that "the Applicant purposefully failed to disclose numerous significant matters, and conclude[d] that the effect of these omissions was to mislead and deceive the Board." In making this finding the Board placed greatest weight on the failure to list: the debts to Huffman and Moses; the disputed debt to the Veneri estate; and the applicant's involvement as a defendant in the 1985 action to recover a debt.

The Board found further that the applicant demonstrated a "pattern of carelessness, neglect, and inattention to detail" while engaged in the practice of law in West Virginia. The Board found that he was "presently morally unfit to practice law in the State of North Carolina because of his failure to settle all accounts left owing from his law practice, his willful conversion of funds owed to a private investigator . . . and his neglect to return legal papers to a client after a written request for such papers."

The Board again concluded that "[t]he Applicant has not satisfied the Board that he possesses the qualifications of character and general fitness requisite for an attorney and counsellor at law and that he is of such good moral character as to be entitled to the high regard and confidence of the public." It again denied Legg's application by order dated 16 June 1988.

Legg filed exceptions to the Board's order and appealed to the Superior Court. Judge Coy E. Brewer, Jr., heard the matter at the 6 September 1988 Civil Non-jury Session of Superior Court, Wake County, and, by order dated 13 December 1988, affirmed the order of the Board.

Applicant assigns as error the conclusion by the Board that he "has not satisfied the Board that he possesses the qualifications of character and general fitness requisite for an attorney and counsellor at law and that he is of such good moral character as to be entitled to the high regard and confidence of the public." More specifically, applicant assigns as error the findings of the Board that he willfully converted funds owed to Moses; that his application omissions were purposeful; that he attempted to conceal the Veneri loan; and that a pattern of carelessness, neglect and

inattention to detail characterized his West Virginia practice. Additionally, applicant asserts that the Board denied him due process when it refused to permit him to present additional evidence after the hearing by denying his petition for rehearing. He also asserts the *de novo* board hearing did not comport with due process since the hearing included the two panel members who originally denied his application.

[1] We address first the due process claims. Legg claims that the Board denied him due process when it refused his petition to rehear the case. Board Rule .1207 provides that an applicant may petition the Board to reopen or reconsider a case in order to present "newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances." Legg sought to admit a letter from Mr. Moses stating that the investigator had "nothing but positive comments for Mr. Legg." The notice Legg received from the Board stated that he would be questioned about his "indebtedness to Tom Moses of Princeton, West Virginia and why this was not reported on applicant's application." Applicant fails to explain why, given full and fair notice such as occurred here, this information could not have been presented to the Board at the time of the board hearing.

Legg also sought reopening in order to introduce testimony from his wife concerning the Veneri loan. His basis for reopening the hearing was that the hearing began one and a half hours late and Mrs. Legg left the hearing without having testified, in order to pick up a child from day care. Again, the notice of hearing specifically identified the Veneri loan as a matter of inquiry. While we do not know what Mrs. Legg's testimony would have been, plaintiff does not contend that its content was newly discovered evidence but rather argues that its exclusion demonstrates arbitrariness in the Board's refusal to reopen the case. We find that the Board did not abuse its discretion in refusing the applicant's petition for rehearing.

We find no violation of due process in the fact that the *de novo* board hearing included the two members of the original hearing panel. We note as an initial matter that the applicant made no motion at the board hearing seeking recusal of the two panel hearing members. Nor has the applicant made a showing of actual prejudice. This situation is analogous to an *en banc* hearing before

a federal appeals court after a case has been decided by a panel of the court's judges. There is no due process consideration when the same trial judge retries the same issues on remand after reversal of his decision by an appellate court. *See FTC v. Cement Institute*, 333 U.S. 683, 702-03, 92 L. Ed. 1010, 1035, *reh'g denied*, 334 U.S. 839, 92 L. Ed. 1764 (1948). The United States Supreme Court heard and rejected this theme in an analogous situation. *Withrow v. Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712 (1975) (investigating members of state medical board may issue probable cause finding and later participate in contested hearing to determine whether to suspend a physician's license temporarily). We find no error in this administrative procedure.

[2] We turn now to the Board's findings of fact and conclusion of law. This Court employs the whole record test when reviewing decisions of the Board of Law Examiners. Under this test, there must be substantial evidence that supports the Board's findings of fact and conclusions of law. Substantial evidence means that relevant evidence which a reasonable mind could accept as adequate to support a conclusion. *In re Moore*, 308 N.C. 771, 779, 303 S.E.2d 810, 815-16 (1983). "Under the 'whole record' test we must review all the evidence, that which supports as well as that which detracts from the Board's findings, and determine whether a reasonable mind, not necessarily our own, could reach the same conclusions and make the same findings as did the Board." *Id.* at 779, 303 S.E.2d at 816. The initial burden of showing good character rests with the applicant. "If the Board relies on specific acts of misconduct to rebut this *prima facie* showing, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence." *In re Elkins*, 308 N.C. 317, 321, 302 S.E.2d 215, 217, *cert. denied*, 464 U.S. 995, 78 L. Ed. 2d 685 (1983).

There is uncontroverted evidence in the record before us to support the Board's finding that Legg willfully converted funds owed investigator Moses. "Conversion is 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Wall v. Colvard, Inc.*, 268 N.C. 43, 49, 149 S.E.2d 559, 564 (1966) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956)). The applicant intentionally deposited checks received from the State of West Virginia into his personal checking account and spent those funds

for his personal account. These funds were paid in reimbursement for expenses incurred in the defense of West Virginia indigents. The evidence showed that Legg had an obligation to forward a portion of these funds to investigator Moses. Legg's conduct shows an unauthorized assumption of the right of ownership over monies to which another was entitled sufficient to support the Board's conclusion in the context of a Board hearing.

Legg argues that he mistakenly spent the money owed to Moses under an erroneous belief that there were no bills outstanding. While the conversion did not necessarily rise to the level of a criminal offense or civil liability, such an evidentiary showing is not necessary in a Board proceeding to determine an applicant's moral fitness to practice law in North Carolina. *See Campbell v. Board of Alcoholic Control*, 263 N.C. 224, 225, 139 S.E.2d 197, 198-99 (1964), *cited in In re Elkins*, 308 N.C. at 323, 302 S.E.2d at 218.

Furthermore, Legg misinterprets the Board finding as requiring that attorneys deposit reimbursement checks in a client trust account. This is not the case. Rather, implicit in the Board finding is the underlying premise that Legg had a duty to ensure that debts associated with the reimbursement claims were paid in full before putting the reimbursement monies to his own use. This position is a reasonable one.

The evidence also supports the Board findings that the omissions from the application were more than inadvertent errors as the applicant suggested during his hearing. Legg told the Board that to him " 'debt' means a confirmed obligation to repay money." He admitted that in spite of this he did not reveal the $250.00 owed Huffman, the $316.10 owed Moses or the $10,000 claimed by the estate of Mary Veneri until after notification by the hearing panel of its interest in these matters.

Applicant asserts that without supporting evidence the Board may not reject his excuses of inadvertence to conclude that he was deceitful. The Board found that there was "a pattern of failing to disclose material matters specifically required to be disclosed" such that "the *effect* of these omissions was to mislead and deceive." (Emphasis added.) The basis of the Board's finding was the failure to list all addresses, places of employment, debts and actions in which applicant had been a party. The Board placed the greatest weight on the applicant's failure to list his debts and the action to which he had been a party.

A material omission from a Bar application is "one that 'has the effect of inhibiting the efforts of the bar to determine an applicant's fitness to practice law.' " *Attorney Grievance Commission v. Gilbert*, 307 Md. 481, 492, 515 A.2d 454, 459 (1986) (quoting *Matter of Howe*, 257 N.W.2d 420, 422 (N.D. 1977)). Like misrepresentations, evasive responses and misleading statements, a purposeful pattern of failing to disclose material matters required to be disclosed can "obstruct full investigation into the moral character of a Bar applicant, [and is] inconsistent with the truthfulness and candor required of a practicing attorney." *In re Willis*, 288 N.C. 1, 18, 215 S.E.2d 771, 781, *appeal denied*, 423 U.S. 976, 46 L. Ed. 2d 300 (1975). *See generally* Annot., "Falsehood, Misrepresentations, Impersonations, and Other Irresponsible Conduct as Bearing on Requisite Good Moral Character for Admission to Bar," 30 A.L.R. 4th 1020 § 23[b] (1984).

Personal indebtedness required to be disclosed on a Bar application is a material matter requiring full disclosure. *Re Application of Lumpkin*, 251 Ga. 64, 302 S.E.2d 679 (1983) (per curiam). Legg admits he failed to make full disclosure. When the admitted omission of a prior legal action in which nonpayment of a debt was the central issue is added to Legg's admission of his failure to make full disclosure of his personal indebtedness, it is clear by the greater weight of the evidence that there was a pattern to Legg's omissions which would support a finding that the failure to disclose was purposeful. The Board could certainly conclude that the effect of these omissions was to mislead and deceive.

In his third assignment of error the applicant asserts that the Board erroneously found he attempted to conceal the existence of a $10,000 loan from the executor of the Veneri estate. Legg admitted that he did not tell the executor about the loan until confronted personally about it. He excused this behavior as being guided by a promise to his deceased mother-in-law. "It is well settled that the credibility of witnesses and the probative value of particular testimony are for the administrative body to determine . . . ." *State ex rel. Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982). The Board committed no error in making this finding.

Nor did the Board commit error when it found that Legg's practice of law in West Virginia "demonstrated a pattern of carelessness, neglect, and inattention to detail." The applicant does

not challenge the underlying evidence which forms the basis of this finding. Instead, he would have us adopt his interpretation of the events surrounding his practice since the West Virginia State Bar never admonished him. The standards relevant to an admonishment by the West Virginia Bar do not determine whether applicant's practice is characterized by a pattern of carelessness and neglect. We hold that the greater weight of the evidence supports the Board finding that such a pattern existed.

[3] As a result of these and other findings not excepted to, the Board concluded that the applicant lacked the moral character and fitness required for licensing. Applicant asserts that this conclusion was also erroneous.

Initially, the burden is on the applicant to prove his good moral character because "[f]acts relevant to the proof of his good moral character are largely within the knowledge of the applicant and are more accessible to him than to an investigative board." *In re Willis*, 288 N.C. at 15, 215 S.E.2d at 780. If evidence of an applicant's omissions becomes apparent, the Board should first determine if the applicant made the omissions purposefully. If the Board determines that the omissions were purposeful, the Board must then decide whether the omissions "so reflect on the applicant's character that they are sufficient to rebut his prima facie showing of good character." *In re Moore*, 301 N.C. 634, 641, 272 S.E.2d 826, 831 (1981).

"[A state] has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law." *In re Griffiths*, 413 U.S. 717, 725, 37 L. Ed. 2d 910, 917 (1973). The character requisite for an applicant to the Bar "is something more than an absence of bad character." *In re Applicants for License*, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926). "Material false statements can be sufficient to show the applicant lacks the requisite character and general fitness for admission to the Bar." *In re Elkins*, 308 N.C. at 327, 302 S.E.2d at 221. "Good moral character has many attributes, but none are more important than honesty and candor." *In re Green*, 464 A.2d 881, 885 (Del. 1983) (per curiam). Where there is a purposeful pattern of omitted material information, the Board may conclude that the applicant has failed in his burden to exhibit candor in his application.

"[T]he prime obligation and responsibility of both the Board and this Court [are] to protect the public from incompetent and

dishonest lawyers, and to assure that those admitted to the Bar possess the requisite attributes of good moral character, learning and ability." *Id.* "The purpose of withholding certifications is not to punish the candidate but to protect the public and preserve the integrity of the Courts." *In re Jenkins*, 94 N.J. 458, 470, 467 A.2d 1084, 1090 (1983). We would add that fundamental attributes of good moral character include the maturity and professional discipline necessary to accept responsibility and perfect the actions required to represent a client properly.

Legg stated in his hearing that because of an unexpectedly early departure from West Virginia, he "did not have the time to appropriately keep track of funds owed Mr. Moses." We note that despite his haste the applicant did have the time to fully bill the Public Service Corporation of West Virginia. Only after the Board made specific inquiry into this and other matters was the applicant forthcoming. But for the Board, it would seem that some debts the applicant paid would remain yet unpaid and Linda White would await yet the contents of her file. The applicant's practices did not inspire the confidence of the Board and would not be likely to inspire the confidence of the general public.

The record and application indicate that Legg exhibited at best an attitude of carelessness and inattention to detail in his practice and his application. Such work habits could prove permanently damaging to any client who might come to rely upon the applicant's professional expertise. Our review of the record reveals no evidence that the applicant accepts personal responsibility for any of the numerous oversights, mistakes and inaccuracies that litter his application and the history of his practice in West Virginia. An applicant who fails to exhibit care in the submission of a document essential to his admission to the practice of his chosen career is unlikely to exhibit any greater degree of care during the course of client representation. In short, the record reveals that Legg fails to show the maturity and professional discipline that is a fundamental attribute of the good moral character required to practice law in this state.

The findings taken singly may not be sufficient to disqualify the applicant from the practice of law in North Carolina. *See In re Rogers*, 297 N.C. 48, 58, 253 S.E.2d 912, 918 (1979) ("Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents"). However, when the findings

are viewed in the aggregate, they reveal a systemic pattern of carelessness, neglect, inattention to detail and lack of candor that permeates the applicant's character and could seriously undermine public confidence and the integrity of the courts. The Board committed no error by concluding that the applicant has failed to satisfy the Board that he possesses the qualifications of character and general fitness requisite for an attorney and counsellor at law and that he is of such good moral character as to be entitled to the high regard and confidence of the public.

Affirmed.

Justice WEBB dissenting.

I dissent. The Board of Law Examiners has denied the appellant the right to be admitted to the bar in this State. The Board based this decision on the following finding:

> Applicant has failed to satisfy the Board that he possesses the qualifications of character and general fitness requisite for an attorney and counselor at law and that he is of such good moral character as to be entitled to the high regard and confidence of the public.

This conclusion of the Board was based on the way the appellant answered certain questions on the application to take the bar examination in this state and on a finding as to how he practiced law in West Virginia. The appellant did not list on his application all his prior residences, two jobs at which he worked, a debt in the amount of $250.00 owed for rent on an office he had used in West Virginia, a debt in the amount of $316.00 to a private investigator in West Virginia, and a loan from the appellant's mother-in-law in the amount of $10,000.00. The appellant also failed to list an action which had been filed against him in a magistrate's court in West Virginia, which action was dismissed. In addition he had represented a woman in West Virginia and obtained a judgment for her. She requested on 10 June 1986 that he deliver to her the legal papers in that action and he did not do so until 28 April 1987.

The appellant appeared before a panel of the Board on 17 April 1987 and the full Board on 15 May 1987. He explained that he had resubmitted the same application to take the February 1987 bar examination as he had submitted for the 1986 examination.

In the process he had forgotten that debts of more than $200.00 had to be listed. For this reason he did not list the debts for rent or to the private investigator. When he closed his law office he billed the State of West Virginia for work he had done for indigent defendants, which included the bill for the private investigator's work. He received checks for this work after he had moved to North Carolina and the checks did not show that any part of them were for the private investigator. He deposited the checks to his account in this state and when it was called to his attention that he owed the private investigator he made arrangements to pay it. When it was called to his attention that he owed rent in West Virginia he paid this.

The applicant testified that he inadvertently left off his application his former residences and his places of employment. He testified he did not intend to deceive the Board. As to the $10,000.00 debt to his mother-in-law, the appellant testified that she lent this money to him and his wife to help them buy a home in North Carolina. His mother-in-law asked him not to tell her other children as they would feel she was favoring his wife. After the death of the mother-in-law, his wife's brother confronted him in regard to the loan and he admitted it. He and his wife had signed a paper which said the loan would be treated by his wife as an advancement from her mother's estate and he did not consider it a debt.

On 30 July 1987 the Board entered an order denying the appellant the right to stand for the bar examination. On 24 March 1988 Judge D. Marsh McLelland remanded the case to the Board with instructions (1) to determine whether the failure of the applicant to make full disclosure concerning his places of residence, his prior employment, and his debts over $200.00 were purposeful omissions designed to mislead the Board, (2) to specify with particularity what facts it relied upon in reaching its conclusion that the applicant's answers to questions on the application displayed a lack of candor in dealing with the Board, (3) to specify with particularity how the Board reached the conclusion that in his West Virginia law practice the applicant demonstrated a pattern of carelessness, neglect and inattention to detail, and (4) to specify what facts it relied upon to support its conclusion that the applicant failed to satisfy the Board that he possesses such good moral character as to be entitled to the high regard and confidence of the public.

On remand the Board found that the applicant's failure to make full disclosure of his places of residence, prior employment and debts over $200.00 were not inadvertent but evidenced a lack of candor and fairness in dealing with the Board. The Board found that the appellant's answers to various questions on the application displayed a lack of candor and fairness. In particular the Board held the failure to list his places of residence, his places of employment, his debts in excess of $200.00, and the magistrate's court action against him indicated a pattern of failing to disclose material matters. It held the applicant had offered no plausible explanation for his failure to fully disclose the matters requested of him and rejected his claim that his failure to list these matters was due to inadvertence. It found the effect of these omissions was to mislead and deceive the Board. The Board said that its finding that while the appellant was engaged in the practice of law in West Virginia he demonstrated a pattern of carelessness, neglect, and inattention to detail was supported by his failure to pay the debts for rent and to the private investigator, his failure to review his files to see if other debts were owed and his failure to return the file to the woman he had represented in an action for child support. The Board held that the applicant had not satisfied it that he possesses the qualifications of character and general fitness requisite to practice law in this state.

I believe the Board erred in its findings of fact and conclusions. It appears to me that if the appellant had included all the matters on his application which he omitted it would not have prevented him from taking the bar examination. The appellant must have known this and the only plausible reason for his failing to do so was inadvertence. He may not have understood the importance of furnishing this explanation but this does not mean he consciously attempted to mislead the Board. I believe the testimony of the appellant was credible and there was no contrary evidence. The Board should have accepted it. *See In re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979).

As to the finding that while he was practicing law in West Virginia he demonstrated a pattern of carelessness, neglect, and inattention to detail, the Board held this was based on the failure to pay the debt to the private investigator, his failure to pay his rent, his failure to review his files after his law practice was closed to see if any other payments were due, and his failure to deliver a file to a client for whom he had obtained a judgment.

The failure to pay the rent and the failure to pay the private investigator were matters that occurred after the appellant's West Virginia law practice was closed. I do not believe they support any conclusion as to what he did while practicing law in West Virginia. There is no evidence as to anything that would have been revealed had the files been reviewed. I do not believe this supports any conclusions as to how the appellant practiced law in West Virginia. The evidence showed that the appellant represented 298 clients while practicing law in West Virginia. The finding by the Board against him is that he failed to deliver a file to one client. If we add to this his overlooking a bill to a private investigator until the matter was called to his attention, I hardly believe this establishes a pattern of carelessness, neglect, and inattention to detail in his West Virginia law practice.

I vote to reverse the Board of Law Examiners.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM EARL CLARK

No. 341A88

(Filed 7 December 1989)

1. Homicide § 21.6 (NCI3d); Weapons and Firearms § 3 (NCI3d) — felony murder — discharging firearm into occupied dwelling — sufficiency of evidence

There was sufficient evidence that defendant intentionally discharged a firearm into a residence that he knew was occupied to support his conviction of first degree murder under the felony murder rule where the State's evidence tended to show that defendant came to the home of his former girlfriend while the victim was visiting her; defendant and the girlfriend argued and defendant left the house in an angry manner; the girlfriend heard an automobile door slam followed by a gunshot; the shot came through the front door and struck the victim in the chest; the girlfriend ran from the house and saw defendant driving slowly away; she stopped defendant and asked him if he knew he had shot the victim, and defendant did not answer but drove away; and defendant volunteered

incriminating statements after his arrest, including a statement that "I just don't know why I did what I did." N.C.G.S. § 14-34.1.

Am Jur 2d, Homicide § 94.

2. **Homicide § 12 (NCI3d)— murder indictment—theories of prosecution**

A murder indictment in the form prescribed by N.C.G.S. § 15-144 will support a verdict finding defendant guilty of first degree murder upon any of the theories set forth in N.C.G.S. § 14-17.

Am Jur 2d, Homicide § 211.

3. **Homicide § 25 (NCI3d)— first degree murder—election of theories not required**

The State is not required at any time to elect a theory upon which it will proceed against the defendant on the charge of first degree murder, and it is proper for the trial court to submit the issue of defendant's guilt of that charge to the jury on each of the theories of first degree murder supported by substantial evidence presented at trial.

Am Jur 2d, Homicide § 211.

4. **Homicide § 31 (NCI3d)— first degree murder—specification of theory in verdict**

Rather than have the jury render a general verdict if it finds the defendant guilty of first degree murder when more than one theory is submitted, the better practice is for the trial court to have the jury specify the theory or theories upon which it finds first degree murder to have been established beyond a reasonable doubt.

Am Jur 2d, Homicide § 542.

5. **Homicide § 30.3 (NCI3d)— murder prosecution—instruction on involuntary manslaughter not required**

The trial court did not err in failing to instruct the jury with regard to a possible verdict of involuntary manslaughter in a murder prosecution in which the trial court's instructions required the jury to find defendant guilty of first degree murder under the felony murder rule or to find him not guilty where the State's evidence tended to show that defendant intentional-

ly shot into an occupied dwelling and caused the death of the victim, and defendant's evidence was that he did not fire a gun at any time on the night in question.

Am Jur 2d, Homicide § 531.

6. Homicide § 4.2 (NCI3d)— felony murder—discharging firearm into occupied property as underlying felony

The "merger doctrine" will not be applied to bar application of the felony murder rule to homicides committed in the perpetration of the felony of discharging a firearm into occupied property.

Am Jur 2d, Homicide § 73.

Justice MITCHELL concurring in result.

