# NORTH CAROLINA REPORTS

## VOLUME 338

SUPREME COURT OF NORTH CAROLINA

3 NOVEMBER 1994

30 DECEMBER 1994

RALEIGH
1995

CITE THIS VOLUME
338 N.C.

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# THE SUPREME COURT
# OF
# NORTH CAROLINA

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BURLEY B. MITCHELL, JR.[1]

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ROBERT F. ORR[4]

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JAMES G. EXUM, JR.[5]

*Retired Justices*

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APPELLATE DIVISION REPORTER

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H. JAMES HUTCHESON

---

1. Appointed by Governor James G. Hunt, Jr. and sworn in as Chief Justice 3 January 1995.
2. Appointed by Governor James G. Hunt, Jr. and sworn in 3 January 1995 to replace Burley B. Mitchell, Jr. who became Chief Justice.
3. Elected and sworn in 3 January 1995.
4. Elected and sworn in 5 January 1995.
5. Retired 31 December 1994.
6. Retired 31 December 1994.

# TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

## SUPERIOR COURT DIVISION

*First Division*

| DISTRICT | JUDGES | ADDRESS |
|---|---|---|
| 1 | J. RICHARD PARKER | Manteo |
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| | NARLEY L. CASHWELL | Raleigh |
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| 12 | COY E. BREWER, JR. | Fayetteville |

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| | James Clifford Spencer, Jr. | Burlington |
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| | Dexter Brooks | Pembroke |

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| 19B | Russell G. Walker, Jr. | Asheboro |
| 19C | Thomas W. Seay, Jr. | Spencer |
| 20A | James M. Webb | Southern Pines |
| | Donald R. Huffman | Wadesboro |
| 20B | William H. Helms | Monroe |
| | Sanford L. Steelman, Jr. | Monroe |
| 21 | Judson D. DeRamus, Jr. | Winston-Salem |
| | William H. Freeman | Winston-Salem |
| | William Z. Wood, Jr. | Winston-Salem |
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| | H. W. Zimmerman, Jr. | Lexington |
| 23 | Julius A. Rousseau, Jr. | North Wilkesboro |

| DISTRICT | JUDGES | ADDRESS |
| --- | --- | --- |
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| 25B | Forrest A. Ferrell | Hickory |
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| | Marcus L. Johnson | Charlotte |
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| | Timothy L. Patti[2] | Gastonia |
| 27B | John Mull Gardner | Shelby |
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| 28 | Dennis Jay Winner | Asheville |
| | Ronald K. Payne[3] | Asheville |
| 29 | Zoro J. Guice, Jr. | Rutherfordton |
| | Loto Greenlee Caviness | Marion |
| 30A | James U. Downs | Franklin |
| 30B | Janet Marlene Hyatt | Waynesville |

## SPECIAL JUDGES

| | |
| --- | --- |
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| Louis B. Meyer | Wilson |
| Ronald L. Stephens | Durham |

## EMERGENCY JUDGES

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| Robert M. Burroughs | Charlotte |
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| Edward K. Washington | High Point |
| L. Bradford Tillery | Wilmington |
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| J. Herbert Small | Elizabeth City |
| Giles R. Clark | Elizabethtown |
| Napoleon B. Barefoot, Sr. | Wilmington |

| DISTRICT | JUDGES | ADDRESS |
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| | Robert W. Kirby | Cherryville |
| | James M. Long | Pilot Mountain |
| | Herbert O. Phillips III | Morehead City |
| | Charles C. Lamm, Jr. | Boone |
| | Lester P. Martin, Jr. | Mocksville |
| | F. Fetzer Mills | Wadesboro |
| | J. Milton Read, Jr. | Durham |
| | Henry L. Stevens III | Warsaw |
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| | Robert D. Lewis | Asheville |

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| --- | --- |
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| Harvey A. Lupton | Winston-Salem |
| John D. McConnell | Pinehurst |
| D. Marsh McLelland | Burlington |

## SPECIAL EMERGENCY JUDGES

| | |
| --- | --- |
| E. Maurice Braswell | Fayetteville |
| Donald L. Smith | Raleigh |

1. Retired 31 March 1995.
2. Appointed and sworn in 10 March 1995 to replace Robert E. Gaines who retired 28 February 1995.
3. Appointed and sworn in 12 May 1995 to replace Robert D. Lewis who retired 31 March 1995.