Justice WEBB joins in the concurring opinion.

APPEAL of right by the defendant from judgment entered by *Reid, J.*, on 3 March 1988, in Superior Court, LENOIR County, sentencing the defendant to life imprisonment for murder in the first degree. Heard in the Supreme Court 11 April 1989.

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 the defendant-appellant.

FRYE, Justice.

Defendant was charged in a proper bill of indictment containing two counts. Count I charged defendant with feloniously discharging a firearm into an occupied dwelling. Count II charged defendant with murder. Defendant was tried in a noncapital trial on the charge of murder and entered a plea of not guilty. At the conclusion of all the evidence at trial, the trial court instructed the jury concerning the law as to murder in the first degree by reason of a killing during the perpetration of a felony. The trial court further instructed the jury that it would find defendant guilty of first degree murder on the basis of this theory or find him not guilty. Acting pursuant to these instructions, the jury returned a verdict finding defendant guilty of first degree murder. The trial court entered judgment sentencing defendant to life imprisonment, and defendant appealed to this Court.

On appeal, defendant brings forth three assignments of error pertaining to the following: (1) whether the trial court erred in failing to dismiss the first degree murder charge under the felony murder rule because there was insufficient evidence to convict defendant of the underlying felony; (2) whether the trial court erred in refusing to instruct the jury that it should consider a possible verdict finding defendant guilty of involuntary manslaughter; and (3) whether this Court should reject the felony murder rule for cases in which the underlying felony is the offense of discharging a firearm into occupied property. We find no error in defendant's trial.

Evidence for the State tended to show in pertinent part that on the night of Sunday, 22 March 1987, Johnny Bryant was shot and killed while visiting at the home of Jacquelyn Foulks. Foulks and defendant William Earl Clark had been "going together" for five years prior to the shooting.

Foulks, a witness for the State, testified that on the afternoon of 22 March 1987, she and defendant had gone out together. They had been together from about mid-day until that night when they went with friends to a club. They had been drinking beer that day and fighting and arguing all evening. Outside the club, the victim Johnny Bryant observed defendant twisting Foulks' arm until she went down on her knees. Bryant and defendant argued over the incident, but Foulks saw no weapons during this confrontation. Bryant, Foulks, and defendant went back into the club. At about 11:00 p.m., the three of them came back outside the club. After knocking a beer out of Foulks' hand, defendant took some of her clothes out of the trunk of his automobile, put them on the ground, and drove off.

Foulks testified that Bryant gave her a ride home. Bryant accompanied Foulks inside her house. After she put her child to bed, Foulks went to her room to change clothes and heard an automobile drive up. Defendant was the driver of the automobile. She let him inside the house, and he sat on the couch. He was "still upset and high" and asked, "What is this, a new boyfriend?" Foulks replied that she and Bryant were just friends. After some further conversation, during which she told defendant that they "were through, it was over with—through," defendant got up and left. Foulks followed defendant to the door and closed and locked it as he left the house.

Bryant stood up as Foulks accompanied defendant to the door. Foulks never heard defendant's automobile pull off or the motor start. She heard a slam, then a gunshot. She saw Bryant stagger toward her kitchen where he grabbed the kitchen table and fell. He had "a big hole in his chest" and blood was everywhere. Foulks testified that the gunshot came through her closed front door. She ran out the front door of her house to get help and saw defendant driving slowly away from her house. She ran into the road, threw up her hands and told defendant to stop. She asked him if he realized that he had shot Bryant. Defendant did not answer, but he jumped out of his automobile and looked at Foulks. Then he got back into the automobile and drove off. Foulks ran to her neighbor's house for help.

Raymond Becton Fields, a neighbor of Foulks, testified that he was awakened about midnight on the date of the shooting incident by Foulks, who was hysterical. She told him that a friend of hers had been shot and that "Bro shot him." He testified that he went with Foulks to her house and saw the victim. He checked the victim Bryant for a pulse and, finding none, told Foulks that Bryant was dead. Fields also testified that he noticed a hole about the size of a finger in the front door.

Captain Lester Gosnell of the Lenoir County Sheriff's Department arrived at Foulks' house shortly after the shooting. He examined the front door of Foulks' residence and observed a hole approximately one inch in diameter with visible black markings around the hole. After taking a statement from Foulks, Gosnell obtained a warrant for defendant's arrest. He then went to defendant's house and placed him under arrest.

Gosnell also testified that he advised defendant of his Miranda rights after defendant was taken into custody. Defendant told Gosnell that he did not want to answer any questions without a lawyer. During a thirty-five to forty-minute wait for the magistrate, the defendant said to Gosnell, "It don't take much to get in trouble but it takes a long time to get out, don't it?" Gosnell replied, "That's true." Later, defendant asked Gosnell, "[T]o be charged with first-degree murder, don't you have to aim at your target?" Gosnell responded, "I think so." Defendant then said, "I just don't know why I did what I did." Gosnell made no further reply but wrote down each of these comments.

Defendant testified at trial in his own behalf. He admitted that he and Foulks had an argument on 22 March 1987, but he denied having words with Bryant. He testified that he went to Foulks' house to make up with her, but he never went inside the house. He testified that he fell asleep in the automobile while he was parked in Foulks' driveway. He awoke hearing Foulks calling him, saying, "Bro, Bro, Bro, come help me. Johnny have been shot." Defendant then backed out of the driveway and went home. He denied shooting a gun at any time that night. He further testified that Foulks later told him that she had gotten the victim's gold necklace and his coat. Defendant testified that the only statements he made to Captain Gosnell were the following: "It don't take you long to get in trouble but it takes you a long time to get out"; and "[A]ny time they get you for murder you're in a world of trouble even though you don't know how you got in it."

[1] Defendant first contends that the trial court erred in denying his motions to dismiss the charge of first degree murder under the felony murder rule because there was insufficient evidence to convict him of the underlying felony of discharging a firearm into an occupied dwelling. In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). The trial court should not grant a dismissal simply because there are contradictions and discrepancies in the evidence; the jury must resolve these conflicts. *State v. Workman*, 309 N.C. 594, 308 S.E.2d 264 (1983). The test that the trial court must apply is whether there is substantial evidence—either direct, circumstantial, or both—to support a finding that the crime charged has been committed and that defendant was the perpetrator. *State v. Locklear*, 322 N.C. at 358, 368 S.E.2d at 383. The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). If there is substantial evidence of each essential element of the offense charged and that defendant was the perpetrator, then a motion to dismiss should be denied. We conclude that there was substantial evidence that defendant committed the offense of discharging a firearm into an occupied dwelling and, therefore, sufficient evidence of the felony required to sustain defendant's conviction of first degree murder under the felony murder rule.

The offense of discharging a firearm into an occupied dwelling is defined by statute, which provides in pertinent part that:

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> . . . (2) a firearm into any building . . . while it is occupied is guilty of a Class H Felony.

N.C.G.S. § 14-34.1 (1986). The evidence must show that defendant intentionally shot into the occupied building. *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973). Defendant's specific argument here is that the State failed to submit substantial evidence that he *intended* to shoot *into* the house. We disagree.

The evidence in the present case was sufficient, when viewed in the light most favorable to the State, to support a finding that defendant intentionally shot into a residence that he knew was occupied. Jacquelyn Foulks testified that defendant came to her home while Johnny Bryant was visiting her. Defendant and Foulks argued and he left the house in an angry manner. As Foulks was locking the door behind defendant, Johnny Bryant stood up. Foulks then heard what she thought was an automobile door slam followed by a gunshot. The shot came through the front door and hit Bryant in the chest. After trying to help the victim, Foulks ran out of the house and saw defendant driving slowly away. She stopped him and asked him if he knew that he had shot Bryant. Defendant did not answer but drove away. Furthermore, the State presented evidence through Captain Gosnell that defendant volunteered incriminating statements after he was arrested. We conclude that this was substantial evidence from which the jury could find that defendant did intend to shoot into the residence. *See id.* Therefore, defendant's argument is without merit.

[2] Defendant next assigns as error the trial court's failure to instruct the jury with regard to a possible verdict finding him guilty of involuntary manslaughter. The second count in the bill of indictment was in the form prescribed by N.C.G.S. § 15-144 and charged defendant with the murder of Johnny Bryant. A murder indictment in the form prescribed by N.C.G.S. § 15-144 will support a verdict finding the defendant guilty of first degree murder upon any of the theories set forth in N.C.G.S. § 14-17. *State v. Bush*, 289 N.C. 159, 221 S.E.2d 333, *death sentence vacated*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976).

[3, 4] The State is not required at any time to elect a theory upon which it will proceed against the defendant on the charge of first degree murder, and it is proper for the trial court to submit the issue of the defendant's guilt of that charge to the jury on each of the theories of first degree murder supported by substantial evidence presented at trial. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983). Further, rather than have the jury render a general verdict if it finds the defendant guilty of first degree murder, the better practice is for the trial court to have the jury specify the theory or theories upon which it finds first degree murder to have been established beyond a reasonable doubt. *See State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

In the present case, the trial court submitted the murder charge for the jury's consideration only upon the theory of first degree murder under the felony murder rule. Both the trial court's instructions and the written verdict form given the jury required that the jury find defendant guilty of first degree murder under that theory or find him not guilty. The jury returned its verdict specifying that it found defendant guilty of first degree murder in the perpetration of a felony.

[5] Defendant contends that the jury should have been instructed with regard to a possible verdict finding him guilty of involuntary manslaughter. However, defendant presented no evidence to establish involuntary manslaughter. The State's evidence tended to show that defendant intentionally shot into an occupied dwelling causing the death of the victim. If the State's evidence is believed, then defendant is guilty of felony murder. Defendant's evidence was that he did not fire a gun at any time on the night in question. If defendant's evidence is believed, then he is not guilty of any degree of homicide. Since there was no evidence of involuntary manslaughter, the trial judge did not err in failing to submit involuntary manslaughter as a possible verdict. It is well settled that a jury should only be instructed with regard to a possible verdict if there is evidence to support it. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 10 (1988) (voluntary manslaughter); *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980) (breaking or entering); *see also State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971) (involuntary manslaughter).

[6] Finally, defendant contends that this Court should reconsider established law and apply the "merger doctrine" to bar application

of the felony murder rule to homicides committed in the perpetration of the felony of discharging a firearm into occupied property. We have rejected this application of the "merger doctrine" on several recent occasions. *See State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Mash*, 305 N.C. 285, 287 S.E.2d 824 (1982); *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982). The defendant has offered no argument that persuades us to alter this well-settled law.

For the foregoing reasons, we hold that the defendant received a fair trial, free of prejudicial error.

No error.

Justice MITCHELL concurring in result.

The majority holds that the trial court properly refused to instruct on the lesser offense of involuntary manslaughter, because there was no evidence of involuntary manslaughter. For reasons which I have fully discussed in my dissenting opinion in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989), involuntary manslaughter is not a lesser *included* offense of first-degree murder, when, as here, first-degree murder is submitted to the jury based *solely* upon the felony murder theory; this is true without regard to what the evidence may tend to show. *Because* the trial court—for whatever reason—permitted this case to go to the jury for its determination of whether the defendant was guilty of first-degree murder *only under the felony murder theory*, no instruction on lesser homicide offenses would have been proper. I concur only in the result reached by the majority.

Justice WEBB joins in this concurring opinion.

STATE OF NORTH CAROLINA v. BILL VESTER COKER

No. 298A88

(Filed 7 December 1989)

Criminal Law § 213 (NCI4th)— statutory speedy trial right—exclusion of time for continuances—sufficient showing by State

The trial court's denial of defendant's motion to dismiss a murder charge for failure to try him within the statutory 120-day speedy trial period was supported by the record, although the trial judge made no findings of fact to support his ruling, where 203 days elapsed between defendant's indictment and trial; the State carried its burden of going forward with evidence that nine continuances totalling 170 days granted to the State should be excluded from the speedy trial computation by producing facially valid orders for those continuances; defendant failed to produce evidence that those orders were invalid; defendant's allegation that all of the continuance motions and orders were not in the file reviewed by the trial judge in ruling on the motion was not supported by evidence in the record; and defendant was tried only 33 days after his indictment when the 170 days for continuances are excluded. N.C.G.S. § 15A-701(b)(1) and (b)(7).

Am Jur 2d, Criminal Law § 863.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Stevens, J.*, at the 11 January 1988 Criminal Session of Superior Court, WAYNE County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 October 1989.

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-appellant.

MEYER, Justice.

Defendant's case was consolidated for trial with that of his codefendant, Ralph Harvey Barfield. The cases were tried as non-capital cases. Both defendants pled not guilty; however, after trial

to a jury, defendant Bill Vester Coker was found guilty as charged and Barfield was acquitted. Defendant received the mandatory life term. In his appeal to this Court, defendant brings forward only one assignment of error. We have performed a careful and thorough review of the record, and we conclude that this assignment of error should be overruled and that defendant received a fair trial free of prejudicial error.

The murder of which defendant was convicted grew out of a confrontation on a dirt road in Wayne County in the late afternoon. Defendant does not take issue with the presentation of the evidence in his case, and we perceive no need to discuss the facts of the case for purposes of this appeal. Defendant brings forth no assignment of error arising from his actual trial. The State's evidence of defendant's killing of an SBI informant whose testimony had been instrumental in defendant's arrest for a drug offense was overwhelming and included the testimony of numerous eyewitnesses. Defendant's argument relates to the trial court's decision to deny his pretrial motion to dismiss for violation of his right to a speedy trial under the Speedy Trial Act (the Act), N.C.G.S. ch. 15A, art. 35 (1988).[1] Defendant contends that the transcript of the hearing on his motion shows a summary denial by the trial judge despite the State's failure to meet the evidentiary burden placed on it by the Act, which specifies that the burden is upon the State to go forward with evidence concerning whether certain periods of time may properly be excluded in determining whether the State has exceeded the 120-day limit mandated by the Act.

Defendant places great emphasis on the fact that the transcript of the trial judge's consideration of defendant's motion to dismiss is brief and on the fact that the judge made no findings of fact to support his ruling. Essentially, the hearing on the motion to dismiss consisted of defense counsel's statement to the court, the district attorney's offering into evidence eighteen marked exhibits, the admission of these documents, and the court's ruling on the motion.

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1. The Speedy Trial Act, article 35 of chapter 15A of the General Statutes, was repealed effective 1 October 1989. Defendant's rights must nevertheless be viewed in light of the law as it existed at the time of his trial. The Act required that the State try a defendant charged with a felony within 120 days from the date the defendant is arrested, served with criminal process, waives indictment or is indicted, whichever occurs last, unless that time is extended by events enumerated in N.C.G.S. § 15A-701(b). If the State fails to try a defendant within the mandated period, the charge must be dismissed.

Our review of these exhibits reveals that the majority of them were superior court docket sheets. These docket sheets indicate, *inter alia*, the dates on which the orders on the State's motions to continue were signed and filed during the court sessions indicated. Our comparative analysis reveals that Exhibits 1 through 15 are docket sheets which directly correspond with the copies of the motions and orders for continuance (excluding 170 days) that were filed in the court file which was maintained for defendant's case. State's Voir Dire Exhibits 16 and 17 are copies of letters which relate to two conferences the district attorney apparently attended in September and October of 1987. State's Voir Dire Exhibit 18 is a clerk's minutes sheet and a marked superior court calendar for the 17 August 1987 Criminal Session of the Superior Court of Greene County. These latter three exhibits (16 through 18) appear to be irrelevant, as the period of time covered in the first two coincide with the period of time defendant's case was continued because of the ongoing trial of other cases in Wayne County and the last (18) relates to a calendar for *Greene* County which coincides with a period of time when the prosecutor was engaged in the trial of cases in Wayne County.

Defendant contends that the trial judge's failure to make specific findings in support of his ruling had the effect of making appellate review impossible and therefore entitled him to entry of an order granting his motion to dismiss. He maintains that the State has failed to carry its burden of proof because it cannot be determined from the record that the trial judge had access to the complete file, including all continuances that were filed. This assertion is based on the fact that the copy of the court file which was sent to the Office of the Appellate Defender failed to include the motions and orders the State relies on to support the trial court's ruling. Defendant argues that because the file sent to the Appellate Defender did not contain the motions and orders, it raises an inference that they were not in the file which the judge reviewed in ruling on his speedy trial motion.

The State submits, and we agree, that a thorough review of the record in this case fully supports the trial court's ruling. Defendant was arrested on 20 January 1987 and indicted on 22 June 1987. His trial began on 11 January 1988, 203 days after the indictment. The record reveals that the State made nine written motions to continue defendant's trial and that corresponding orders were

entered in accordance with proper procedure. The excluded periods were as follows:

22 June 1987—5 July 1987	13 days
13 July 1987—26 July 1987	13 days
31 July 1987—11 August 1987	11 days
14 August 1987—14 September 1987	31 days
14 September 1987—28 September 1987	14 days
1 October 1987—18 October 1987	18 days
19 October 1987—25 October 1987	6 days
29 October 1987—7 December 1987	39 days
10 December 1987—4 January 1988	25 days
TOTAL:	170 days

The reason given for delay in seven of the motions for continuance was the fact that other cases were in the process of being tried at that time. The Speedy Trial Act provides that a continuance necessitated by trial of other cases is an excludable period. N.C.G.S. § 15A-701(b)(7) (1988); *State v. Kivett*, 321 N.C. 404, 364 S.E.2d 404 (1988). Two of the motions requested continuances because defendant was in the process of being arraigned and thus could not yet be tried. The Act provides that any period of delay resulting from pretrial proceedings concerning the defendant shall be excluded from the computation. N.C.G.S. § 15A-701(b)(1) (1988). The orders granting these motions for continuance (as well as other such motions in other cases) recited that they were entered for the reasons set forth in the motions and found that "the ends of justice served by granting continuances in the cases listed [in the respective motions] outweigh the best interests of the public and defendants in a speedy trial." The Act specifies that any period of delay from a continuance granted by any judge is excluded if the judge finds that the ends of justice served outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record the reasons for so finding. N.C.G.S. § 15A-701(b)(7) (1988).

The total time excluded due to these continuances covered by Exhibits 1 through 15 was 170 days. Subtracting 170 days from the total number of days which elapsed between the day of indictment and the trial date, 203 days, leaves only 33 days, a period well within the 120-day mandate of the Act. This Court has previously decided that such a showing is all that is necessary: "By producing the orders for continuance, all entered for facially valid reasons, the State carried its burden of going forward with evidence to

show that the continuance periods should be excluded from the computation." *State v. Kivett*, 321 N.C. at 409, 364 S.E.2d at 407. Several of the orders granting continuances specifically directed that they "be filed with the Clerk's minutes and copies filed in each case file listed in this Order."

Rule 11(c) of the North Carolina Rules of Appellate Procedure provides that if the parties are unable to agree on the record on appeal, it is the duty of the trial judge to settle the record. At the hearing to settle the record on appeal in this case, the State offered evidence which tended to show the customary practice in Superior Court, Wayne County, regarding the filing of court records, including continuances in particular. The original document is placed in the clerk's minutes, while a copy is placed in the defendant's case file. The Wayne County Deputy Clerk of Superior Court testified that there were about sixty documents in the defendant's case file, excluding subpoenas and settlement documents. Twenty-one pages consisted of continuance motions. Defendant does not now challenge the clerk's filing procedure or the testimony in this regard, nor does he claim any wrongdoing on the part of the clerk's office.

The trial judge made the following findings of fact at the conclusion of the hearing to settle the record on appeal:

> 1. That at the time the Court originally ruled on the Speedy Trial Motion the Court had reviewed the file including the existing continuances before it made it's [sic] ruling;
>
> 2. That the Court was aware of the substance contained in the Speedy Trial Motion, having discussed the same with counsel for the defendant, Mr. Gene Braswell; and the District Attorney, Mr. Donald Jacobs, in chambers and prior to this cause coming on to be heard;
>
> 3. That the Court's recollection is specific as to these conversations, except as to the exact time and place, but the Court recollects conversing with both counsel extensively about the matter;
>
> 4. That the Court examined the file in this case, as was its custom and practice in such instances, fully and completely due to the nature and gravity of the case;

5. That there was sufficient evidence in the knowledge of the Court, including the file, the minutes of the Court, and statement of counsel, upon which the Court made its ruling being fully aware of the contents of the motion.

That upon the foregoing, the Court concludes and so finds as a fact that it had sufficient knowledge of the facts and proceedings surrounding the Speedy Trial Motion when it originally ruled, whether contained in the minutes, whether contained in statements made by counsel for the State or the Defendant, or whether contained in the records of the case, to make findings of fact based upon this evidence and did so in substantial compliance with the law of the State of North Carolina, in holding that the Speedy Trial Law did not apply to the Defendant Coker. The Court further finds from the evidence that there was no tampering with the files in this case nor was such alleged or suggested.

That the Court hereupon incorporates and finally adjudges and decrees that the entire record on file as it now exists to be the Record of the Case on Appeal which includes minutes or other entries which may not have been forwarded to the Appellate Defender by the Clerk of Superior Court of Wayne County. The Court further takes judicial notice of the same as being now fully completed and finalized.

These findings are supported by the evidence presented at the hearing to settle the record held by Judge Stevens on 21 November 1988, as reflected in the fifty-eight page transcript of that hearing.

Defendant argues that since the trial judge's finding was that he had "reviewed the file including *the existing continuances* before . . . ruling" (emphasis added), this amounted to a declaration by the judge that he would take judicial notice of whatever was in the clerk's records, whether he had yet considered them or not. Defendant fears such an application of the doctrine of judicial notice will abrogate the statutory burden placed upon the State. We do not find defendant's argument persuasive. By producing the facially valid orders for continuance, it is clear that the State has carried its burden of showing that the stated periods of time should be excluded from the 120-day computation. *State v. Kivett*, 321 N.C. at 409, 364 S.E.2d at 407. It is now incumbent upon defendant to support his allegation, unsupported by the evidence before us, that the trial judge did not in fact review everything now in the

record to support his findings. The Speedy Trial Act provides that "[t]he defendant shall have the burden of proof of supporting [the] motion [for dismissal]" alleging a violation of the Act. N.C.G.S. § 15A-703(a) (1988).

In *Kivett*, the defendant argued that 154 days should not be excluded from the computation because there were no findings supporting the judge's conclusion that the ends of justice would be served by doing so. *Kivett*, 321 N.C. 404, 364 S.E.2d 404. This Court found that the State had carried its burden by producing orders for continuances entered for facially valid reasons, and absent evidence produced by defendant, the Court would not assume that other cases were not in fact being tried, that the State was trying cases of more recent origin, or that the cases being tried were not sufficiently significant to merit being tried ahead of the one in question. *Id.* at 409, 364 S.E.2d at 407.

This Court has consistently held that findings of fact made by a trial court are conclusive on appeal if supported by the evidence. *State v. Miller*, 321 N.C. 445, 364 S.E.2d 387 (1988). "While the better practice is for the court to make findings of fact, the court's failure to make findings does not constitute reversible error when it is apparent the court determined the State carried its burden of proof under G.S. 15A-703(a)." *State v. Waller*, 77 N.C. App. 184, 187, 334 S.E.2d 796, 798 (1985), *cert. denied*, 315 N.C. 396, 338 S.E.2d 886 (1986).

The record in this case unequivocally shows that the State did indeed file nine facially valid motions for continuance in defendant's trial and that orders granting such motions were signed and filed with the clerk. There is a presumption that the court's record speaks the truth. *Jones v. Jones*, 241 N.C. 291, 85 S.E.2d 156 (1955). The trial judge's findings in the hearing to settle the record on appeal are supported by the evidence. We find no reason to disturb these findings on appeal, and we therefore decline to do so.

We conclude that defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. GRAYSON RILEY DAVIS

No. 100A89

(Filed 7 December 1989)

Narcotics § 4.3 (NCI3d)— trafficking in narcotics—constructive possession—evidence sufficient

There was sufficient evidence to go to the jury under an instruction on constructive possession in a prosecution for trafficking in cocaine and methadone where the evidence did not support a finding that defendant was in exclusive control of the mobile home where the narcotics were found, but was sufficient to provide the other incriminating circumstances necessary for constructive possession. There was evidence of defendant's presence in the mobile home when the controlled substances were found; officers presented only defendant with a copy of the search warrant after it was read and there was no evidence that defendant protested; a bill of sale for the mobile home was found with defendant's name on it; a bottle of prescription drugs bearing defendant's name was found on a table beside the chair in which defendant was sitting when officers arrived; and defendant did not object during trial when an officer referred to the mobile home as defendant's residence.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 11, 45.

ON appeal and discretionary review of the decision of the Court of Appeals, 92 N.C. App. 627, 376 S.E.2d 37 (1989), reversing defendant's convictions and sentences entered by *Ross, J.*, in the Superior Court, RANDOLPH County, on 7 December 1987. Heard in the Supreme Court 12 September 1989.

Lacy H. Thornburg, Attorney General, by Michael Rivers Morgan, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for defendant-appellee.

FRYE, Justice.

Upon proper indictments, defendant was convicted by a jury of trafficking in the controlled substances of dilaudid, codeine, co-

caine, methadone, morphine, and anileridine, in violation of N.C.G.S. § 90-95(h) (1985), and of possession of the controlled substance diazapam in violation of N.C.G.S. § 90-95(a)(3) (1985). On each of the convictions of trafficking in dilaudid, morphine, methadone, and anileridine, defendant was sentenced to life imprisonment and fined $500,000, a total of four life sentences and $2,000,000 in fines. Defendant received a term of thirty years imprisonment and a fine of $100,000 for the offense of trafficking in codeine, fifteen years imprisonment and a $50,000 fine for trafficking in cocaine, and five years imprisonment for possession of diazapam.

From the judgments entered, defendant gave notice of appeal to the Court of Appeals, assigning as error the trial court's denial of defendant's motion to dismiss the charges at the close of the evidence. The Court of Appeals reversed, holding that the trial court should have granted defendant's motion to dismiss all the charges. *State v. Davis*, 92 N.C. App. 627, 376 S.E.2d 37 (1989). Judge Eagles dissented from the portion of the opinion which reversed the two convictions on the trafficking charges relating to the controlled substances (methadone and cocaine) found inside the mobile home. *Id.* at 637, 376 S.E.2d at 43 (Eagles, J., dissenting). The State appealed to this Court as of right on that issue. N.C.G.S. § 7A-30(2) (1986). On 5 April 1989, we allowed the State's petition for discretionary review of that portion of the Court of Appeals' opinion with which the dissenting judge agreed, i.e., the reversal of defendant's convictions related to the controlled substances found in the outbuilding. Since we have determined that the State's petition for discretionary review was improvidently allowed, we address only the issue brought forward by the State's appeal based on the dissenting opinion in the Court of Appeals, the sufficiency of the evidence as it relates to the controlled substances found inside the mobile home.

The specific question for our decision is whether the Court of Appeals erred in reversing defendant's convictions and sentences for trafficking by possession of more than twenty-eight grams of cocaine and trafficking by possession of twenty-eight grams or more of methadone on the grounds that the evidence was insufficient to survive defendant's motions to dismiss as to those charges. We hold that the Court of Appeals erred, and its decision on this issue is reversed.

The State presented evidence at trial that seven law enforcement officers entered a beige mobile home on Marlboro Church

Road in the Hillsville community in Randolph County on 27 February 1987, pursuant to a search warrant which authorized the search of the residence. The officers found seven adults in the living room of the mobile home. Among the seven were the defendant, his wife Patricia, his stepdaughter, her husband, and Vernon Lunsford. At the time of the search, Grayson Davis, the defendant, was fifty-eight years old with physical impairments which required the use of a walker.

When the officers entered the living room of the mobile home to begin the search, Vernon Lunsford ran down the hall into a bathroom and flushed the toilet. An officer, who was pursuing Lunsford, reached into the toilet as it was flushing and retrieved several plastic bags which contained white powder and several large rocks. Both the powder and the rocks were later identified as cocaine. At that time, Lunsford was taken into custody.

The other people in the mobile home were instructed to remain seated in the living room, the search warrant was read, the officers gave a copy of the search warrant to defendant, and the officers continued the search of the mobile home and the area outside the mobile home. They found a blue Crown Royal liquor bag which contained white powder and various tablets in the bathroom where Lunsford was apprehended. In the front bedroom, the officers found bottles containing white tablets identified as methadone. In a wooden box in the front bedroom, the officers also found a mobile home sales contract with the name of Grayson Davis. This sales contract was dated 27 March 1986 and contained a description of a mobile home which matched the description of the mobile home being searched. However, the officers did not compare any of the identification numbers found in the contract with the identification numbers of the mobile home.

In the living room, the officers found several bottles of pills on a coffee table located on the right-hand side of the chair where defendant was seated. One of these bottles was a prescription bottle with defendant's name on it. When defendant was searched, the officers found several white tablets in his pants pockets and between his legs in the seat of the chair. The officers also found drug-related paraphernalia such as scales, syringes, smoking pipes, screen wire, and rolling papers throughout the mobile home.

In presenting its evidence, the State called the following witnesses: Sergeant Bunting, a criminal investigator with the

Randolph County Sheriff's Department who supervised the search of the mobile home; S.B.I. Agent Allcox who was found by the court to be an expert in the field of forensic chemistry and who analyzed some of the controlled substances removed from the premises; Lieutenant Allred, a detective with the Randolph County Sheriff's Department who assisted primarily in the search of the outbuilding; and S.B.I. Agent Hatley who also assisted in the search. Agent Allcox specifically testified as to the laboratory analysis performed on the substances taken from the mobile home and the outbuilding. Agent Hatley testified specifically about the sales contract with the name of Grayson Davis which was found on the premises. The State also introduced some twenty-three exhibits, consisting primarily of bottles and bags of the controlled substances found in the mobile home and the outbuilding which were identified by Agent Allcox, and ten photographs of the controlled substances and drug paraphernalia found inside the mobile home and the outbuilding.

At the close of the State's evidence, defendant moved to dismiss the charge of trafficking by possession of cocaine on the grounds that all the evidence tended to show that the cocaine which was seized in this raid was under the direct control of Mr. Lunsford and that there was no evidence to show that defendant possessed the cocaine at any time. Defendant also renewed his previous motion to dismiss the remaining trafficking charges and the possession of anileridine charge on the grounds that those indictments properly charged only one offense, trafficking in opium. Finally, defendant moved, "for the record," to dismiss the charge of trafficking by possession of methadone. The trial judge denied each of defendant's motions. Defendant elected not to offer any evidence and renewed each of his motions which were again denied by the trial court.

Defendant now contends that the State did not offer sufficient evidence on which a jury could base his guilt. On the issue before us on this appeal, defendant contends that the trial judge erred by not granting his motions to dismiss the charges relating to the cocaine and methadone found inside the mobile home.

When ruling on a defendant's motion to dismiss, the evidence must be considered in the light most favorable to the State. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581 (1975). The State is entitled to every reasonable inference which can be drawn from the evidence presented. *Id.* "If there is substantial evidence—

whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit is denied." *Id.* at 117, 215 S.E.2d at 582. The Court of Appeals held that there was not substantial evidence presented at trial to prove that defendant was guilty of the offenses related to the controlled substances found in the mobile home. *State v. Davis*, 92 N.C. App. at 634, 376 S.E.2d at 42. We disagree and, therefore, reverse the decision of the Court of Appeals on this issue.

Defendant's convictions were based on the theory of constructive possession. Under the theory of constructive possession, a person may be charged with possession of an item such as narcotics when he has both "the power and intent to control its disposition or use," *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972), even though he does not have actual possession. *Id.* "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *Id.* However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred. *State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984). Since the State did not show that defendant had exclusive possession of the mobile home, the real issue is whether the evidence disclosed other incriminating circumstances sufficient for the jury to find that defendant had constructive possession of the narcotics found in the mobile home. When all the evidence is examined in a light most favorable to the State, as it must be on a motion to dismiss, we conclude that the evidence was sufficient to go to the jury on the issue of defendant's constructive possession of the narcotics found in the mobile home.

While the evidence presented in this case does not support a finding that defendant was in exclusive possession of the mobile home because other persons were present and defendant was disabled, the evidence was sufficient to provide the other incriminating circumstances necessary for constructive possession when the possession is nonexclusive. The evidence presented by the State showed that the officers who searched the mobile home found a bill of sale to a mobile home which matched the description of the mobile home being searched. The name on the bill of sale was that of

Grayson Davis, the defendant. The evidence further showed that a bottle of prescription drugs with the name of Grayson Davis was found on a coffee table beside the chair defendant was sitting in when the officers arrived. When the officers searched defendant, they found white tablets in the pockets of his pants and on the chair where he had been sitting.

Defendant relies on this Court's decision in *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987). In *McLaurin* we held that the State did not present enough other incriminating evidence to support a verdict based on constructive possession. *Id.* at 147, 357 S.E.2d at 638. The defendant in *McLaurin* admitted that she lived in the home where the drugs were found. *Id.* at 145, 357 S.E.2d at 638. However, she was not present when the search was made, and two men were seen entering and leaving the house before the search. *Id.* at 144, 357 S.E.2d at 638. In the instant case, defendant was present when the mobile home was searched. In fact, after the search warrant was read to those present, a copy of the warrant was given to defendant before the search was begun. Also, officers found footprints in the snow leading from the house to an outbuilding, but they found no footprints leading from the street to the front door. This permits an inference that those present had been there for some time and that no one else had entered the house since the snow had begun. These and other facts distinguish *McLaurin* from the present case.

In *State v. Brown*, this Court held that the State had made a sufficient case to go to the jury on the issue of constructive possession. 310 N.C. at 570, 313 S.E.2d at 589. The defendant in *Brown* claimed that he was not in exclusive control of the premises because he did not live there. The evidence showed that the defendant was present when the apartment was searched and that narcotics were located on a table only six to eight inches from where defendant was standing when police arrived to search the apartment. *Id.* at 564, 313 S.E.2d at 586. The evidence further showed that police found a key to that apartment and over $1,700 in cash in defendant's pockets when they searched him. The police also had the defendant under surveillance for some time before the search and, on every occasion when police had observed him, he was at this apartment rather than the place he claimed was his home. *Id.* at 565, 313 S.E.2d at 586.

In the present case, defendant likewise on appeal contends that there was no evidence that he lived at this mobile home or

that he had exclusive control of it. However, the other evidence presented in this case, namely: 1) defendant's presence in the mobile home when the controlled substances were found; 2) the fact that the officers presented only the defendant with a copy of the search warrant after it was read and there was no evidence that defendant protested; 3) the bill of sale with defendant's name on it; and 4) the bottle of prescription drugs with defendant's name on it, as the other evidence in *Brown*, was enough to go to the jury on the issue of constructive possession, even though it was nonexclusive possession. Furthermore, as other evidence of possession, Sergeant Bunting, on two separate occasions during his testimony, referred to the mobile home as Grayson Davis' residence. Defendant did not object to this testimony. These circumstances, coupled with defendant's nonexclusive possession of the premises, tend to buttress the inference that defendant had constructive possession of the cocaine and methadone found inside the mobile home.

After reviewing the evidence of this case in a light most favorable to the State, we conclude that there was sufficient evidence to go to the jury under an instruction on constructive possession. Therefore, the Court of Appeals erred in its ruling on this issue. On the State's appeal, the decision of the Court of Appeals reversing defendant's convictions and sentences in case number 87-CRS-2796 (trafficking in drugs by possession of cocaine) and in case number 87-CRS-2797 (trafficking in drugs by possession of methadone) is reversed. The petition for discretionary review of the portion of the Court of Appeals' opinion concerning the controlled substances found in the outbuilding was improvidently allowed.

Reversed in part; discretionary review improvidently allowed.

THE NORTH CAROLINA STATE BAR v. CLYDE C. RANDOLPH, JR., ATTORNEY

No. 153PA89

(Filed 7 December 1989)

1. Appeal and Error § 9 (NCI3d)— moot questions—discretion of Supreme Court to consider

The Supreme Court may, if it chooses, consider a moot question that involves a matter of public interest, is of general

importance, and deserves prompt resolution. A jurisdictional dispute between the superior court and the North Carolina State Bar presents such a question.

Am Jur 2d, Appeal and Error § 768.

2. Attorneys at Law § 10 (NCI3d)— attorney grievance filed with State Bar—no authority by superior court to dismiss

The North Carolina State Bar and the trial courts of this state share concurrent jurisdiction over matters of attorney discipline. A superior court judge thus erred in entering a judgment naming the State Bar as a party and purporting to dismiss a grievance proceeding filed with the State Bar against defendant attorney.

Am Jur 2d, Attorneys at Law §§ 28, 29.

ON discretionary review prior to a determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31(b), of an order by *Rousseau, J.*, filed on 17 March 1989 in Superior Court, FORSYTH County. Calendared for argument in the Supreme Court 15 November 1989; determined on the briefs without oral argument pursuant to N.C.R. App. P. 30(d).

B. E. James and Carolin D. Bakewell for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by William D. Caffrey, for defendant-appellee.

PER CURIAM.

Plaintiff is an agency of the State of North Carolina with statutory power over the discipline of attorneys. N.C.G.S. §§ 84-15, -23 (1985). Defendant is a duly licensed attorney who practices in Forsyth County, North Carolina. While serving as attorney for an estate, defendant paid himself, from the estate, an attorney's fee of $98,000 for his services in settling an insurance claim on behalf of the estate. The administratrix filed a civil action against defendant, alleging that the fee was unauthorized and excessive. She also filed a grievance with plaintiff, alleging that defendant had violated plaintiff's Rules of Professional Conduct. *See* Rules of Professional Conduct of The North Carolina State Bar (1989). Both the trial court and the plaintiff exonerated defendant of any wrongdoing in the handling of the estate and payment of the fee.

This appeal arises from a judgment of the trial court purporting to dismiss the grievance proceeding filed with plaintiff. Plaintiff moved pursuant to N.C.G.S. § 1A-1, Rule 60 for a modification of the judgment to delete those portions naming plaintiff as a party and dismissing the grievance. The trial court denied the motion, and plaintiff appealed. On 8 June 1989 we allowed plaintiff's petition for discretionary review prior to a determination by the Court of Appeals. N.C.G.S. § 7A-31(b) (1986). We now reverse.

[1] Defendant argues that because both the trial court and the plaintiff have exonerated him of any wrongdoing, no controversy exists, and this Court should not hear the appeal. "[A]s a general rule[,] this Court will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). Even if moot, however, this Court may, if it chooses, consider a question that involves a matter of public interest, is of general importance, and deserves prompt resolution. *Matthews v. Dept. of Transportation*, 35 N.C. App. 768, 770, 242 S.E.2d 653, 654 (1978); *Leak v. High Point City Council*, 25 N.C. App. 394, 397, 213 S.E.2d 386, 388 (1975); *see also Netherton v. Davis*, 234 Ark. 936, 355 S.W.2d 609 (1962); *Walker v. Pendarvis*, 132 So.2d 186 (Fla. 1961); *Payne v. Jones*, 193 Okla. 609, 146 P.2d 113 (1944); 5 C.J.S. *Appeal and Error* § 1354(1) (1958). We conclude that a jurisdictional dispute between the superior court and the North Carolina State Bar presents such a question.

[2] The North Carolina General Assembly has vested plaintiff with control of the discipline of attorneys practicing law in this state. N.C.G.S. § 84-23 (1985). It has provided, however, that this empowerment does not disable or abridge "the inherent power of the court to deal with its attorneys." N.C.G.S. § 84-36 (1985). Thus, plaintiff and the trial courts of this state share concurrent jurisdiction over matters of attorney discipline. Our Court of Appeals has stated correctly:

> It is true that . . . questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar. . . . G.S. 84-36 specifically provides, however, that the provisions of [N.C.G.S. ch. 84] are not to be construed as disabling or abridging the inherent powers of a court to deal with its attorneys. Furthermore, it has been held repeatedly that in North Carolina there are

two methods by which disciplinary action or disbarment may be imposed upon attorneys—statutory and judicial.

In re Bonding Co., 16 N.C. App. 272, 275, 192 S.E.2d 33, 35, *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E.2d 837 (1972) (citations omitted). *See also State v. Malone*, 65 N.C. App. 782, 785, 310 S.E.2d 385, 387, *disc. rev. denied and appeal dismissed*, 311 N.C. 405, 319 S.E.2d 277 (1984); *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E.2d 279, 299 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E.2d 181 (1979) (statutory power in State Bar and inherent power in court "co-equal and co-extensive").

The trial court thus erred in naming plaintiff as a party and dismissing the grievance proceeding against defendant, and in denying plaintiff's motion to delete those portions of the judgment. Accordingly, the order denying plaintiff's motion to modify the judgment entered on 3 May 1988, *nunc pro tunc* 22 April 1988, is reversed, and the cause is remanded to the Superior Court, Forsyth County, for entry of an order allowing the motion.

Reversed and remanded.

DEBORAH PHARR CULPEPPER, EMPLOYEE v. FAIRFIELD SAPPHIRE VALLEY, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER

No. 194A89

(Filed 7 December 1989)

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 93 N.C. App. 242, 377 S.E.2d 777 (1989), reversing an opinion and award of the North Carolina Industrial Commission filed 17 December 1987, denying plaintiff's workers' compensation claim. Defendants' petition for writ of certiorari was allowed by the Supreme Court 13 November 1989. Heard in the Supreme Court 13 November 1989.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Max E. Justice and William L. Brown; and Ball, Kelley, Barden & Arrowood, P.A., by Phillip G. Kelley, for plaintiff-appellee.

Russell & King, P.A., by J. William Russell and Sandra M. King, for defendant-appellants.

PER CURIAM.

Affirmed.

JULIANA G. YATES v. BOBBY RAY DOWLESS

No. 233PA89

(Filed 7 December 1989)

ON plaintiff's petition for discretionary review of a decision of the Court of Appeals, 93 N.C. App. 787, 379 S.E.2d 79 (1989), which reversed the decision of *Elkins, J.*, at the 30 June 1988 session of District Court, MECKLENBURG County. Heard in the Supreme Court 14 November 1989.

Lacy H. Thornburg, Attorney General, by T. Byron Smith, Assistant Attorney General, and Bertha Fields, Associate Attorney General, for the plaintiff-appellant.

Helms, Cannon & Hamel, P.A., by Thomas R. Cannon and Amy L. McGrath, for defendant-appellee.

PER CURIAM.

Affirmed.

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

AMICK v. TOWN OF STALLINGS

No. 396PA89

Case below: 95 N.C. App. 64

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

BLANCHFIELD v. SODEN

No. 391P89

Case below: 95 N.C. App 191

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

BRITT JACKS & ASSOC. v. WEATHERFORD

No. 394P89

Case below: 95 N.C. App. 223

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

BROOKS v. STROH BREWERY CO.

No. 436P89

Case below: 95 N.C. App 226

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

BROWN v. BURLINGTON INDUSTRIES, INC.

No. 206PA89

Case below: 93 N.C. App. 431

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 16 November 1989.

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

BROWN v. SMITH TRANSMISSIONS

No. 404P89

Case below: 95 N.C. App. 223

Petition by plaintiff for writ of certiorari to the North Carolinia Court of Appeals denied 7 December 1989.

CITY OF KANNAPOLIS v. CITY OF CONCORD

No. 460A89

Case below: 95 N.C. App. 591

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 20 November 1989.

COFFEY v. COFFEY

No. 359PA89

Case below: 94 N.C. App. 717

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

CONCERNED CITIZENS v. HOLDEN BEACH ENTERPRISES

No. 401PA89

Case below: 95 N.C. App. 39

Petition by plaintiffs and intervenor plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

DeHAVEN v. HOSKINS

No. 434P89

Case below: 95 N.C. App. 397

Petition by defendant (Betty Hoskins) for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

GANT v. NCNB

No. 282P89

Case below: 94 N.C. App. 198

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed as moot 7 December 1989.