# DISTRICT COURT DIVISION

| DISTRICT | JUDGES | ADDRESS |
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| | David A. Leech | Greenville |
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| | J. H. Corpening II | Wilmington |
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| | William Robert Lewis II | Jackson |
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| | Sarah F. Patterson | Rocky Mount |
| | Joseph John Harper, Jr. | Tarboro |
| | M. Alexander Biggs, Jr. | Rocky Mount |
| | John L. Whitley | Wilson |
| 8 | J. Patrick Exum (Chief) | Kinston |
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| | Kenneth R. Ellis | Goldsboro |
| | Rodney R. Goodman | Kinston |
| | Joseph E. Setzer, Jr. | Goldsboro |

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| | ERNEST J. HARVIEL | Graham |
| 15B | LOWRY M. BETTS (Chief) | Pittsboro |

| DISTRICT | JUDGES | ADDRESS |
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| DISTRICT | JUDGES | ADDRESS |
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| | David V. Byrd | Wilkesboro |
| 24 | Alexander Lyerly (Chief)[2] | Banner Elk |
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| | Ralph C. Gingles, Jr.[4] | Gastonia |
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| | James Thomas Bowen III | Lincolnton |

| DISTRICT | JUDGES | ADDRESS |
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| | STEVEN J. BRYANT | Bryson City |
| | RICHLYN D. HOLT | Waynesville |

1. Appointed and sworn in 3 March 1995 to replace Russell J. Lanier, Jr. who went to the Superior Court.
2. Appointed as Chief Judge 1 May 1995 to replace Robert H. Lacey who retired 30 April 1995.
3. Appointed as Chief Judge 17 April 1995 to replace Timothy L. Patti who went to the Superior Court.
4. Appointed and sworn in 5 May 1995.
5. Appointed as Chief Judge 17 April 1995 to replace George W. Hamrick who retired 31 March 1995.
6. Appointed and sworn in 28 April 1995.

## ATTORNEY GENERAL OF NORTH CAROLINA

*Attorney General*
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*Deputy Attorney General for Administration*
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Teresa L. White
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Theodore R. Williams
Thomas B. Wood
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Donald M. Wright

## DISTRICT ATTORNEYS

| DISTRICT | DISTRICT ATTORNEY | ADDRESS |
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| 2 | Mitchell D. Norton | Washington |
| 3A | Thomas D. Haigwood | Greenville |
| 3B | W. David McFadyen, Jr. | New Bern |
| 4 | William H. Andrews | Jacksonville |
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KRISTEN LEE LAURENTI ZILLIOUX . . . . . . . . . . Clayton
COLLEEN P. ZINGARO . . . . . . . . . . Emerald Isle

Given over my hand and seal of the Board of Law Examiners this the 6th day of April, 1995.

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

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of April, 1995 and said persons have been issued certificates of this Board:

ROBERT REGINALD HYDE . . . . . . . . . . Oriental
Applied from the State of Pennsylvania
KENNETH MCNEILL TAYLOR, JR. . . . . . . . . . . Hickory
Applied from the State of New York
JEFFREY ALLAN SAUL . . . . . . . . . . Charlotte
Applied from the State of Michigan
MARY DAVIDSONO WAGAMAN . . . . . . . . . . Vienna, Virginia
Applied from the State of Virginia
MILLER TIMOTHY PORTERFIELD . . . . . . . . . . Wytheville, Virginia
Applied from the State of Virginia
LOREY HANNON RIVES . . . . . . . . . . Charlotte
Applied from the State of New York
OSCAR EUGENE EMERSON PRIOLEAU, JR. . . . . . . . . . . Greenville, South Carolina
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RICHARD THOMAS MCNEIL . . . . . . . . . . Jacksonville
Applied from the State of Pennsylvania
BRENDA LEA ZEINSTRA PAWLOSKI . . . . . . . . . . Durham
Applied from the State of Missouri
ROBERT JEFFREY HAHN . . . . . . . . . . Charlotte
Applied from the State of New York
A. WILLIAM CHARTERS . . . . . . . . . . Norfolk, Virginia
Applied from the States of New York and Virginia
ELEANOR WESTON BARRETT . . . . . . . . . . Charlotte
Applied from the State of Virginia

# LICENSED ATTORNEYS

I, FRED P. PARKER, III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons duly passed the examination of the Board of Law Examiners as of the 7th day of April, 1995, and said persons have been issued license certificates.