GENSINGER v. WESTON

No. 366P89

Case below: 95 N.C. App. 223

Petition by defendants for writ of supersedeas and temporary stay dismissed 7 December 1989. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

HARVEY v. RALEIGH POLICE DEPARTMENT

No. 469P89

Case below: 96 N.C. App. 28

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

HAYWOOD v. HAYWOOD

No. 432P89

Case below: 95 N.C. App. 426

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

HEARTLAND GROUP v. DESTINY GROUP

No. 374P89

Case below: 94 N.C. App. 389

Petition by defendant and third-party plaintiff-appellants for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

HOWARD v. WHITFIELD

No. 373P89

Case below: 95 N.C. App. 777

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

HUNT v. SCOTSMAN CONVENIENCE STORE

No. 471P89

Case below: 95 N.C. App. 620

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

IN RE APPEAL OF MORAVIAN HOME, INC.

No. 433P89

Case below: 95 N.C. App. 324

Motion by Moravian Home to dismiss appeal by Forsyth County for lack of substantial constitutional question allowed 7 December 1989. Petition by Forsyth County for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

IN RE APPLICATION FOR VARIANCE

No. 378P89

Case below: 95 N.C. App. 182

Petition by J. H. Carter Builder Co., Inc. for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

IN RE APPLICATION OF RAYNOR

No. 357P89

Case below: 94 N.C. App. 91

Petition by several plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

IN RE ESTATE OF FRANCIS

No. 342PA89

Case below: 94 N.C. App. 744

Petition by Iva P. Marshall for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

IN RE GUESS

No. 431PA89

Case below: 95 N.C. App. 435

Motion by Dr. Guess to dismiss appeal by Board of Medical Examiners for lack of substantial constitutional question allowed 7 December 1989. Petition by Board of Medical Examiners for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

IN RE SCOTT

No. 489P89

Case below: 95 N.C. App. 760

Petition by Henderson County Department of Social Services for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

MORRIS v. PINE ACRES LODGE

No. 448P89

Case below: 95 N.C. App. 454

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

MORRIS v. TERMINIX CO.

No. 447P89

Case below: 95 N.C. App. 454

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

NAPOWSA v. LANGSTON

No. 393P89

Case below: 95 N.C. App. 14

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

N. C. ELECTRIC MEMBERSHIP CORP. v. DUKE POWER CO.

No. 392P89

Case below: 95 N.C. App. 123

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

N. C. PRESS ASSOC., INC. v. SPANGLER

No. 345P89

Case below: 94 N.C. App. 694

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

PARKS CHEVROLET, INC. v. GWYN

No. 439PA89

Case below: 95 N.C. App. 454

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

QUATE v. CAUDLE

No. 390P89

Case below: 95 N.C. App. 80

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

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

SCHUBERT v. KAMPGROUND PROPERTIES, INC.

No. 362P89

Case below: 94 N.C. App. 781

Petition by defendant (Properties) for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STAR AUTOMOBILE CO. v. JAGUAR CARS, INC.

No. 398P89

Case below: 95 N.C. App. 103

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. BROWN

No. 438P89

Case below: 95 N.C. App. 454

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

STATE v. DAVENPORT

No. 445P89

Case below: 95 N.C. App. 224

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

STATE v. DOWNING

No. 484P89

Case below: 95 N.C. App. 224

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

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

STATE v. GIVIAN

No. 384P89

Case below: 94 N.C. App. 390

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

STATE v. JOHNSON

No. 450P89

Case below: 95 N.C. App. 662

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. KAMTSIKLIS

No. 303P89

Case below: 94 N.C. App. 250

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 December 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. LOCKHART

No. 355P89

Case below: 94 N.C. App. 780

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. McRAE

No. 325P89

Case below: 94 N.C. App. 601

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 December 1989. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

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

STATE v. MANLEY

No. 400P89

Case below: 95 N.C. App. 213

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. MORGAN

No. 425PA89

Case below: 95 N.C. App. 639

Petition by Attorney General for writ of supersedeas allowed 7 December 1989. Amended petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

STATE v. QUICK

No. 397P89

Case below: 95 N.C. App. 225

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. SANDERS

No. 459P89

Case below: 95 N.C. App. 494

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. THOMPSON

No. 376P89

Case below: 94 N.C. App. 782

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

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

STATE v. WADDELL

No. 399P89

Case below: 95 N.C. App. 225

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

STATE v. WIGFALL

No. 437P89

Case below: 95 N.C. App. 455

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 December 1989.

TALBOT v. N.C. DEPARTMENT OF TRANSPORTATION

No. 435PA89

Case below: 95 N.C. App. 446

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 December 1989.

WALLACE COMPUTER SERVICES v. WAITE

No. 402P89

Case below: 95 N.C. App. 439

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

WARD v. COUNTY DEPT. OF SOC. SERVICES

No. 428P89

Case below: 95 N.C. App. 456

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

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

WILLIAMS v. WILLIAMS

No. 528P89

Case below: 96 N.C. App. 276

Petition by plaintiff for writ of supersedeas and temporary stay denied 7 December 1989. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

WILLIS v. PAPPAS TELECASTING OF THE CAROLINAS

No. 285P89

Case below: 94 N.C. App. 226

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 December 1989.

WILSON v. McLEOD OIL CO.

No. 506A89

Case below: 95 N.C. App. 479

Petition by plaintiffs and intervenor plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 7 December 1989. Petitions by defendants Estate of Riggan, McLeod Oil Co., Loren A. Tompkins and Adrian Simmons for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 7 December 1989.

PETITION TO REHEAR

FINCH v. CITY OF DURHAM

No. 85PA89

Case below: 325 N.C. 352

Petition by plaintiffs to rehear denied 7 December 1989.

APPENDIXES

PRESENTATION OF
DEVIN PORTRAIT

PRESENTATION OF
BROGDEN PORTRAIT

RULES FOR COURT-ORDERED
ARBITRATION IN NORTH CAROLINA

AMENDMENTS TO STATE BAR RULES
RELATING TO POSITIVE ACTION FOR LAWYERS

AMENDMENT TO NOMINATING
COMMITTEE RULES

AMENDMENTS TO STATE BAR RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

CEREMONY FOR THE PRESENTATION OF THE PORTRAIT OF FORMER CHIEF JUSTICE WILLIAM A. DEVIN

On May 7, 1987, at 10:00 a.m., the Supreme Court of North Carolina convened for the purpose of receiving the portrait of the Honorable William A. Devin, former Chief Justice of the Supreme Court of North Carolina.

Upon the opening of Court on the morning of May 7, 1987, the Clerk of the Supreme Court sounded the gavel and announced:

> "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina."

All persons in the Courtroom rose, and upon the members of the Court reaching their respective places on the bench, the Clerk announced:

> "Oyez, Oyez, Oyez—The Supreme Court of North Carolina is now sitting in ceremonial occasion for the presentation of the portrait of former Chief Justice William A. Devin. God save the State and this Honorable Court."

The Clerk was then seated.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court:

> It is always a most pleasant occasion when the Court gathers for ceremonial purposes, such as we are convened here this morning, for the presentation of the portrait of a former Chief Justice of the Court, William A. Devin.
>
> I want to welcome all of the many guests we have here. I'm not going to detract from the business at hand by calling everyone by name; but I would like to especially welcome former Chief Justices Bobbitt and Sharp, who honor us with their presence, and we do have a number of former Associate Justices of this Court who are here, and we have the Chief Judge and a number of members of the Court of Appeals. I would also be remiss, I think, if I didn't recognize a man who calls himself 'the oldest rat' in what will be an unnamed barn, Secretary of State Thad Eure is here, and we're glad to have you here, sir. I also want to welcome a number of the direct descendants and collateral descendants of Justice Devin, who are here with us today.

It is a very great privilege for me to call on the man who will make the memorial address of presentation at this time, the Honorable William T. Watkins. Mr. Watkins is a member of the North Carolina House of Representatives, where he represents the Twenty-Second Representative District, composed of the counties of Caswell, Granville, part of Halifax, Person, Vance, and Warren. He has been a community leader all of his adult life; he has served in the North Carolina House of Representatives continuously since 1969, and has, during his tenure there, risen to a position of preeminent leadership in that body. He is the author of important pieces of legislation for this State too numerous to mention. He has been a longtime friend of this Court and of the judiciary in general. He and former Chief Justice Devin share the same home town of Oxford. It is most appropriate, now, that this Court recognize the Honorable William T. Watkins to make the address of presentation.

REMARKS OF THE HONORABLE WILLIAM T. WATKINS IN PRESENTING THE PORTRAIT OF FORMER CHIEF JUSTICE WILLIAM A. DEVIN TO THE SUPREME COURT OF NORTH CAROLINA ON MAY 7, 1987

May it please the Court:

I am honored today to present this portrait of former Chief Justice William A. Devin to the North Carolina Supreme Court. I knew Judge Devin well; and I hope that as I talk about him, he will come to life for those of you who did not know him. He was truly a remarkable man—an athlete who played football, baseball and, later, golf; a scholar who established an enviable academic record; a young lawyer who was known for his ability to win tough cases; a judge whose opinions are models of clarity; and a man whose marriage was obviously happy and who had a deep and abiding faith in God.

Judge Devin, born in 1871, was the son of the founder of the Oxford Baptist Church, the Reverend Robert I. Devin, and Mrs. Devin. He attended school in Granville County at the famous old Horner Military School in Oxford, then went to Wake Forest for three years. By the time he completed his studies at Wake Forest, he had decided to become a lawyer; so he enrolled in the University of North Carolina Law School.

At Carolina, he was a member of the 1892 football team—the team known as the aggregation of "iron men", and in later years he loved talking about Thanksgiving week of 1892, when UNC played and defeated Auburn, Vanderbilt, and the University of Virginia in a single week. He also played first base on the crack Carolina baseball team, and loved the game so much that in 1903 he traveled all the way to New York to watch a team called the New York Highlanders. The following year that team became the New York Yankees. His talent for sports was passed on to his son, who played both football and basketball for Carolina. His son played on the 1924 basketball team that was undefeated and was the first team in this State to claim a National Championship.

Judge Devin graduated from Carolina, passed the bar, and opened his own law office in Oxford in 1899. He later said that his first 'real' case was his most interesting. The Democrats were badly beaten in the elections of 1894 and 1896, but rallied in 1898 to retake control of the legislature. The General Assembly then abolished a number of public offices and recreated substantially similar offices under slightly different names. The North Carolina Supreme Court declared these acts unconstitutional and in violation of the 14th Amendment.

Judge Devin represented the Superintendent of the old Board of Education of Granville County. The issue was whether the Superintendent who had been elected by the new board had the right to the office. His client sued to recover the office.

Devin's job was not an easy one. The jury answered the issue in favor of the new Superintendent and against Judge Devin and his client. Because of their belief in their case, however, they appealed the case to the North Carolina Supreme Court, where he presented his case so well that Judge Clark wrote him a letter of commendation. The Supreme Court reversed the previous decision, sustaining him on all points of his argument. This contributed immensely to his reputation for winning tough cases.

He also served as Mayor of Oxford, represented Granville County in the 1911 and 1913 sessions of the General Assembly, and served on the Constitutional Amendments Commission in 1913. He was a Captain in the National Guard and then later a member of Governor Locke Craig's staff. Governor Craig appointed him Judge of Superior Court in 1914. In 1935, Governor J. C. B. Ehringhaus appointed him to the State Supreme Court, where he

served until he was appointed Chief Justice by Governor Kerr Scott in 1951.

Judge Devin once heard the case of a man tried for a murder committed more than 40 years before. A 16-year-old boy had killed another man in a fight over a girl, fled to Texas, married, became a father, an outstanding citizen. Later moved to Florida on the death of his first wife, remarried there, and raised another family. The man was a grandfather when he was turned in by a Florida acquaintance. Only one eyewitness remained alive, and Judge Devin considered his testimony inadequate for a conviction.

Another time he was on his way to court in a storm. The rain had washed out a bridge he needed to cross, so he drove his old Ford into the creek at a point where he thought he could make it across. The old car balked, and the Judge and the Sheriff, who was with him, began to push—but to no avail. They were joined by a big man who waded out to the car, and pushed them to the opposite bank. It turned out that the helpful man had been tried for First Degree Murder in Judge Devin's court some years before and had been acquitted. Judge Devin said he didn't remember the case, but he was mighty glad he hadn't convicted the man.

The opinions written by Judge Devin are considered models of clarity. Appellate judges can learn from these opinions how to write simply on complicated subjects, so that even state legislators can understand them. One of his best tributes was paid on the occasion of a gathering honoring the Judge after his retirement from the Supreme Court. Justice J. Wallace Winborne told those present that "the humanizing influence of his hand will live in our law."

His liberal education, his knowledge of literature and art, made him a cultured man and provided him a basis for understanding and appreciating life. In our time, when divorce is almost commonplace, we might stand in awe of his happy marriage that lasted nearly sixty years.

His life was closely woven with his church. Even when travelling, he would return to Oxford on the weekends to teach the Sunday School Class which was later named for him and to serve as a Church Deacon.

His portrait was the first ever to hang in the Granville County Courthouse. Judge Devin was a happy man, and I believe that

his happiness was rooted in his faith in God. When he wrote his will in 1958, he had just lost his wife and apparently knew his own death was fast approaching. The last words of his will are these: "Reaffirming my faith in God and in His saving grace, through His only Son, the Lord Jesus Christ, to whom I have put my trust and forgiveness and salvation."

I hope that from time to time, school children and young people aspiring to be lawyers, practicing lawyers, judges, and the general public will be told something about the man behind this portrait, that they may learn about history, about justice, and, above all, about life and about living.

It is with great pleasure that I present to this court the portrait of its distinguished Chief Justice, William Augustus Devin.

The Chief Justice announced the unveiling of the portrait by William A. Devin III, grandson and namesake of the former Chief Justice.

[UNVEILING OF PORTRAIT]

Mr. Devin made the following remarks upon the unveiling:

"It gives us a tremendous feeling of pride to be here. We haven't been in Raleigh for many years—since we were children. But I remember we used to stay at the Sir Walter Hotel with my grandparents and come up to the Court and meet the Associate Justices. I have a lot of very fond memories of North Carolina. It's such a great pleasure to hear such fine words about my grandfather. Thank you very much."

The Chief Justice then made his remarks accepting the portrait:

I want to thank Representative Watkins for those eloquent words about our former Chief Justice. The Court, now having a majority who graduated from the University of North Carolina, I'm sure particularly appreciates the exploits of the Chief Justice on the athletic field on behalf of that University.

We also, of course, all recognize the eruditeness and the clarity of his opinions and, Representative Watkins, I want to say that the Court will continue to try to emulate Chief Justice Devin in writing the kinds of opinions that you and the legislators can understand if the Legislature will reciprocate and continue to write statutes that the Court can understand.

The address of Representative Watkins will be spread upon the minutes of the Court and will be printed in the next bound volume of the North Carolina Reports. Chief Justice Devin's portrait will be hung in this Courtroom, along with other portraits of former Chief Justices.

I want, at this time, to thank again Representative Watkins, the Arts Council of North Carolina, and former Chief Justices Bobbitt and Sharp, who were instrumental in making this portrait available. I would like to recognize Ms. Jean McLaughlin, Director of the Arts Council. We want to thank her and the Arts Council for their work. I believe we have the artist here, who was commissioned to paint the portrait, Mr. Ron Rozelle; would you please stand to be recognized. And we also have the framemaker, Ms. Rosa Reagan.

The Clerk then escorted the Devin family and Associate Justice John Webb, a great-nephew of Chief Justice Devin, to their places in the receiving line. Members of the Supreme Court, official guests of the Court, and special friends proceeded through the receiving line until all had so proceeded. The ceremony was thereupon concluded.

CEREMONY FOR THE PRESENTATION OF THE PORTRAIT OF FORMER ASSOCIATE JUSTICE WILLIS J. BROGDEN

On September 15, 1987, at 10:00 a.m., the Supreme Court of North Carolina convened for the purpose of receiving the portrait of the Honorable Willis J. Brogden, former Associate Justice of the Supreme Court of North Carolina.

Upon the opening of Court on the morning of September 15, 1987, the Clerk of the Supreme Court sounded the gavel and announced:

> "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of North Carolina."

All persons in the Courtroom rose, and upon the members of the Court reaching their respective places on the bench, the Clerk announced:

> "Oyez, Oyez, Oyez—The Supreme Court of North Carolina is now sitting in ceremonial occasion for the presentation of the portrait of former Associate Justice Willis J. Brogden. God save the State and this Honorable Court."

The Clerk was then seated.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court:

> The Court is pleased to be convened this morning on this ceremonial occasion for the purpose of receiving the portrait of one of its former members, Associate Justice Willis James Brogden. I want, first of all, to welcome the guests that are here. I'm not going to go through and call everyone by name, but we are pleased to have you all; and we are particularly pleased to have members of Justice Brogden's family with us this morning.
>
> I would like to recognize former Chief Justices Bobbitt and Sharp, who are with us, and former Associate Justice William Copeland and his wife, Nancy. We have members of the Court of Appeals, and I see our venerable Clerk, Mr. Adrian Newton, in the back and I would like to recognize him and our former Librarian, Raymond Taylor. We are happy to have you all. It is always a pleasant occasion when the Court and

its former members gather for presentation of a portrait of a former member of the Court.

I will now call on the distinguished gentleman who will make the formal presentation: Mr. Claude Jones of the Durham County Bar. Mr. Jones was born in Elizabeth City. He received his undergraduate and legal education from the University of North Carolina at Chapel Hill, and was licensed to practice law in 1925. He has had a distinguished and long career at the bar; he has practiced entirely in Durham County. He for many years, I think over 35 years, was City Attorney for Durham. For over 30 years, he was counsel for the Hospital Care Association and its successor, Blue Cross and Blue Shield of North Carolina. He has been active throughout his professional life in the North Carolina State Bar. He has served as President of that organization; he has served as President of the North Carolina Municipal Attorneys Association; he has served as a Delegate from North Carolina to the American Bar Association. We are very honored to have Mr. Jones with us and I will call on him at this time to make the presentation. Mr. Jones.

REMARKS OF CLAUDE V. JONES, ESQUIRE, IN PRESENTING THE PORTRAIT OF ASSOCIATE JUSTICE WILLIS J. BROGDEN TO THE SUPREME COURT OF NORTH CAROLINA ON SEPTEMBER 15, 1987

May it please the Court:

On behalf and at the behest of the members of his family, I have the distinct honor to present to this Court a portrait of the late Willis James Brogden, who served ably and with distinction as an Associate Justice of this Court from January 1926 to the date of his death in October 1935, a period of nine years and nine months.

Although at the time of his death then Chief Justice Stacy, Mr. Percy Reade, a former law partner, and others expressed the sadness of both Bench and Bar at his passing, the presentation of his portrait, preserving his physical likeness for succeeding generations, was unavoidably delayed until now.

And before I proceed further, I should like to pause in order to express the genuine appreciation of the family of Justice Brogden to the Minister and members of the congregation of the First Bap-

tist Church in Durham for making his portrait available for presentation to the Court. For many years this portrait has hung upon the walls of the Brogden Bible Class at the Church.

Because of your relative youth, I doubt if any of you who now constitute the membership of this Court knew Justice Brogden personally, or had the opportunity to observe him in the performance of his civic, religious, political, and community activities, or to have been familiar with the way he practiced law, or how he approached and performed his duties as a member of this Court.

I was blessed to have known Justice Brogden well. For about a year before he was appointed to the Supreme Court, I was a deputy Clerk of the Superior Court in Durham, serving in the courtroom, and had, as it were, a front row seat in all the trials which took place during that period. Durham then had a small but very strong Bar. It was a joy and delight to have been so placed as to witness, first hand, the exhibitions of skill and learning which were demonstrated in those trials. Justice Brogden had no superiors in the trial of a case, either civil or criminal; and his orderly and convincing arrangement of the facts before a jury was absolutely irrefutable.

He was a successful lawyer—a shining star in the practice of an honored profession.

But he did not conduct a legal business or manage a commercial venture dedicated to making money. He earned a modest income and he and his family lived simply and modestly.

Justice Brogden was born in Wayne County on October 18, 1877, and died October 29, 1935, almost 52 years ago. He was in the prime of his life, only 58, when he died; and, because of such an untimely death, cutting short his service upon the highest Court in this State, the people and their institutions suffered a great loss.

His experiences were varied, and he derived knowledge from each. He was a farm boy in Wayne County. He was a school teacher and school principal. He was County Attorney of Durham County. He was Mayor of the City of Durham. He was a Trustee of the University of North Carolina, as well as Chairman of the Board of what is now North Carolina Central University. He was a teacher in a Bible Class which has borne his name for many years. He was a political adviser. He was an active and brilliant lawyer and

a distinguished jurist; and all the while he was a faithful and loving husband and a kind and considerate father to his two sons, Willis J. Brogden, Jr. and Blackwell M. Brogden, both now deceased, who were good lawyers in their own right, and whose children and grandchildren are Justice Brogden's surviving grandchildren and great-grandchildren, the latter having been chosen to unveil the portrait upon this occasion.

In the relatively short span of his adult life, Justice Brogden acquired and built upon a host of experiences, skills, and knowledge in disparate fields; and all of his wisdom and experiences he generously shared, thereby enriching the lives of many.

He was such a person as was equally at ease in discussions with learned people on high educational and cultural levels as he was with the boys at the filling station, the workers at the cotton mill, and the farmers who came to town on Saturday. He accommodated his use of language to the forum in which he was speaking, always to the end that what he said was clear and understood by his listeners.

He was humble, but not obsequious—self-confident, but not arrogant.

When he served as a jurist, the North Carolina Supreme Court consisted of only five members; and when he went on the Bench in 1926 the members of the Court, including him, were: Walter P. Stacy, Chief Justice, George W. Connor, W. J. Adams, Heriott Clarkson, and W. J. Brogden, Associate Justices. The Supreme Court was located in the building across the street in the quarters now occupied by the Court of Appeals.

There were no District Courts and no Court of Appeals in the State Judicial System at that time. Appeals were taken directly from the Superior Court to the Supreme Court. What we now call District Attorneys were then known as Solicitors.

In his nine and three-fourths years as an Associate Justice of this Court, Justice Brogden wrote 717 Opinions for the Majority, 7 Concurring Opinions, 18 Dissenting Opinions, and of the 955 Per Curiam decisions filed during that period of time I am certain that he authored his share.

His Opinions may be found in bound Volumes 191 through 208 of the North Carolina Supreme Court Reports.

He was concise in his writings. You could almost see his brain working in analyzing the case, separating the chaff from the wheat, to reduce the subject matter to a dispositive query, thus permitting brevity in posing the question, as well as in stating its answer, which contributed substantially to the clarity of the Opinion.

By my actual count, examination, and computation, I found that in all of his Opinions, not including dissents or, of course, per curiams, the average length of Justice Brogden's Opinions, excluding the statement of fact, was 1.54 pages. Because of two unusually lengthy Dissenting Opinions, their average length was 2.82 pages.

And the beauty of it is that these Opinions are not only short and concise, but clear and understandable.

A perusal of his Opinions will yield the information that in writing them he would often begin with language such as:

"Brogden, J. The question is this: . . . ."

Tankersley v. Davis (1928), 195 NC 542, 142 SE 765; *Brooks v. Garrett* (1928), 195 NC 452, 142 SE 486, and many other cases decided throughout Justice Brogden's tenure on the Bench.

"Brogden, J. The case is this: . . . ."

Sheets v. Stradford (1930), 200 NC 36, 156 SE 144.

"Brogden, J. The decisive point in the case is . . . ."

State v. White (1928), 196 NC 1, 144 SE 299.

"Brogden, J. The pleadings and the judgment produce the following question of law: . . . ."

Barber v. Benson (1931), 200 NC 683, 158 SE 245.

"Brogden, J. Eliminating scenery and background, the case is this: . . . . "

Bd. of Education v. Hood (1933), 204 NC 356, 168 SE 522.

"Brogden, J. Chapter 2, Public Laws 1921, commonly known as the Road Act, when stripped of all bare technicalities and thin-spun discriminations, creates certain unmistakable objectives. These objectives may be classified as follows: . . . ."

Newton v. Highway Com. (1926), 192 NC 54, 133 SE 522, reh. den. 192 NC 834, 134 SE 134.

And in a case in which a testator had bequeathed a total of over $100,000 to various churches and other institutions and causes; the executor had embezzled $40,000; securities owned by the estate had decreased in value; and there remained only $59,000 to be distributed, Justice Brogden, in his down-to-earth manner, stated:

> "It would seem that the bald question is: On whom should the axe fall?"
>
> *Clement v. Whisnant* (1935), 208 NC 167, 179 SE 430.

The Judge was a cheerful man with a great sense of humor. Sprinkled throughout his Opinions we find expression of this trait. He would often recite some humorous story to make or emphasize a point.

Perhaps lawyers are more familiar with his stirring defense of the mule in a case wherein plaintiff had sued to recover damages for injuries sustained when kicked by a mule. In that case Justice Brogden said, in part:

> "A mule is a melancholy creature. It is *nullius fillius* in the animal kingdom. It has been said that a mule has neither 'pride of ancestry nor hope of posterity' . . . . Men love and pet horses, dogs, cats, and lambs. These animals have found their way into literature . . . . But nobody loves or pets a mule. No poet has ever penned a sonnet or ode to him, and no prose writer has ever paid a tribute to his good qualities . . . . Yet, withal, he has a grim endurance and a stubborn courage which survives his misfortunes and enables him to do a large portion of the world's rough work . . . . The idealist may dream of a day when the 'world is safe for democracy', but this event will perhaps arrive long before the world will be safe from the heels of a mule."
>
> *Rector v. Coal Co.* (1926), 192 NC 804, 136 SE 113.

Another manifestation of Justice Brogden's ready wit surfaced one day when the Court was hearing oral argument, and the lawyer who was then addressing the Court was so carried away with his argument that he inadvertently said, "Now, Gentlemen of the Jury . . . ," whereupon Justice Brogden turned to Justice Clarkson and said: "He's talking to you and me, now, Judge."

In another case involving the activities of an animal, this one in which plaintiff was injured by having been gored by a bull, Justice Brogden sort of played down the plaintiff's contention that the bull was vicious, in these words:

> "The ancestry and social standing of a bull antedates the pyramids of Egypt. Indeed, the written record reveals that in the first civilization along the stretches of the Nile a bull was a god . . . .
>
> It is true that a witness said that each morning when the bull was turned out of the pen 'he would bellow, paw the ground, and burrow in the ground with his head.'
>
> Those bred to the soil perhaps know that such acts on the part of the normal bull constituted per se no more than boastful publicity or propaganda, doubtless designed by the animal to inform his bovine friends and admirers that he was arriving upon the scene."
>
> *Banks v. Maxwell* (1933), 205 NC 233, 171 SE 70.

Justice Brogden's style of writing, as well as being clear and understandable, was also colorful and expressive.

Thus, by way of illustration, we find in various of his Opinions these expressions:

On the question of deciding the case on the theory upon which it was tried below:

> "The law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court."
>
> *Weil v. Herring* (1934), 207 NC 6, 175 SE 836.

When there was some lurid testimony in a seduction case, he said:

> "Much conflicting evidence was introduced at the trial, but it would serve no useful purpose to embalm all the sordid testimony for future generations."
>
> *State v. McDade* (1935), 208 NC 197, 179 SE 755.

In the Lawrence murder case in which he dissented because he felt the evidence was insufficient to be submitted to the jury, Justice Brogden wrote:

"It is contended that the facts and circumstances are so slight in probative value that in themselves and standing alone they would not amount to evidence, but when taken in combination they constitute a rope of great strength. I do not concur in this reasoning. Unless the principles of mathematics have been recently changed, adding a column of zeros together produces zero; neither can a multitude of legal zeros beget a legal entity."

State v. Lawrence (1929), 196 NC 562, 146 SE 367.

In a case involving the question of whether or not the General Assembly can ratify a void deed, he wrote:

" . . . but the power to cure a crippled instrument, having at least a spark of legal life, does not extend to raising a legal corpse from the dead."

Booth v. Hairston (1927), 195 NC 8, 136 SE 879.

In an appeal in which appellants had assigned 162 errors, and appellees 73, Brogden, J. cited the late Justice Allen as having remarked:

"It is highly improbable that a trial judge could make 235 errors in one game."

Morrison v. Finance Co. (1929), 197 NC 319, 148 SE 458.

The Town of Smithfield sued the City of Raleigh to enjoin it from polluting the waters of the Neuse River, from which Smithfield obtained its supply of drinking water for its citizens. The case had been appealed from a judgment entered by Superior Court Judge Henry A. Grady, who had decided the case against Smithfield. Justice Brogden, in his inimitable style, wrote:

"Indeed, it seems that the trial judge subjected the question to 'trial by water', because the Record discloses that His Honor 'had drunk of the water, bathed in it, and suffered no ill effects.' The ancient mode of 'trial by water' was aforetime deemed efficacious in determining the guilt or innocence of witches, and by applying the practices of the ancient law the distinguished jurist has found the waters of Neuse River not guilty."

Smithfield v. Raleigh (1935), 207 NC 597, 178 SE 114.

In referring to the rule not to send the case to the jury if the evidence only raises conjecture, he said:

"This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation."

Poovey v. Sugar Co. (1926), 191 NC 722, 133 SE 12.

And, further, he expressed a need for balance in saying that while it is the mandate of sound public policy to encourage commerce and to lend to its legitimate expansion the full power of the law,

" . . . . it is also true that the sanctity of commerce must yield to the sanctity of life 'for the life is more than meat, and the body than raiment.' "

Willis v. New Bern (1926), 191 NC 507, 132 SE 286.

Justice Brogden was learned in the law. He understood the philosophy of the law, its history, its adaptation to changing times, and its essential function as the glue which holds together a civilized society. He also appreciated the fact that laws must be just and fairly interpreted and administered in order to be respected and obeyed by the people; and that judges are also subject to the law.

Thus, I am sure he would have approved the sentiment expressed in the admonition carved in granite at the entrance to the courthouse in Kansas City, Missouri, which reads:

"The people shall obey the Magistrates; The Magistrates shall obey the law."

Justice Brogden had all of the qualifications required or desired for service on the Bench of the Supreme Court of the United States. His presence would have graced and added dignity and strength to that Court. Unfortunately, however, the geographical factor, alone, was sufficient to make highly unlikely any favorable consideration to his nomination or confirmation.

He was a great believer in the separation of powers, i.e., that the legislative branch should enact laws, the judicial branch should interpret laws, and the executive branch should administer laws, with each subject to checks and balances.

He agreed with the principle, enunciated in the sixteen hundreds by Sir Francis Bacon in his *Of Judicature*, that

"Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law and not to make law, or give law."

I should like to close these remarks by repeating Justice Brogden's own words which he wrote 61 years ago in the case of *Carlyle v. Highway Commission*, 193 NC 36, 136 SE 612 (1927), when our Supreme Court consisted of 5 members:

> "The function of the court is to construe laws and not to make them. If the courts attempt to read into the law words of their own or read out of the law other words contrary to their conception of what the law ought to be, then this would amount to erecting a legislative despotism of five men, which would perhaps be more pernicious and subversive of the State's peace than the judicial despotism mentioned by Chief Justice Pearson in *Brodnax v. Groom*, 64 NC 244."

I thank you very much for permitting us to make this presentation and these remarks, and for your kind attention to them.

The Chief Justice announced the unveiling of the portrait by John Brogden, the great-grandson of Associate Justice Brogden, assisted by his father, Blackwell Brogden, Justice Brogden's grandson.

[UNVEILING OF PORTRAIT]

The Chief Justice then made his remarks accepting the portrait:

> Mr. Jones, the Court wishes to express its appreciation to you for your diligence in preparing these remarks and for calling to our minds the many accomplishments and the distinguished career, in such an interesting and informative way, of Associate Justice Brogden. There is certainly much in the way he approached his work as a member of this Court and in the way he accomplished his work that those of us who come after him would do well to emulate. His portrait, when it hangs in these halls, will serve, of course, to remind us of these things. We appreciate very much the eloquence of the presentation.
>
> The Court also wishes to express its gratitude to the family and to the First Baptist Church of Durham for presenting the portrait and for making it available to the Court. The portrait will be hung in an appropriate place in the halls of the courthouse, where it will serve to remind us of the many accomplishments, the erudition, and achievements of the man it portrays. Mr. Jones' eloquent address will be spread upon the minutes of the court and published in our official reports.

The Clerk then escorted the Brogden family to their places in the receiving line. Members of the Supreme Court, official guests of the Court, and special friends proceeded through the receiving line until all had so proceeded. The ceremony was thereupon concluded.

ORDER ADOPTING
RULES FOR
STATEWIDE COURT-ORDERED, NONBINDING ARBITRATION

WHEREAS, the North Carolina General Assembly, by Ch. 301 of the 1989 Session Laws, authorized statewide court-ordered, nonbinding arbitration in certain civil actions, and further authorized the Supreme Court of North Carolina to adopt rules governing this procedure and to supervise its implementation and operation through the Administrative Office of the Courts.

NOW, THEREFORE, the Court orders:

(1) The program shall operate on a permanent basis in the Third, Fourteenth, and Twenty-Ninth Judicial Districts, and in all other judicial districts designated by the Administrative Office of the Courts, in consultation with local court officials, subject to the availability of funds appropriated for this purpose;

(2) Effective immediately, the program shall operate pursuant to the attached "Rules for Court-Ordered Arbitration in North Carolina";

(3) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina.

Done by the Court in conference this the 14th day of September, 1989.

WHICHARD, J.
For the Court

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Arb. Rule 1

ACTIONS SUBJECT TO ARBITRATION

(a) Types of Actions; Exceptions.

All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules, except actions:

(1) Involving a class;

(2) In which there is a substantial claim for injunctive or declaratory relief;

(3) Involving:

(i) family law issues,

(ii) title to real estate,

(iii) wills and decedents' estates, or

(iv) summary ejectment;

(4) Which are special proceedings;

(5) In which a claim is asserted for an unspecified amount exceeding $10,000 in compliance with N.C.R. Civ. P. 8(a)(2);

(6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed $15,000; or

(7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) Arbitration by Agreement.

The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) Court-Ordered Arbitration in Cases Having Excessive Claims.

The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed.

(d) Exemption and Withdrawal From Arbitration.

(1) The court may exempt or withdraw any action from arbitration on its own motion, or on motion of a party, made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Arb. Rule 1(a); or (iii) there is a strong and compelling reason to do so.

(2) During the pilot arbitration program, the court shall exempt from arbitration a random sample of cases so as to create a control group of cases to be used for comparison with arbitrated cases in evaluating the pilot arbitration program.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted:	28 August 1986.
Pilot Rule Amended:	4 March 1987.
Permanent Rule Adopted:	14 September 1989

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000. The $15,000 jurisdictional limit by statute and Arb. Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is (are) based on a statute providing for multiple damages, e.g. N.C. Gen. Stat. §§1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without court involvement. The court has ultimate authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these rules, which merely give the court a new civil procedure. A false certification under Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. §6-21.5 sanctions or State Bar disciplinary action.

"Family law issues" in Arb. Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are "special proceedings" or involve summary ejectment, referred to in Arb. Rule 1(a), are actions so designated by the General Statutes.

Arb. Rule 1(b) allows binding or non-binding arbitration of any case by agreement and permits the parties to modify these rules for a particular case. Court approval of any modification will give a variant proceeding the court's imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation by the parties. This rule was not intended to provide compensation from the limited funds available to the pilot courts for protracted or exceptional cases. Therefore, the court should review and approve any such extraordinary stipulations.

Arb. Rule 1(c) is a safeguard against overvaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule does not require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Arb. Rule 1(c). See also the Comment to Arb. Rule 1(a).

Exemption or withdrawal may be appropriate under Arb. Rule 1(d)(1)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General's office.

Arb. Rule 2

ARBITRATORS

(a) Selection.

The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within the first 20 days after the 60-day period fixed in Arb. Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list.

(b) Eligibility.

An arbitrator shall have been a member of the North Carolina State Bar for at least five years and must be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service.

(c) Fees and Expenses.

Arbitrators shall be paid a $75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court Judge, or the Chief Judge of the District Court, of the court in which the case was pending.

(d) Oath of Office.

Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. §11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) Disqualification.

Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) Replacement of Arbitrator.

If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Under Arb. Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have the

burden of taking the initiative if they want to make the selection, and they must do it promptly.

Under Arb. Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Arb. Rule 3(n).

Payments and expense reimbursements authorized by Arb. Rule 2(c) are made subject to court approval to insure conservation and judicial monitoring of the funds available during the pilot program from the "private sources" specified in the enabling Act.

Arb. Rule 3

ARBITRATION HEARINGS

(a) Hearing Scheduled by the Court.

Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) Prehearing Exchange of Information.

At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions. Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing.

(c) Exchanged Documents Considered Authenticated.

Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents

not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) Copies of Exhibits Admissible.

Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) Witnesses.

Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) Subpoenas.

N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) Authority of Arbitrator to Govern Hearings.

Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) Law of Evidence Used as Guide.

The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect he determines appropriate.

(i) No Ex Parte Communications With Arbitrator.

No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) Failure to Appear; Defaults; Rehearing.

If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered

upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond his control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 5(a).

(k) No Record of Hearing Made.

No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) Sanctions.

Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)—37(b)(2)(C) and N.C. Gen. Stat. §6-21.5.

(m) Proceedings in Forma Pauperis.

The right to proceed in *forma pauperis* is not affected by these rules.

(n) Limits of Hearings.

Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for prehearing exchange of information under Arb. Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) Hearing Concluded.

The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments he permits have been com-

pleted. In exceptional cases, he may in his discretion receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) Parties Must be Present at Hearings; Representation.

All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear *pro se*.

(q) Motions.

Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in his award. Parties shall state their contentions regarding pending motions deferred to the arbitrator in the exchange of information required by Arb. Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Arb. Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. See Arb. Rule 3(p).

The purpose of Arb. Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the

option in Arb. Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Arb. Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Arb. Rule 4(a), which requires the arbitrator to file his award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, he should specify the points he wants addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§103-4, 103-5.

Under Arb. Rule 3(q) the court will rule on prehearing motions which dispose of the case on the pleadings or relate to the procedural management of the case. The court will normally defer to the arbitrator for his consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which a N.C.R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

Arb. Rule 4

THE AWARD

(a) Filing the Award.

The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) Findings; Conclusions; Opinions.

No findings of fact and conclusions of law or opinions supporting an award are required.

(c) Scope of Award.

The award must resolve all issues raised by the pleadings and may exceed $15,000.

(d) Copies of Award to Parties.

The court shall forward copies of the award to the parties or their counsel.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Under Arb. Rule 4(a) the arbitrator should issue the award when the hearing is over and should not take the case under advisement. If the arbitrator wants post-hearing briefs, he must receive them within three days, consider them, and file his award within three days thereafter. See Arb. Rule 3(o) and its Comment.

See Arb. Rule 1(a) and its Comment in connection with Rule 4(c).

Arb. Rule 5

TRIAL DE NOVO

(a) Trial De Novo As Of Right.

Any party not in default for a reason subjecting him to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of an Arb. Rule 3(j) motion to rehear.

(b) Filing Fee.

A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the demanding party improved his position over the arbitrator's award. Otherwise, the filing fee shall be forfeited to the fund from which arbitrators are paid.

(c) No Reference to Arbitration in Presence of Jury.

A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(d) No Evidence of Arbitration Admissible.

No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) Arbitrator Not to be Called as Witness.

An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. His notes are privileged and not subject to discovery.

(f) Judicial Immunity.

The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to his actions in the arbitration proceeding.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

Arb. Rule 5(c) does not preclude cross-examination of a witness in later proceedings concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Rules 5(c) and 5(d).

See also the Comment to Arb. Rule 6 regarding demand for trial de novo.

Arb. Rule 6

THE COURT'S JUDGMENT

(a) Termination of Action by Agreement Before Judgment.

The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) Judgment Entered on Award.

If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. By failing to demand a trial de novo the right is waived. Demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

Arb. Rule 7

COSTS

(a) Arbitration Costs.

The arbitrator may include in an award court costs accrued through the arbitration proceedings in favor of the prevailing party.

(b) Costs Following Trial De Novo.

If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Arb. Rule 7(a) incurred in the arbitration proceedings.

(c) Costs Denied if Party Does Not Improve His Position in Trial De Novo.

A party demanding trial de novo who does not improve his position may be denied his costs in connection with the arbitration proceeding by the trial judge, even though prevailing at trial.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

Arb. Rule 8

ADMINISTRATION

(a) Actions Designated for Arbitration.

The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the parties in all cases not exempted for comparison purposes pursuant to Arb. Rule 1(d)(2).

(b) Hearings Rescheduled; 60 Day Limit; Continuances.

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) Date of Hearing Advanced by Agreement.

A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) Forms.

Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) Delegation of Nonjudicial Functions.

To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) Definitions.

"Court" as used in these rules means, depending upon the context in which it is used:

(1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or his delegate;

(2) The Chief District Court Judge, if the action is pending in the District Court Division, or his delegate; or

(3) Any assigned judge exercising the court's jurisdiction and authority in an action.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

One goal of these rules is to expedite disposition of claims involving $15,000 or less. See Arb. Rule 8(a). The 60 days in Arb. Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

Arb. Rule 9

APPLICATION OF RULES

These Arb. Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Arb. Rule 1(b) or referred to arbitration by order of the court.

ADMINISTRATIVE HISTORY

Pilot Rule Adopted: 28 August 1986.
Pilot Rule Amended: 4 March 1987.
Permanent Rule Adopted: 14 September 1989

COMMENT

A common set of rules has been adopted for the three pilot districts. These rules may be amended, to permit experiments with

variant procedures or to take into account local conditions, with the prior approval of the Supreme Court of North Carolina. The enabling legislation, G.S. §7A-37, vests rulemaking authority in the Supreme Court, and this includes amendments.

AMENDMENTS TO STATE BAR RULES RELATING TO POSITIVE ACTION FOR LAWYERS

The following amendments to the Rules, Regulations, and 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 July 14, 1989, and amended at its meeting on October 20, 1989.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committee of the Council i. Positive Action Committee, as appears in 302 N.C. 637 be and the same is hereby amended by adding a new subsection designated as Sec. 5. i. (6) as follows:

(6) If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said members of the Positive Action Committee may petition any Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its inherent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.

By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

(a) The initial petition to the Court shall contain a request for a protective order sealing the proceedings for the protection of the impaired lawyer.

(b) All members of the Positive Action for Lawyers Committee participating under this Article shall be deemed to be acting as agents of the North Carolina State Bar, and within the course and scope of the agency relationship.

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 20, 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 30th day of October, 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 9th day of November, 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 9th day of November, 1989.

WHICHARD, J.
For the Court

AMENDMENT TO
NOMINATING COMMITTEE RULES

ARTICLE III
ELECTION AND SUCCESSION OF OFFICERS

The following 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 January 12, 1990, quarterly meeting.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article III, Section 5(a) as approved by the Supreme Court and appears in 307 N.C. 737 and amended as appears in 312 N.C. 843 be and same is hereby amended by rewriting subsection (a) of Section 5 to read as follows:

Sec. 5. NOMINATING COMMITTEE

a. There shall be a Nominating Committee appointed to nominate one or more candidates for each of the offices. The Nominating Committee shall be composed of the immediate Past President and the five most recent living Past Presidents who are in good standing with The North Carolina State Bar. The Nominating Committee shall meet prior to the Council meeting at which the election of officers will be held. The Nominating Committee shall submit its nominations in writing to the Secretary at least 45 days prior to the election, and the Secretary shall transmit the report by mail to the members of the Council at least 30 days prior to the election.

b. At the Council meeting at which elections are held, the floor shall be open for additional nominations for each office at the time of the election.

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 January 12, 1990, 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 25th day of January, 1990.

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 7th day of February, 1990.

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 7th day of February, 1990.

WHICHARD, J.
For the Court

RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

ARTICLE IX
DISCIPLINE AND DISBARMENT OF ATTORNEYS
DISABILITY PROCEDURES

The following 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 January 12, 1990, quarterly meeting.

Be it resolved by the Council of the North Carolina State Bar that Article IX, Sections 3, 5, 6, 7, 13, 23 and 29 as approved by the Supreme Court and appear in 310 N.C. 794 *et seq.* and as amended by the Council and approved by the Supreme Court on Dec. 8, 1988, as to sections 5, 6, 13 and 23 be and the same are hereby amended as follows:

Section 3. Definitions.

1. Section 3 of said Article IX is amended as follows:

(a) To establish a Letter of Admonition by the adoption of a new Subsection 3(21) to read as follows:

(21) Letter of Admonition: Communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is either an unintentional, minor or technical violation without significant prejudice to the client and may be the basis for discipline if continued or repeated.

(b) To renumber present Subsection 3(21) as 3(22) and amend the same to read as follows:

(22) Letter of Caution: Communication from the Grievance Committee to an attorney stating that the past conduct of the attorney, while not the basis for discipline, is unprofessional or not in accord with accepted professional practice.

(c) To renumber present Subsections 3(22) through 3(32) as Subsections 3(23) through 3(33) as follows:

(23) Letter of Notice: a communication to an accused attorney setting forth the substance of a grievance.

(24) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.

(25) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(26) party: after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(27) plaintiff: after a complaint has been filed, The North Carolina State Bar.

(28) preliminary hearing: hearing by the Grievance Committee to determine whether probable cause exists.

(29) Probable cause: a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(30) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(31) serious crime: the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or willful failure to file a tax return.

(32) Supreme Court: the Supreme Court of North Carolina.

(33) consolidation of cases: a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

Section 5. Chairman of the Grievance Committee—Powers & Duties

2. Subsection 5(A)(5) of Section 5 of said Article IX is amended to add the words "a Letter of Admonition," after the word "Caution." The word "private" is also deleted before the word "reprimand." Subsection 5(A)(5) now reads as follows:

(A) The Chairman of the Grievance Committee shall have the power and duty;

. . .

(5) to issue, at the direction and in the name of the Grievance Committee, a Letter of Caution, a Letter of Admonition, a Reprimand, a Public Reprimand, or a Public Censure to an accused attorney.

Section 6. Grievance Committee—Powers & Duties

3. Section 6 of said Article IX is amended as follows:

(a) By amending Subsection 6(4) to read as follows:

(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 unprofessional or not in accord with accepted professional practice. The Letter of Caution shall recommend that the attorney be more professional in his or her practice in one or more ways which are to be specifically identified.

(b) To adopt a new Subsection 6(5) to read as follows:

(5) To issue a Letter of Admonition to an accused attorney in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is either an unintentional, minor or technical violation without significant prejudice to the client. The Letter of Admonition shall advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The letter shall specify in one or more ways the conduct or practice for which the attorney is being admonished. A copy of the Letter of Admonition shall be maintained in the office of the Counsel subject to the confidentiality provisions of Section 29.

(c) To renumber present subsections 6(5) through 6(8) as subsections 6(6) through 6(9) and to substitute the term "reprimand" for "private reprimand" in subsections 6(6) and 6(8), as renumbered. The subsections as amended will read as follows:

6(6) to issue a reprimand to an accused attorney in cases wherein minor misconduct is established.

6(7) to issue a public reprimand wherein a violation of the Rules of Professional Conduct has occurred but a public censure is not warranted.

6(8) 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 reprimand, or public reprimand.

6(9) to direct that petitions be filed seeking a determination whether a member of the North Carolina State Bar is dis-

abled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

Section 7. Counsel—Power & Duties

4. Subsection 7(2) of Section 7 of said Article IX is amended by deleting the words "or private reprimand" which follow the word "caution" and inserting the words "or Letter of Admonition" to replace said deleted words as follows:

(2) to recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or Letter of Admonition be issued; or that the matter be passed upon by the Grievance Committee to determine whether probable cause exists.

Section 8. Chairman of the Hearing Commission—Powers & Duties

5. Section 8(7) of said Article IX is amended by deleting the words "private reprimand" and substituting the word "reprimand" as follows:

(7) to prepare and issue letters of reprimand.

Section 13. Preliminary Hearing

6. Section 13 of said Article IX is amended as follows:

(a) To amend Subsection 13(9) 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 unprofessional; or not in accord with accepted professional practice, the Committee may issue a Letter of Caution to the accused attorney recommending to the attorney to be more professional in his or her practice in one or more ways which are to be specifically identified.

(b) To adopt a new Subsection 13(10) to read as follows:

(10) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is either an unintentional, minor or technical violation without significant prejudice to the client then the committee may issue a Letter of Admonition to the accused attorney. The Letter of Admonition shall advise the attorney that he or she may be subject to discipline if such

conduct is continued or repeated. The letter shall specify in one or more ways the conduct or practice for which the attorney is being admonished. A copy of the Letter of Admonition shall be maintained in the office of the Counsel.

(c) To renumber present Subsections 13(10) through 13(13) as Subsections 13(11) through 13(14) respectively. To substitute the term "reprimand" for "private reprimand" in subsections 13(11) through 13(13) as renumbered. The sections, as renumbered, read as follows:

(11) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a reprimand to the accused attorney. A record of such reprimand shall be maintained in the office of the Secretary, and a copy of the reprimand shall be served upon the accused attorney as provided in G.S. Section 1A-1, Rule 4. Within fifteen days after service the accused attorney may refuse the reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

(12) 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 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 notified 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).

(13) If probable cause is found and it is determined by the Grievance Committee that a complaint and hearing are not warranted but the conduct warrants more than a reprimand, the Committee may issue a notice of proposed public censure to the accused attorney. A copy of the proposed public censure 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 censure 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 censure is accepted by the accused, the discipline becomes public and must be filed as provided by Section 23(A)(2).

(14) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

Section 23. Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts

7. Section 23(A) of said Article IX is amended as follows:

(1) Reprimand. A Letter of Reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission depending upon the agency ordering the reprimand. The Letter of Reprimand shall be served upon the accused attorney or defendant. The Letter of Reprimand shall not be recorded in the judgment docket of the North Carolina State Bar. The complainant shall be notified that the accused attorney has been reprimanded, but shall not be entitled to a copy of the reprimand.

Section 29. Confidentiality

8. Section 29 of Article IX is amended by deleting the word "private" where it appears before the word "reprimand." Further, the term "a Letter of Admonition and" is inserted before the words "a reprimand" which appear in italics in the first paragraph of said section. The section as amended now reads as follows:

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 as a result of the Grievance Committee of the North Carolina State Bar having found that there is probable cause to believe that said accused attorney is guilty of misconduct justifying disciplinary action, or the accused attorney requests that the matter be public prior to the filing of the aforementioned complaint, or the investigation is predicated upon conviction of the

accused attorney of a crime, *except the previous issuance of a Letter of Admonition and a reprimand to an accused attorney may be revealed in any subsequent disciplinary proceeding.* In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or a Hearing Committee of the Disciplinary Hearing Commission enters an Order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association, or to the Client Security Fund Board of Trustees to assist the Board in determining losses caused by dishonest conduct by members 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 January 12, 1990, 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 25th day of January, 1990.

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 7th day of February, 1990.

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 7th day of February, 1990.

WHICHARD, J.
For the Court

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ANALYTICAL INDEX

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ABATEMENT AND REVIVAL

§ 8.1 (NCI3d). Identity of Actions Arising out of Domestic Relationships

The trial court properly dismissed plaintiff's claims against defendant attorney and his law firm arising from a court ordered sale of property where there was pending the civil action in which the court had ordered the disposal of property and plaintiff could enforce all of the rights he had by a motion in the cause. *Weaver v. Early*, 535.

APPEAL AND ERROR

§ 6.9 (NCI3d). Appealability of Preliminary Matters and Mode of Fraud

An interlocutory order that denied a motion to deny a demand for a jury trial affected a substantial right and was immediately appealable. *State ex rel. Rhodes v. Simpson*, 514.

§ 9 (NCI3d). Moot and Academic Questions

An appeal is dismissed as moot where a consent judgment settling all matters in controversy between the parties was entered while the appeal was pending. *State ex rel. Rhodes v. Gaskill*, 424.

The Supreme Court may consider a moot question that involves a matter of public interest, is of general importance, and deserves prompt resolution, and a jurisdictional dispute between the superior court and the North Carolina State Bar presents such a question. *N.C. State Bar v. Randolph*, 699.

§ 64 (NCI3d). Affirmance or Reversal

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals stands without precedential value. *Bruce v. Memorial Mission Hospital*, 541.

ASSAULT AND BATTERY

§ 17 (NCI3d). Verdict

An indictment for first degree murder was insufficient to support a verdict of guilty of assault, assault inflicting serious injury, or assault with intent to kill. *S. v. Whiteside*, 389.

ATTORNEYS AT LAW

§ 2 (NCI3d). Admission to Practice

The evidence in the whole record supported the Board of Law Examiners' finding that an applicant willfully converted funds, that omissions from his application were more than inadvertent errors, and that his practice of law in another state had demonstrated a pattern of carelessness, neglect, and inattention to detail. *In re Legg*, 658.

The Board of Law Examiners did not err by concluding that an applicant to take the North Carolina bar examination lacked the moral character and fitness required for licensing. *Ibid.*

§ 7.7 (NCI3d). Sanctions

Defendant medical center's noticing and taking of the depositions of two physicians, one in California six days before trial of plaintiff's medical malpractice

ATTORNEYS AT LAW — Continued

claim and one in Florida four days before trial, subsequent to its failure to reveal the existence of the California physician in response to discovery requests, as well as the duplicative and cumulative nature of the Florida physician's testimony, threatened to increase plaintiff's litigation costs and cause unnecessary delay in the trial in violation of Rule 11(a), represented an attempt to harass plaintiff's counsel in violation of Rule 11(a), and therefore required the trial court to impose sanctions on defendant and/or its counsel pursuant to Rule 11(a). *Turner v. Duke University*, 152.

§ 10 (NCI3d). Disbarment Generally

The North Carolina State Bar and the trial courts share concurrent jurisdiction over matters of attorney discipline, and a superior court judge erred in dismissing a grievance proceeding filed with the State Bar against defendant attorney. *N.C. State Bar v. Randolph*, 699.

CONSTITUTIONAL LAW

§ 1.1 (NCI3d). Authority to Interpret Constitution

Issues concerning the proper construction and application of North Carolina laws and the Constitution of North Carolina can only be answered with finality by the North Carolina Supreme Court. *State ex rel. Martin v. Preston*, 438.

§ 2.1 (NCI3d). Rules of Construction

Issues concerning the proper construction of the Constitution of North Carolina are governed by the same principles controlling the meaning of all written instruments; where the meaning is clear from the words used the meaning will not be searched for elsewhere. *State ex rel. Martin v. Preston*, 438.

§ 19 (NCI3d). Monopolies and Exclusive Emoluments and Privileges

A city's decision to establish a municipal cable television system and to decline to grant cable television franchises to other applicants does not violate the exclusive emoluments and monopoly clauses of Art. I, §§ 32 and 34 of the N. C. Constitution. *Madison Cablevision v. City of Morganton*, 634.

§ 23.4 (NCI3d). Scope of Protection of Due Process; Actions Affecting Professions

The Board of Law Examiners did not deny an applicant due process when it refused his petition to reopen or reconsider his case to present newly-discovered evidence. *In re Legg*, 658.

§ 28 (NCI3d). Due Process and Equal Protection Generally in Criminal Proceedings

The Fifth Amendment protects individuals only against due process violations by the federal government and was inapplicable to the trial court's instructions in a prosecution in state court for state crimes. *S. v. Huff*, 1.

The trial court properly denied defendant's motion for a mistrial in a murder case on the ground that the State knowingly used false testimony to obtain his conviction because the statements made by two accomplices to the police were inconsistent with their testimony at trial. *S. v. Whiteside*, 389.

§ 31 (NCI3d). Affording the Accused the Basic Essentials for Defense

The trial court erred in denying an indigent defendant's pretrial motion for funds to hire an independent fingerprint expert in a first degree murder case. *S. v. Bridges*, 529.

CONSTITUTIONAL LAW — Continued

§ 32 (NCI3d). Right to Fair and Public Trial

The trial court did not err in refusing to sever the joint representation of defendant's two accomplices by the same retained attorney and in denying defendant's motion for a mistrial on the ground that the joint representation created a conflict of interest between the attorney and the public's interest in the fair administration of justice due to the "artificial conformity" of the testimony of the two accomplices after they retained the same attorney. *S. v. Whiteside*, 389.

§ 40 (NCI3d). Right to Counsel Generally

The trial court committed prejudicial error in failing to appoint assistant counsel to represent an indigent defendant in a capital trial instead of merely allowing a paralegal to aid defendant's appointed attorney in legal research and filing defense motions. *S. v. Brown*, 427.

§ 46 (NCI3d). Removal or Withdrawal of Appointed Counsel

The Supreme Court, in the exercise of its supervisory authority, elects to remand a capital case to the superior court for entry of an order allowing counsel for defendant to withdraw and for appointment of new counsel and assistant counsel to represent defendant at his retrial given the gravity of the charge against defendant and the representations of his counsel that he will no longer communicate effectively with them. *S. v. Mitchell*, 539.

§ 48 (NCI3d). Effective Assistance of Counsel

Defendant's right to the effective assistance of counsel was not violated by the admission of a psychiatric evaluation team's testimony concerning information obtained during a second court-ordered psychiatric examination of defendant because that evaluation was ordered for the purpose of determining defendant's capacity to proceed rather than his sanity at the time of the crimes. *S. v. Huff*, 1.

§ 60 (NCI3d). Racial Discrimination in Jury Selection Process

The prosecutor's use of peremptory challenges against black citizens did not deprive defendant of his right to a trial by an impartial jury composed of a fair cross-section of the community. *S. v. Davis*, 607.

The trial court did not err in excusing two jurors for cause because of their capital punishment views although the jurors gave conflicting answers to questions concerning those views. *Ibid.*

§ 66 (NCI3d). Presence of Defendant at Proceedings

The confrontation clause of Art. I, § 23 of the N. C. Constitution is the sole source of a criminal defendant's nonwaivable state right to be present at every stage of his capital trial. *S. v. Huff*, 1.

The proper standard for reversal in reviewing violations of a defendant's state constitutional right to be present at all stages of his capital trial is the "harmless beyond a reasonable doubt" standard. *Ibid.*

The trial court erred in permitting defendant to be absent during part of the presentation of the prosecution's evidence in defendant's capital case, but such error was harmless beyond a reasonable doubt. *Ibid.*

A murder defendant's constitutional rights to be present at all stages of his trial were not violated where the trial judge spoke privately with potential jurors who had been dismissed from jury service or where the trial judge routinely inquired about any problems individual jurors might have had but no such problems were expressed by the jurors. *S. v. Laws*, 81.

CONSTITUTIONAL LAW — Continued

Any error in the trial judge's communication with a juror by telephone outside the presence of defendant was harmless beyond a reasonable doubt. *S. v. Davis*, 607.

§ 74 (NCI3d). Self-incrimination Generally

When a defendant relies on the insanity defense and introduces expert testimony on his mental status, the prosecution may introduce expert testimony derived from prior court-ordered psychiatric examinations for the purpose of rebutting that testimony without violating defendant's right against self-incrimination. *S. v. Huff*, 1.

There was no error in a murder prosecution where the prosecutor noted in his closing argument that defendant claimed that he had no memory of events after a certain point, that he had stopped talking, and that officers had left defendant alone. *S. v. Laws*, 81.

§ 76 (NCI3d). Nontestimonial Disclosures by Defendant

The trial court erred in a prosecution for first degree murder by allowing the prosecutor to ask certain questions regarding defendant's post-arrest silence and to refer to defendant's silence in his closing argument before the jury. *S. v. Hoyle*, 232.

§ 80 (NCI3d). Death Sentence

North Carolina's death penalty statute is constitutional and the requirement that mitigating factors must be found unanimously to exist in a capital case does not violate the U. S. Constitution. *S. v. Artis*, 278.

CRIMINAL LAW

§ 5 (NCI3d). Mental Capacity in General; Insanity

The North Carolina law on insanity is not unconstitutional. *S. v. Huff*, 1.

§ 5.1 (NCI3d). Determination of Issue of Insanity

The trial court properly denied defendant's motion for a bifurcated trial on the issues of insanity and guilt. *S. v. Huff*, 1.

When a defendant relies on the insanity defense and introduces expert testimony on his mental status, the prosecution may introduce expert testimony derived from prior court-ordered psychiatric examinations for the purpose of rebutting that testimony without violating defendant's right against self-incrimination. *Ibid.*

Defendant's right to the effective assistance of counsel was not violated by the admission of a psychiatric evaluation team's testimony concerning information obtained during a second court-ordered psychiatric examination of defendant because that evaluation was ordered for the purpose of determining defendant's capacity to proceed rather than his sanity at the time of the crimes. *Ibid.*

§ 9.3 (NCI3d). Determination of Guilt as Principal in Second Degree

The trial court did not err in the guilt-innocence phase of a murder prosecution by instructing the jury that it could find defendant guilty not only for having personally committed the murders, but also on the separate theory of acting in concert. *S. v. Laws*, 81.

CRIMINAL LAW — Continued

§ 15.1 (NCI3d). Pretrial Publicity as Ground for Change of Venue

The trial court did not abuse its discretion in denying defendant's motion for a change of venue of two first degree murder charges because of pretrial publicity. *S. v. Hunt*, 187.

§ 34.7 (NCI3d). Admissibility of Evidence of other Offenses to Show Knowledge or Intent; Motive, Malice, Premeditation or Deliberation

There was no prejudicial error in a first degree murder prosecution by admitting testimony from a witness who described defendant's conduct toward her on a night ten years before this trial where the earlier incident led to a conviction for assault on a female, a fact defense counsel later raised on direct examination of defendant. *S. v. Artis*, 278.

Defendant in a first degree murder prosecution failed to demonstrate prejudice or plain error from the court's instruction that the jury could consider testimony or conduct ten years earlier leading to a conviction for assault on a female. *Ibid.*

§ 35 (NCI3d). Evidence that Offense Was Committed by Another

The trial court did not err in a murder prosecution by excluding evidence that another person was responsible for the death of the victim. *S. v. Brewer*, 550.

§ 43.1 (NCI3d). Photographs of Defendant

Color photographs made of defendant and his alleged accomplice soon after their arrest for the murders of the victims were properly admitted for the purpose of demonstrating the ability of the witness to identify defendant and his accomplice and to illustrate his testimony. *S. v. Hunt*, 187.

§ 43.4 (NCI3d). Inflammatory or otherwise Prejudicial Photographs

The trial court did not err in a first degree murder prosecution by allowing the State to introduce photographs of defendant and a codefendant which were allegedly grotesque and unflattering. *S. v. Brewer*, 550.

§ 46.1 (NCI3d). Flight of Defendant as Implied Admission; Competency of Evidence

The trial court did not err in a first degree murder prosecution by excluding evidence of defendant's state of mind, offered to refute the State's theory that defendant fled the state because he had learned he was a suspect. *S. v. Brewer*, 550.

§ 48 (NCI3d). Silence of Defendant as Implied Admission; Silence Competent

Defendant's long glances at an accomplice indicating that the accomplice "had better shut up" after the accomplice made statements in defendant's presence could be found to manifest defendant's adoption or belief in the truth of the accomplice's statements so as to render those statements admissible against defendant under Rule 801(d)(B). *S. v. Hunt*, 187.

§ 61.2 (NCI3d). Competency of Shoe Print Evidence

Tennis shoes taken from defendant's residence and expert testimony describing the similarities between shoe prints found at a murder scene and the soles of tennis shoes were admissible as tending to connect defendant with the alleged murder. *S. v. Whiteside*, 389.

§ 67 (NCI4th). Original, Concurrent, and Exclusive Jurisdiction; Superior Courts Generally

The superior court had jurisdiction to try defendant for a misdemeanor where the amended record on appeal shows that this charge was initiated by presentment. *S. v. Birdsong*, 418.

§ 73 (NCI3d). Hearsay Testimony in General

The trial court did not err in a first degree murder prosecution by refusing to admit an anonymous letter received by defendant's sister stating that defendant was not responsible for the victim's death or testimony from defendant that he had heard the victim say that others were going to kill her. *S. v. Artis*, 278.

§ 75.7 (NCI3d). Voluntariness of Confession; Requirement that Defendant Be Warned of Constitutional Rights

The trial court erred in a first degree murder prosecution by admitting into evidence a statement by defendant made prior to Miranda warnings. *S. v. Hoyle*, 232.

§ 79.1 (NCI3d). Acts of Companions

Evidence that an accomplice had been convicted of murdering the victims could not have prejudiced defendant since he sought to establish at trial that the accomplice, alone, committed the murders. *S. v. Hunt*, 187.

§ 85.3 (NCI3d). Character Evidence Relating to Defendant; State's Cross-Examination of Defendant

There was no prejudice in a prosecution for first degree murder from the trial court's decision to allow the prosecutor to question defendant and a defense witness and to argue to the jury concerning defendant's association with a character who had been convicted of murder. *S. v. Brewer*, 550.

§ 86.1 (NCI3d). Impeachment of Defendant

The prosecutor's cross-examination of defendant concerning certain men he had entrusted to read his mail and write letters for him while he was incarcerated awaiting trial was proper to question the credibility of defendant's testimony that he had trusted two persons other than a State's witness to perform these tasks. *S. v. Hunt*, 187.

§ 86.2 (NCI3d). Impeachment of Defendant; Prior Convictions Generally

There was no prejudicial error in a prosecution for first degree murder from erroneously permitting the State to cross-examine defendant about convictions for assault on a female in 1957 and 1967. *S. v. Artis*, 278.

§ 86.9 (NCI3d). State's Witnesses; Impeachment of Accomplices Generally

A defendant tried for two first degree murders was not prejudiced by evidence that defendant's accomplice had been arrested for the attempted murder of his girlfriend. *S. v. Hunt*, 187.

§ 89 (NCI3d). Credibility of Witnesses; Corroboration and Impeachment

The trial court did not err in a first degree murder prosecution by admitting testimony from the husband of the decedent regarding the reason he gave reward money to a State's witness. *S. v. Brewer*, 550.

CRIMINAL LAW — Continued

§ 89.1 (NCI3d). Evidence of Character Bearing on Credibility

Assuming that the chief jailer's testimony that certain security measures were taken after a State's witness reported that defendant's alleged accomplice stood outside the jail and pointed a shotgun at the window of the witness's cell constituted improper evidence of the witness's character for truthfulness in violation of Rule of Evidence 608, the admission of the jailer's testimony was harmless error. *S. v. Hunt*, 187.

§ 89.8 (NCI3d). Impeachment; Promise of Hope of Leniency

The trial judge did not err in a first degree murder prosecution by prohibiting defense counsel from impeaching the State's witness with a letter the witness had written to a federal judge during a prior incarceration requesting a reduction in his sentence. *S. v. Brewer*, 550.

§ 89.9 (NCI3d). Impeachment; Prior Statements of Witness

The trial court did not err in a first degree murder prosecution by excluding from the evidence a portion of the transcript of a State witness's testimony at an earlier trial of a codefendant. *S. v. Brewer*, 550.

§ 89.10 (NCI3d). Impeachment; Witness's Prior Degrading and Criminal Conduct and Convictions

The trial judge in a homicide case did not abuse his discretion in refusing to admit into evidence the juvenile adjudications of a State's witness after he had allowed the adjudication to be used on cross-examination for impeachment purposes. *S. v. Whiteside*, 389.

§ 91.1 (NCI3d). Continuance

Defendant in a murder prosecution was not denied effective assistance of counsel because the court refused to continue the trial after the State adjourned early and defense counsel was unprepared for closing arguments. *S. v. Laws*, 81.

§ 92.4 (NCI3d). Consolidation of Multiple Charges against Same Defendant Held Proper

There was sufficient evidence of a transactional connection to support the trial court's joinder for trial of charges against defendant for the first degree murder of his infant son and first degree murder of his mother-in-law, and joinder did not hinder defendant's ability to present his defense of insanity and lack of premeditation and deliberation. *S. v. Huff*, 1.

§ 98 (NCI3d). Presence and Conduct of Defendant and Witnesses

The confrontation clause of Art. I, § 23 of the N. C. Constitution is the sole source of a criminal defendant's nonwaivable state right to be present at every stage of his capital trial. *S. v. Huff*, 1.

The proper standard for reversal in reviewing violations of a defendant's state constitutional right to be present at all stages of his capital trial is the "harmless beyond a reasonable doubt" standard. *Ibid.*

The trial court erred in permitting defendant to be absent during part of the presentation of the prosecution's evidence in defendant's capital case, but such error was harmless beyond a reasonable doubt. *Ibid.*

§ 102 (NCI3d). Argument and Conduct of Counsel and Solicitor

The prosecutor's comment during jury selection in a murder prosecution that he had a personal belief about the case which should not come in did not amount to a gross impropriety. *S. v. Laws*, 81.

The trial court did not abuse its discretion by failing to intervene ex mero motu in a murder prosecution when the prosecutor pointed out several persons in the courtroom as members of the victim's family during the jury selection. *Ibid.*

There was no gross impropriety requiring the trial court to intervene ex mero motu during jury selection in a murder prosecution because of the prosecutor's speaking objections. *Ibid.*

§ 102.6 (NCI3d). Particular Conduct and Comments in Argument to Jury

The prosecutor's jury argument during the sentencing phase of a capital trial that the jury is the voice and conscience of the community was not improper. *S. v. Huff*, 1.

There was no prejudicial error in the prosecutor's opening argument in a murder prosecution from the prosecutor's admonishment of the jury that it was their responsibility to uphold the law even though the victims were alcoholics and street people or from his explanation of the absence of some of his expert witnesses. *S. v. Laws*, 81.

The prosecutor's closing argument in a murder prosecution did not include gross improprieties requiring a new trial where the prosecutor told the jury to try to do justice for the victims and their families. *Ibid.*

There was no error in a murder prosecution where the prosecutor argued to the jury that defendant committed the killings for the love of killing. *Ibid.*

There was no error in a murder prosecution from the prosecutor's closing argument regarding defendant's claimed loss of memory. *Ibid.*

Prosecutor's closing argument in a murder prosecution that nothing could make what had happened any different but that they could make sure that defendant and an accomplice never did that again was not a gross impropriety. *Ibid.*

There was no prejudicial error in a murder prosecution from the prosecutor's inadequate explanation of voluntary manslaughter. *Ibid.*

The trial court did not err by not intervening ex mero motu during the prosecutor's closing argument in a murder prosecution where the prosecutor asserted that defendant robbed and murdered the victim because he wanted money to buy drugs. *S. v. Quesinberry*, 125.

The trial court did not err during closing arguments in a murder prosecution by not intervening ex mero motu where the prosecutor argued that the jury could send a message to the community. *Ibid.*

§ 102.12 (NCI3d). Jury Argument; Comment on Sentence or Punishment

The trial court properly prohibited defense counsel from informing the jury in argument that the capital punishment statute authorizes the trial court to impose a life sentence if the jury is unable to reach a unanimous sentence verdict. *S. v. Huff*, 1.

There was no prejudicial error in a sentencing proceeding for first degree murder from the prosecutor's reading from *State v. Huffstetler* in arguing for the especially heinous, atrocious or cruel aggravating factor. *S. v. Laws*, 81.

CRIMINAL LAW — Continued

There was no error in a sentencing proceeding for first degree murder where the prosecutor argued from *State v. Pinch* that the jury could consider the defendant's attack on each victim in aggravation of the murder of the other. *Ibid.*

There was no gross impropriety requiring the trial court to intervene ex mero motu in the sentencing proceeding of a murder trial based on the prosecutor's alleged misstatement of the law governing the statutory mitigating circumstance of impaired capacity. *Ibid.*

There was no error in the sentencing proceeding of a murder prosecution regarding the prosecutor's argument concerning the any other circumstance provisions of G.S. 15A-2000(f)(9). *Ibid.*

There was no error in the sentencing proceeding of a murder trial where the prosecutor argued that the death penalty was the only way to be sure that this man never did this again. *Ibid.*

There was no gross impropriety requiring the trial court to intervene ex mero motu in the sentencing portion of a murder prosecution where the prosecutor made Biblical references. *Ibid.*

There was no gross impropriety requiring the trial court to act ex mero motu in the closing argument of a sentencing proceeding for first degree murder where the prosecutor argued that the victims were entitled to the protection of the law. *Ibid.*

There was no gross impropriety requiring the trial court to intervene ex mero motu in the closing argument of the sentencing proceeding at a murder trial where the prosecutor criticized our capital sentencing laws in that juries are required to decide that some murders are worse than others. *Ibid.*

§ 102.13 (NCI3d). Jury Argument; Comment on Executive Review

Prosecutor's closing argument in a murder prosecution did not suggest the possibility of parole in so direct a manner as to require intervention ex mero motu. *S. v. Quesinberry*, 125.

§ 107 (NCI4th). Reports not Subject to Disclosure by State

The trial court did not err in a first degree murder prosecution by failing to require the State and a witness's attorney to disclose evidence favorable to the defense. *S. v. Brewer*, 550.

§ 111.1 (NCI3d). Particular Miscellaneous Instructions

The trial court's instructions could not reasonably have been understood by the jury to permit a joint determination of defendant's guilt on two murder charges although the court on occasion referred to a single "victim" and "the case" and referred to a single offense in giving pattern jury instructions on insanity. *S. v. Huff*, 1.

§ 126.3 (NCI3d). Acceptance of Verdict Generally

The trial court in a first degree murder prosecution properly denied defendant's motion for appropriate relief based on allegations that the jurors considered defendant's possibility of parole in their sentencing deliberations. *S. v. Quesinberry*, 125.

§ 128.2 (NCI3d). Particular Grounds for Mistrial

The trial court did not err in denying defendant's motion for a mistrial in a first degree murder case when defendant's former girlfriend testified that a card with the word "killed" had been placed in her mailbox while defendant was in jail awaiting trial. *S. v. Huff*, 1.

CRIMINAL LAW — Continued

The trial court in a murder prosecution did not err by denying defendant's motion for a mistrial where the prosecutor interjected during defense cross-examination that another judge would have defense counsel locked up. *S. v. Laws*, 81.

§ 135.3 (NCI3d). Exclusion of Veniremen Opposed to Death Penalty

The trial court did not err in excusing jurors for cause in a first degree murder trial because of their opposition to capital punishment. *S. v. Huff*, 1.

§ 135.4 (NCI3d). Cases under N.C.G.S. § 15A-2000; Separate Sentencing Proceeding

The trial court did not violate G.S. 15A-2000(b) by failing to impose a life sentence in a capital case when the jury returned a nonunanimous verdict on Friday afternoon after two hours of deliberation or when the trial was reconvened on Monday morning after the jury had deliberated an additional forty-five minutes. *S. v. Huff*, 1.

The trial court did not err in denying defendant's motion for separate juries for the guilt and penalty phases of his first degree murder trial and his motion to prohibit the State from death qualifying the jurors. *Ibid.*

The North Carolina death penalty statute is constitutional. *Ibid.*

§ 135.7 (NCI3d). Separate Sentencing Proceeding; Instructions

The trial court's error in using the term "best deserving" of the death penalty in instructing the jury as to the meaning of "mitigating circumstances" was cured by a following instruction using the term "less deserving." *S. v. Huff*, 1.

The trial court in a first degree murder case did not err in instructing that the jury must recommend a sentence 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. *Ibid.*

The trial judge's unanimity instructions following the jury's return of a nonunanimous verdict recommending life imprisonment in a capital case did not coerce a unanimous sentencing verdict where the court further instructed the jury before it retired to deliberate for the last time that the bailiff would bring the jury back into the courtroom if the jury determined "that with a reasonable amount of additional deliberations you will not be able to reach a unanimous recommendation." *Ibid.*

The trial court did not err during the sentencing portion of a murder prosecution by instructing the jurors that they must be unanimous to find a mitigating circumstance. *S. v. Quesinberry*, 125.

The North Carolina Pattern Jury Instruction on the jury's duty to return a recommendation of death is not unconstitutional. *Ibid.*

§ 135.8 (NCI3d). Separate Sentencing Proceeding; Aggravating Circumstances

The trial court's submission of the especially heinous, atrocious or cruel aggravating circumstance in a first degree murder case did not allow the jury unguided discretion in determining what facts were sufficient to find that the circumstance existed. *S. v. Huff*, 1.

The evidence was sufficient to support the court's submission of the especially heinous, atrocious or cruel aggravating circumstance in a prosecution of defendant for the first degree murder of his infant son by suffocation. *Ibid.*

CRIMINAL LAW — Continued

The jury could properly consider the age of the infant victim in determining the weight of the especially heinous aggravating circumstance. *Ibid.*

Defendant was not entitled to a bill of particulars from the State disclosing the aggravating factors upon which it proposed to rely in seeking the death penalty. *Ibid.*

In a sentencing proceeding for first degree murder, the submission to the jury of the aggravating factor that the murders were especially heinous, atrocious or cruel was justified by the prolonged brutal attacks which were required to inflict the gruesome injuries. *S. v. Laws*, 81.

By enacting specific aggravating circumstances to be considered in capital sentencing, the legislature intended that a jury must give some weight in aggravation to circumstances it has found. *Ibid.*

§ 135.9 (NCI3d). Separate Sentencing Proceeding; Mitigating Circumstances

The trial court's peremptory instructions on nonstatutory mitigating circumstances were not erroneous in requiring the jury to determine both that the evidence supported the existence of the nonstatutory circumstance and that the circumstance had mitigating value in order to find the existence of such circumstance. *S. v. Huff*, 1.

It is not constitutional error to require the defendant in a capital case to prove mitigating circumstances by a preponderance of the evidence or to instruct the jury that it must reach unanimous agreement before finding mitigating circumstances. *Ibid.*

The prosecutor's jury argument defining a mitigating circumstance as evidence that lessens or reduces the severity of the crime did not imply that the jury would have to find that evidence was sufficient to reduce the crime of first degree murder to some lesser-included offense in order to find that it had mitigating value and was not erroneous. *Ibid.*

The prosecutor's jury argument that the statutory mitigating circumstances submitted in a first degree murder case had "been passed into law by the legislature" and that the nonstatutory mitigating circumstances were "created and urged" upon the jury by defense counsel was not improper. *Ibid.*

The trial court did not err when sentencing defendant for murder by refusing to submit as a nonstatutory mitigating circumstance that defendant had had a fatherless childhood with no male guidance. *S. v. Laws*, 81.

The trial court did not err when sentencing defendant for murder by failing to submit the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. *Ibid.*

The trial court did not err when sentencing defendant for murder by not submitting to the jury the statutory mitigating circumstance of defendant's age at the time of the crimes. *Ibid.*

§ 135.10 (NCI3d). Separate Sentencing Proceeding; Review

A sentence of death imposed on defendant for the first degree murder of his infant son by suffocation was not disproportionate to the penalty imposed in similar cases. *S. v. Huff*, 1.

A death sentence in a first degree murder prosecution was not disproportionate even though the victim was killed during an armed robbery. *S. v. Quesinberry*, 125.

CRIMINAL LAW — Continued

A death sentence for two first degree murders was not recommended or entered under the influence of passion, prejudice, or any arbitrary circumstance, and was not disproportionate. *S. v. Laws*, 81.

§ 138.7 (NCI3d). Fair Sentencing Act; Severity of Sentence; Particular Matters and Evidence Considered

A defendant being sentenced for placing LSD in a pot of coffee at a campus restaurant did not show that he was prejudiced by the use of victim impact statements at the sentencing hearing. *S. v. Phillips*, 222.

§ 146.1 (NCI3d). Appeal Limited to Questions Raised in Lower Court and Properly Presented and Argued on Appeal

The Supreme Court elected to consider the issue of racial discrimination in the prosecutor's use of peremptory challenges although consideration of that issue ordinarily would be precluded on appeal because defendant failed to object to the denial of a pretrial motion or to object to the State's exercise of any specific peremptory challenge of a black juror. *S. v. Davis*, 607.

§ 169.3 (NCI3d). Harmless Error in Exclusion of Evidence; Error Cured by Introduction of other Evidence

There was no prejudicial error in a first degree murder prosecution from the exclusion of testimony concerning the results of defendant's I.Q. test. *S. v. Artis*, 278.

§ 213 (NCI4th). Speedy Trial; Excludable Periods; Other Proceedings, Trials, Appeals, or Pretrial Motions

Defendant's statutory right to a speedy trial within 120 days after indictment was not violated where the State showed that nine continuances totalling 170 days granted to the State should be excluded from the speedy trial computation by producing facially valid orders for those continuances. *S. v. Coker*, 686.

§ 415 (NCI4th). Jury Argument; Latitude and Scope of Argument Generally

The trial court did not err in a first degree murder prosecution by failing to intervene ex mero motu in the prosecutor's argument where defendant contended that the State argued matters intended to prejudice defendant and to elicit passion and sympathy for the victim. *S. v. Brewer*, 550.

§ 416 (NCI4th). Matters Beyond Permissible Scope of Jury Argument

The trial court in a first degree murder case did not abuse its discretion in refusing to permit defense counsel during closing argument to show excerpts of the videotaped confessions of two accomplices who testified for the State. *S. v. Whiteside*, 389.

§ 425 (NCI4th). Jury Argument; Comment on Defendant's Failure to Call other Particular Witness

There was no prejudicial error in a first degree murder prosecution in allowing the State to cross-examine defendant about the absence of an accomplice and defendant's six-year-old son as witnesses at defendant's trial and to argue the absence of those witnesses to the jury. *S. v. Brewer*, 550.

§ 434 (NCI4th). Jury Argument; Comment on Defendant's Character or Credibility; Prior Convictions or Criminal Conduct

There was no error in a first degree murder prosecution in the prosecutor's closing argument concerning a prior offense. *S. v. Artis*, 278.

CRIMINAL LAW — Continued

§ 436 (NCI4th). Jury Argument; Comment on Defendant's Character or Credibility; Defendant's Lack of Remorse

There was no error in a first degree murder prosecution in which defendant had testified that he had not committed the crime where the prosecutor called the jury's attention in closing argument of the sentencing proceeding to defendant's lack of remorse. *S. v. Artis*, 278.

§ 442 (NCI4th). Jury Argument; Comment on Jury's Duty

The prosecutor's remark in the sentencing portion of a first degree murder prosecution urging the jury to try the case without prejudice and without sympathy was not improper. *S. v. Artis*, 278.

§ 447 (NCI4th). Jury Argument; Inflammatory Comments; Comments on Rights of Victim's Family

There was no plain error in the sentencing portion of a first degree murder prosecution where the prosecutor remarked on the loss the victim's family suffered by her death. *S. v. Artis*, 278.

§ 451 (NCI4th). Jury Argument; Comment on Sentence or Punishment Generally

The trial court did not abuse its discretion during sentencing for a first degree murder prosecution by denying defendant's objection to the prosecutor's stressing to jurors that it was not they who were responsible for the judgment they would recommend, but defendant. *S. v. Artis*, 278.

§ 452 (NCI4th). Jury Argument; Comment on Aggravating or Mitigating Factors

The trial court did not err in the sentencing portion of a first degree murder prosecution by overruling defendant's objection to the prosecutor's argument that defendant's son, daughter and aunt had been put on the stand to provoke sympathy. *S. v. Artis*, 278.

§ 454 (NCI4th). Jury Argument; Comment on Sentence or Punishment; Capital Cases Generally

The trial court did not err in the sentencing portion of a first degree murder prosecution where the victim had been strangled by allowing the prosecutor to tell the jurors that he would clock a four-minute pause in which he wanted them to hold their breath as long as they could. *S. v. Artis*, 278.

The trial court did not err during the sentencing portion of a first degree murder prosecution by allowing the prosecutor to urge the jury to consider community responses to their sentencing recommendation. *Ibid.*

A prosecutor's amalgam of biblical and statutory language when arguing for the death penalty was not so improper as to require intervention ex mero motu. *Ibid.*

§ 568 (NCI4th). Mistrial; Impossibility of Proceeding in Conformity with Law; Improper Influencing of Witnesses

The trial court did not err in refusing to sever the joint representation of defendant's two accomplices by the same retained attorney and in denying defendant's motion for a mistrial on the ground that the joint representation created a conflict of interest between the attorney and the public's interest in the fair administration of justice due to the "artificial conformity" of the testimony of the two accomplices after they retained the same attorney. *S. v. Whiteside*, 389.

CRIMINAL LAW — Continued

§ 1339 (NCI4th). Particular Aggravating Circumstances in Capital Cases; Capital Felony Committed During Commission of Another Crime

The trial court did not err in a sentencing portion of a first degree murder prosecution by allowing the jury to consider as an aggravating circumstance the felony underlying defendant's conviction for felony murder. *S. v. Artis*, 278.

The trial court in a first degree murder case committed prejudicial error in submitting both the statutory aggravating factor that defendant was engaged in the commission of common law robbery and the statutory factor that the murder was committed for pecuniary gain. *S. v. Davis*, 607.

§ 1344 (NCI4th). Particular Aggravating Circumstances in Capital Cases; Particularly Heinous, Atrocious, or Cruel Offense; Submission of Circumstance to Jury

The trial court did not err during the sentencing portion of a first degree murder prosecution by submitting to the jury the aggravating circumstance that the murder was especially heinous, atrocious or cruel. *S. v. Artis*, 278.

§ 1355 (NCI4th). Particular Mitigating Circumstances in Capital Cases; Lack of Prior Criminal Activity

The trial court did not err during the sentencing portion of a first degree murder prosecution by failing to instruct the jury on the statutory mitigating circumstance of no significant prior criminal activity. *S. v. Artis*, 278.

§ 1360 (NCI4th). Particular Mitigating Circumstances in Capital Cases; Impaired Capacity of Defendant; Instructions

The trial court did not err during the sentencing phase of a first degree murder prosecution by submitting a separate nonstatutory mitigating circumstance regarding defendant's mild mental retardation rather than relating mental retardation specifically to the statutory mitigating circumstance of impaired capacity. *S. v. Artis*, 278.

§ 1373 (NCI4th). Death Penalty Held not Excessive or Disproportionate

A sentence of death was not disproportionate. *S. v. Artis*, 278.

DIVORCE AND ALIMONY

§ 30 (NCI3d). Equitable Distribution

There is no right under Art. I, § 25 or Art. IV, § 13 of the N. C. Constitution to a jury trial on questions of fact in an equitable distribution proceeding. *Kiser v. Kiser*, 502.

ELECTIONS

§ 1 (NCI3d). Calling of Election and Time of Holding Election

A judicial redistricting act which created new judicial districts and which delayed some election dates to eliminate staggered terms and multiple seat districts, with incumbents holding over until the new election dates, did not violate the North Carolina Constitution; deny the fundamental right to vote for judges; deny candidates the right to seek office; usurp the governor's power to make judicial appointments or violate separation of powers; render the eight-year judicial term meaningless; confer a special emolument on incumbent judges; or violate the residency requirement for judges. *State ex rel. Martin v. Preston*, 438.

ELECTRICITY

§ 3 (NCI3d). Rates

A decision by the Utilities Commission to authorize a power company to amortize costs associated with canceled nuclear power units as "reasonable operating expenses" for ratemaking purposes was within the Commission's power and was supported by competent, material and substantial evidence. *State ex rel. Utilities Commission v. Thornburg, (57A88)*, 463.

An amount spent by a power company to build excess common facilities to serve abandoned nuclear generating units cannot be considered as "used and useful" and thus cannot be included in the company's rate base. *State ex rel. Utilities Commission v. Thornburg, (89A89)*, 484.

The entire amount spent by a power company to build excess common facilities to serve abandoned nuclear generating units should be treated as cancellation costs of the abandoned units and recovered as operating expenses through amortization. *Ibid.*

EMINENT DOMAIN

§ 1.3 (NCI3d). Limitation of Power; Just Compensation

The law of the land clause of Art. I, § 19 of the N. C. Constitution prohibits the taking of private property for public use without payment of just compensation. *Finch v. City of Durham*, 352.

HOMICIDE

§ 4.2 (NCI3d). Murder in the First Degree in Commission of Felony

The "merger doctrine" will not be applied to bar application of the felony murder rule to homicides committed in the perpetration of the felony of discharging a firearm into occupied property. *S. v. Clark*, 677.

§ 8.1 (NCI3d). Defense of Intoxication; Evidence and Instructions

The trial court did not err in a murder prosecution by not instructing the jury during the guilt-innocence phase of the trial on voluntary intoxication. *S. v. Laws*, 81.

§ 12 (NCI3d). Indictment Generally

An indictment for first degree murder was insufficient to support a verdict of guilty of assault, assault inflicting serious injury, or assault with intent to kill. *S. v. Whiteside*, 389.

§ 18.1 (NCI3d). Particular Circumstances Showing Premeditation and Deliberation

The evidence in a first degree murder case allowed a reasonable inference that defendant premeditated and deliberated before killing the elderly victim. *S. v. Davis*, 607.

§ 21.5 (NCI3d). Sufficiency of Evidence of First Degree Murder

The evidence was sufficient for the jury to find beyond a reasonable doubt all the elements of first degree murder in a prosecution in which a new trial was awarded on other grounds. *S. v. Hoyle*, 232.

The trial court did not err in a prosecution for first degree murder by denying defendant's motion to dismiss based on insufficient evidence of premeditation and deliberation. *S. v. Artis*, 278.

HOMICIDE — Continued

§ 21.6 (NCI3d). Sufficiency of Evidence of Murder in Perpetration of Felony

There was sufficient evidence that defendant intentionally discharged a firearm into a residence that he knew was occupied to support his conviction of first degree murder under the felony murder rule. *S. v. Clark*, 677.

§ 21.9 (NCI3d). Sufficiency of Evidence of Manslaughter

There was sufficient evidence in a first degree murder prosecution to support a conviction for involuntary manslaughter. *S. v. Thomas*, 583.

§ 24.1 (NCI3d). Instructions on Presumptions Arising from Use of Deadly Weapon

The trial court's instruction during a murder prosecution that the law requires that a killing intentionally inflicted with a deadly weapon is unlawful and done with malice was a mere lapsus linguae. *S. v. Laws*, 81.

§ 25.2 (NCI3d). Instructions on First Degree Murder; Premeditation and Deliberation

There was substantial evidence in a first degree murder prosecution supporting all of the circumstances submitted by the court to the jury indicating premeditation and deliberation. *S. v. Artis*, 278.

The evidence supported each of the examples given by the trial court in its instructions regarding proof from which premeditation and deliberation may be inferred. *S. v. Davis*, 607.

§ 30.3 (NCI3d). Submission of Lesser Offense of Manslaughter

The trial court did not err in a first degree murder prosecution by refusing to instruct on involuntary manslaughter. *S. v. Brewer*, 550.

The trial court erred in a first degree murder prosecution by not submitting to the jury the lesser-included offense of involuntary manslaughter where the murder charge arose from the felony of discharging a firearm into an occupied structure. *S. v. Thomas*, 583.

The evidence did not require the trial court to instruct the jury with regard to a possible verdict of involuntary manslaughter in a murder prosecution in which the trial court instructed the jury to find defendant guilty of first degree murder under the felony murder rule or to find him not guilty. *S. v. Clark*, 677.

INDICTMENT AND WARRANT

§ 13.1 (NCI3d). Discretionary Denial of Motion for Bill of Particulars

Defendant was not entitled to a bill of particulars from the State disclosing the aggravating factors upon which it proposed to rely in seeking the death penalty. *S. v. Huff*, 1.

INSURANCE

§ 18 (NCI3d). Life Insurance; Avoidance of Policy for Misrepresentations or Fraud

The trial court properly struck portions of plaintiff's affidavit which were conclusions rather than statements of fact, but the court erred in striking as hearsay portions of the affidavit relating statements made by plaintiff and an applicant for life insurance to defendant insurer's agent since they were offered to prove

INSURANCE — Continued

that defendant's agent had notice of the matters contained in the statements and not to prove the truth of those matters. *Ward v. Durham Life Insurance Co.*, 202.

§ 18.1 (NCI3d). Life Insurance; Avoidance of Policy for Misrepresentations as to Health and Physical Condition

A misrepresentation in an application for life insurance that the applicant had never been treated for high blood pressure was material as a matter of law. *Ward v. Durham Life Insurance Co.*, 202.

§ 19.1 (NCI3d). Imputation to Insurer of Knowledge of its Agent; Fraud of Agent in Preparing Application

An insurance agent acted within the scope of her apparent authority if she accepted an application for life insurance with knowledge of misrepresentations therein. *Ward v. Durham Life Insurance Co.*, 202.

An insurer's authorized agent's knowledge of false material answers on a life insurance application is imputed to the insurer unless both the agent and the applicant intend to perpetrate a fraud on the insurer by submitting the false answers. *Ibid.*

The mere signing of a life insurance application with false material answers by an applicant who can read and write is not enough to avoid imputation of the agent's knowledge of the false answers to the insurer. *Ibid.*

Where an insured understandingly executes an application he knows contains false material answers or executes it under circumstances that would put a reasonable person on notice that the application contains such answers, he ipso facto colludes with the agent in misleading the company. *Ibid.*

Plaintiff's forecast of evidence presented a material issue of fact as to whether knowledge by defendant insurer's agent of false material misrepresentations in an application for life insurance concerning the applicant's treatment for high blood pressure and arrest for the use of alcohol should be imputed to defendant insurer where it tended to show that insured signed the application only after defendant's agent assured him that, since the events in question occurred more than two years earlier, they would not affect his insurability. *Ibid.*

§ 69 (NCI3d). Automobile Insurance; Protection against Injury by Uninsured or Unknown Motorist Generally

Underinsured motorist coverage can never be excess or additional coverage within the meaning of G.S. 20-279.21(g), which would exclude it from statutory provisions. *Sutton v. Aetna Casualty & Surety Co.*, 259.

The argument that underinsured motorist coverage is not required by the Financial Responsibility Act and is therefore controlled by the terms of the policy rather than by statute was rejected. *Ibid.*

§ 69.1 (NCI3d). Automobile Insurance; Policy Provisions in Conflict with Uninsured Motorist Statutes

The North Carolina statute which provides for stacking or aggregation of underinsured motorist coverage, G.S. 20-279.21(b)(4), prevails over language in the policy and requires that the underinsured motorist coverages for each vehicle in a single policy and all such coverages in both policies be aggregated. *Sutton v. Aetna Casualty & Surety Co.*, 259.

INSURANCE — Continued

§ 81 (NCI3d). Automobile Liability Insurance; Assigned Risk Insurance

The Court of Appeals correctly determined that the Commissioner of Motor Vehicles exceeded his authority by promulgating a rule that insurers were not required to notify DMV of the termination of automobile insurance policies in effect for six months or longer. *Allstate Ins. Co. v. McCrae*, 411.

The failure of Allstate to notify DMV of a lapse in automobile insurance coverage did not result in continued coverage of the vehicle under the Allstate policy. *Ibid.*

§ 95.1 (NCI3d). Cancellation of Compulsory Automobile Insurance; Notice to Insured

In order to cancel an automobile insurance policy for nonpayment of premium, the insurer must strictly comply with the requirements of the automobile insurance cancellation notice statute both as to stating the effective date of cancellation and giving the statutorily required time period. *Pearson v. Nationwide Mutual Ins. Co.*, 246.

Where the insurer's midterm notice of cancellation of an automobile insurance policy for nonpayment of premium failed to state the date upon which cancellation was to become effective and failed to provide the insured with the statutorily required fifteen days from the date of mailing of the notice, the notice was not effective to cancel the policy, and the policy remained in effect until the termination date specified in the policy when it was issued. *Ibid.*

JUDGMENTS

§ 37.4 (NCI3d). Preclusion or Relitigation of Judgments in Particular Proceedings

The Utilities Commission's treatment of costs associated with canceled nuclear power units in prior general rate cases was not res judicata in this rate case. *State ex rel. Utilities Commission v. Thornburg*, 463.

JURY

§ 1 (NCI3d). Nature and Extent of Right

Art. I, § 25 contains the sole substantive guarantee of the right to trial by jury under the N. C. Constitution. *Kiser v. Kiser*, 502.

There is no right under Art. I, § 25 or Art. IV, § 13 of the N. C. Constitution to a jury trial on questions of fact in an equitable distribution proceeding. *Ibid.*

There was no right under Art. I, § 25 of the N. C. Constitution to a jury trial in an action instituted by the State to enjoin dredge and fill development of marshland by a private property owner. *State ex rel. Rhodes v. Simpson*, 514.

§ 5 (NCI3d). Excusing of Jurors

The trial court did not err in a murder prosecution by denying defendant's motion challenging the procedure used to excuse or defer potential jurors from the petit jury panel. *S. v. Murdock*, 522.

§ 6 (NCI3d). Voir Dire Examination Generally; Practice and Procedure

Defendant in a murder prosecution did not show prejudice or abuse of discretion from the trial court's denial of his motion for individual voir dire and sequestration. *S. v. Quesinberry*, 125.

There was no prejudicial error during the jury selection process of a first degree murder prosecution where a juror responded when the court asked wheth-

The exclusion of a prospective juror for cause because of his opposition to the death penalty based on his religious beliefs did not violate constitutional principles regarding the free exercise of religion and the right to serve as a juror regardless of one's religion. *Ibid.*

§ 7.12 (NCI3d). Challenges for Cause; Scruples against Capital Punishment; What Constitutes Disqualifying Scruples or Beliefs

The trial court did not err during jury selection in a murder prosecution by excusing three jurors for cause where all three jurors said they could not vote for the death penalty under any circumstances. *S. v. Quesinberry*, 125.

§ 7.13 (NCI3d). Peremptory Challenges Generally; Number of Challenges

The trial court had no authority to increase the number of peremptory challenges provided by statute. *S. v. Hunt*, 187.

§ 7.14 (NCI3d). Peremptory Challenges; Manner, Order, and Time of Exercising Challenge

The trial court did not err in a first degree murder prosecution by allowing the State to use peremptory challenges to exclude prospective jurors opposed to the death penalty. *S. v. Quesinberry*, 125.

There was no substantiation in the record of a first degree murder prosecution of defendant's contention that the prosecutor used peremptory challenges to remove jurors hesitant about the death penalty; moreover, it is not improper to so use peremptory challenges. *S. v. Artis*, 278.

The Supreme Court elected to consider the issue of racial discrimination in the prosecutor's use of peremptory challenges although consideration of that issue ordinarily would be precluded on appeal because defendant failed to object to the denial of a pretrial motion or to object to the State's exercise of any specific peremptory challenge of a black juror. *S. v. Davis*, 607.

Defendant failed to establish a prima facie case of racial discrimination against black citizens by the State's exercise of peremptory challenges in this first degree murder and common law robbery case. *Ibid.*

The prosecutor's use of peremptory challenges against black citizens did not deprive defendant of his right to a trial by an impartial jury composed of a fair cross section of the community. *Ibid.*

The prosecutor's use of peremptory challenges to exclude potential jurors expressing reservations about capital punishment did not violate defendant's constitutional rights. *Ibid.*

The trial court did not abuse its discretion in removing a juror who had child care problems and replacing her with an alternate juror. *Ibid.*

MASTER AND SERVANT

§ 10.2 (NCI3d). Actions for Wrongful Discharge

The trial court erred by dismissing plaintiff's action for wrongful termination of his at will employment as a truck driver after plaintiff refused to violate U. S. Department of Transportation regulations by driving excessive hours and falsifying records. *Coman v. Thomas Manufacturing Co.*, 172.

MONOPOLIES

§ 2 (NCI3d). Agreements and Combinations Unlawful Generally

A city's decision to establish a municipal cable television system and to decline to grant cable television franchises to other applicants does not establish a monopoly in violation of Art. I, § 34 of the N. C. Constitution. *Madison Cablevision v. City of Morganton*, 634.

MUNICIPAL CORPORATIONS

§ 23 (NCI3d). Franchises for Public Utilities and Services

Provisions of G.S. chapter 160A, article 16, part 1 which authorize cities to finance, own and operate a cable television system do not violate the "public purpose" clause of Art. V, § 2(1) of the N. C. Constitution. *Madison Cablevision v. City of Morganton*, 634.

A city's decision to establish a municipal cable television system and to decline to grant cable television franchises to other applicants does not violate the exclusive emoluments and monopoly clauses of Art. I, §§ 32 and 34 of the N. C. Constitution or the antimonopoly or unfair trade practices provisions of G.S. chapter 75. *Ibid.*

§ 30.5 (NCI3d). Zoning Ordinance; Particular Factors and Circumstances Considered in Determination as to Validity

The test for determining whether a taking has occurred in the context of a rezoning is whether the property as rezoned has a practical use and a reasonable value. *Finch v. City of Durham*, 352.

§ 30.7 (NCI3d). Amendment or Repeal of Zoning Ordinance

Plaintiffs did not have a reasonable expectation of an investment return untroubled by zoning changes on a 2.6-acre tract which they planned to use as a motel site where they exercised their option to purchase the property twenty-seven days after they knew of a recommendation by a city planning commission to rezone the property from an office-institutional to a residential classification. *Finch v. City of Durham*, 352.

The rezoning of plaintiffs' 2.6-acre tract which they planned to use as a motel site from O-I to R-10 did not amount to a taking under the N. C. Constitution or the U. S. Constitution. *Ibid.*

Plaintiffs' forecast of evidence was insufficient for submission of an issue of a taking by rezoning to the jury in an action brought under 42 U.S.C. § 1983. *Ibid.*

The 1985 rezoning of plaintiffs' 2.6-acre tract from O-I to R-10 was not arbitrary, capricious or unreasonable as applied to plaintiffs so as to render the rezoning ordinance invalid where the ordinance returned the property to its prior zone in conformity with the remainder of the neighborhood. *Ibid.*

NARCOTICS

§ 4.3 (NCI3d). Sufficiency of Evidence of Constructive Possession

There was sufficient evidence to go to the jury under an instruction on constructive possession in a prosecution for trafficking in cocaine and methadone where the evidence did not support a finding that defendant was in exclusive control of the mobile home where the narcotics were found but was sufficient to provide the other incriminating circumstances necessary for constructive possession. *S. v. Davis*, 693.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 19 (NCI3d). Malpractice; Sufficiency of Evidence of Failure to Attend Patient

Plaintiff's evidence raised a question of fact for the jury as to whether a hospital patient's death from a perforated colon was proximately caused by defendant attending physician's negligent failure to attend, diagnose and treat the patient's dangerous state of constipation after the patient had been admitted to a medical center for evaluation for a neurosurgical procedure. *Turner v. Duke University*, 152.

PUBLIC OFFICERS

§ 11 (NCI3d). Criminal Liability of Public Officers

Where the indictment charged that a Department of Correction employee failed to discharge the duties of his office by failing to follow the directives of the officer in charge and by failing to investigate facts received concerning the possible death of an inmate, the State was not required to prove both omissions in order to make out the offense, and insufficiency of the evidence to show failure to follow directives did not require dismissal of the charge entirely. *S. v. Birdsong*, 418.

ROBBERY

§ 4.2 (NCI3d). Common Law Robbery Cases Where Evidence Held Sufficient

The State's evidence was sufficient for the jury to find that defendant took items from a murder victim's apartment by force and violence rather than as an afterthought following the murder and thus was sufficient to support defendant's conviction of common law robbery. *S. v. Davis*, 607.

§ 5.4 (NCI3d). Instructions on Lesser Included Offenses and Degrees

The trial court in a common law robbery case did not commit plain error in failing to instruct on misdemeanor larceny where the disheveled condition of the victim's apartment, coupled with evidence of violent force displayed by the victim's body, suggested that a robbery rather than a larceny was committed. *S. v. Davis*, 607.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and Verification of Pleadings

A subjective showing of bad faith is unnecessary for the imposition of sanctions under Rule 11(a). *Turner v. Duke University*, 152.

The trial court's decision to impose or not to impose mandatory sanctions under Rule 11(a) is reviewable de novo as a legal issue. *Ibid.*

An "abuse of discretion" standard will be used in reviewing the appropriateness of a particular sanction imposed under Rule 11(a). *Ibid.*

Defendant medical center's noticing and taking of the depositions of two physicians, one in California six days before trial of plaintiff's medical malpractice claim and one in Florida four days before trial, subsequent to its failure to reveal the existence of the California physician in response to discovery requests, as well as the duplicative and cumulative nature of the Florida physician's testimony, threatened to increase plaintiff's litigation costs and cause unnecessary delay in the trial in violation of Rule 11(a), represented an attempt to harass plaintiff's counsel in violation of Rule 11(a), and therefore required the trial court to impose sanctions on defendant and/or its counsel pursuant to Rule 11(a). *Ibid.*

RULES OF CIVIL PROCEDURE — Continued

§ 26 (NCI3d). Depositions in a Pending Action

A physician deposed by defendant medical center in Florida concerning his prior treatment of a hospital patient for lung cancer was not an expert witness, and the trial court's order requiring the identification and deposition of expert witnesses prior to a certain date was not violated by defendant's deposition of the physician after that date. *Turner v. Duke University*, 152.

§ 56.3 (NCI3d). Summary Judgment; Necessity for and Sufficiency of Supporting Material; Moving Party

The trial court properly struck portions of plaintiff's affidavit which were conclusions rather than statements of fact, but the court erred in striking as hearsay portions of the affidavit relating statements made by plaintiff and an applicant for life insurance to defendant insurer's agent since they were offered to prove that defendant's agent had notice of the matters contained in the statements and not to prove the truth of those matters. *Ward v. Durham Life Insurance Co.*, 202.

SEARCHES AND SEIZURES

§ 23 (NCI3d). Application for Warrant; Cases Where Evidence of Probable Cause Is Sufficient

The trial court erred in a narcotics prosecution by allowing defendant's motion to suppress evidence seized under a search warrant. *S. v. Beam*, 217.

TAXATION

§ 7.2 (NCI3d). Public Purpose; Particular Purposes as Public

Provisions of G.S. chapter 160A, article 16, part 1 which authorize cities to finance, own and operate a cable television system do not violate the "public purpose" clause of Art. V, § 21(1) of the N. C. Constitution. *Madison Cablevision v. City of Morganton*, 634.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair Trade Practices in General

Municipal ownership and operation of a cable television system do not violate the antimonopoly or unfair trade practices provisions of G.S. chapter 75. *Madison Cablevision v. City of Morganton*, 634.

UTILITIES COMMISSION

§ 35 (NCI3d). Property Included in Rate Base; Overadequate Facilities

An amount spent by a power company to build excess common facilities to serve abandoned nuclear generating units cannot be considered as "used and useful" and thus cannot be included in the company's rate base. *State ex rel. Utilities Commission v. Thornburg*, 484.

§ 38 (NCI3d). Establishment of Rate Base; Current and Operating Expenses

A decision by the Utilities Commission to authorize a power company to amortize costs associated with canceled nuclear power units as "reasonable operating expenses" for ratemaking purposes was within the Commission's power and was supported by competent, material and substantial evidence. *State ex rel. Utilities Commission v. Thornburg*, 463.

UTILITIES COMMISSION — Continued

The entire amount spent by a power company to build excess common facilities to serve abandoned nuclear generating units should be treated as cancellation costs of the abandoned units and recovered as operating expenses through amortization. *State ex rel. Utilities Commission v. Thornburg*, 484.

§ 41 (NCI3d). Rate Regulation; Fair Return Generally

Where a decision of the Supreme Court resulted in removal of $389,000,000 from the rate base of a power company, it will be necessary for the Utilities Commission, on remand, to determine whether a new rate of return must be fixed. *State ex rel. Utilities Commission v. Thornburg*, 484.

§ 44 (NCI3d). Rate Regulation; Proceedings Before and By Commission

The Utilities Commission's treatment of costs associated with canceled nuclear power units in prior general rate cases was not res judicata in this rate case. *State ex rel. Utilities Commission v. Thornburg*, 463.

WATERS AND WATERCOURSES

§ 7 (NCI3d). Marsh and Tidelands

There was no right under Art. I, § 25 of the N. C. Constitution to a jury trial in an action instituted by the State to enjoin dredge and fill development of marshland by a private property owner. *State ex rel. Rhodes v. Simpson*, 514.

WEAPONS AND FIREARMS

§ 3 (NCI3d). Pointing, Aiming, or Discharging Weapon

There was sufficient evidence that defendant intentionally discharged a firearm into a residence that he knew was occupied to support his conviction of first degree murder under the felony murder rule. *S. v. Clark*, 677.

WORD AND PHRASE INDEX

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