February 1995 North Carolina Bar Examination

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JULIE WATSON ANDERSON . . . . . . . . . . Emerald Isle
LEONARD ANTHONY BENNETT . . . . . . . . . . Carrollton, Virginia
MIRANDA RENEE CADE . . . . . . . . . . Fuquay-Varina
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ANNE SABISTON LEGGETT . . . . . . . . . . Charlotte
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AIMEE MCHALE NESS . . . . . . . . . . Gastonia
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DAVID A. SURBECK . . . . . . . . . . Asheville
MICHAEL EDWARD UTLEY . . . . . . . . . . Lake Wylie, South Carolina

Given over my hand and seal of the Board of Law Examiners this the 13th day of April, 1995.

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

CASES

ARGUED AND DETERMINED IN THE

# SUPREME COURT

## OF

## NORTH CAROLINA

## AT

## RALEIGH

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STATE OF NORTH CAROLINA v. CARL STEPHEN MOSELEY

No. 124A93

(Filed 3 November 1994)

**1. Criminal Law § 78 (NCI4th)— murder and rape—pretrial publicity—change of venue denied**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree sexual offense, and first-degree rape by denying defendant's motion for a change of venue where defendant contended that he could not receive a fair trial in Stokes County because of extensive media coverage of this case and an earlier trial in Forsyth County. The affidavits submitted in the record on appeal indicate only that one television station covered developments in defendant's Forsyth County trial approximately fifty times and that the other station covered developments eleven times; the affidavits do not suggest in any way that the televised coverage of defendant's cases was inflammatory; the bulk of the newspaper articles submitted by defendant were factually based and expressed no opinions regarding defendant's guilt or innocence; the State put on credible evidence in rebuttal of defendant's claims of prejudicial media coverage; and the transcript further shows that each juror during *voir dire* unequivocally stated that he or she could put aside anything read, seen, or heard about defendant and that he or she would decide defendant's case solely upon the evidence presented in the courtroom.

**Am Jur 2d, Criminal Law § 378.**

**Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.**

**2. Indigent Persons § 21 (NCI4th)— murder and rape— appointment of pathologist denied—insufficient showing of particularized need**

The trial court did not err in a prosecution for first-degree murder, first-degree rape, and first-degree sexual offense by denying defendant's motion for funds to employ a pathologist to assist in his defense where the pathologist who had performed the autopsy in this case in Stokes County also supervised an autopsy in Forsyth County and testified in the Forsyth County case as to the similarities between the two cases. Defendant failed to demonstrate that the assistance of a pathologist would have materially aided him in the preparation of his defense or that the lack thereof deprived him of a fair trial in that the record, the transcripts, the slides, and the photographs at issue reveal that the similarities between the location and types of wounds of the two victims are obvious and self-explanatory even to the ordinary lay juror, there was substantial additional evidence that demonstrated the similarities between the two crimes from which the jury could find that they were committed by the same person, and defendant did not demonstrate that a pathologist could have added anything to his defense. Moreover, the conclusion that both victims sustained torture wounds and were subjected to overkill was also readily apparent to a lay juror upon viewing the evidence and, although defendant contended that an expert was necessary to provide an opinion concerning the time of death of the victims, that was not a material issue in this case.

**Am Jur 2d, Criminal Law §§ 771, 1006.**

**Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert. 34 ALR3d 1256.**

**3. Jury § 203 (NCI4th)— murder and rape—jury selection— questions concerning publicity—restricted—no abuse of discretion**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by limiting the scope of defendant's *voir dire* questions concerning the extent of jury exposure to pre-

trial publicity and the content of the information heard by the jurors. *Morgan v. Illinois*, 119 L. Ed. 2d 492, does not create a constitutional right to ask *voir dire* questions about the specifics of juror exposure to pretrial publicity and the content of that publicity and a careful review of the record reveals that the trial court did not abuse its discretion in that all prospective jurors unequivocally indicated that they had neither formed nor expressed any opinion of defendant's guilt or innocence as a result of pretrial publicity and that they were certain they could disregard entirely anything they had heard or read about the case and decide the verdict solely on the evidence presented.

**Am Jur 2d, Jury §§ 201, 202, 279 et seq., 294 et seq.**

**4. Jury § 205 (NCI4th)— first-degree murder—jury selection—neighbor of victim**

The trial court did not abuse its discretion in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by limiting defendant's *voir dire* of a prospective juror who had indicated that he was a neighbor of the victim's family. Defendant was not prohibited from eliciting information that would have disqualified the juror and the juror stated that he could decide the case solely on the evidence presented, that he could disregard any prior information, and that his prior knowledge of the case would not make rendering a decision solely on the evidence difficult.

**Am Jur 2d, Jury §§ 313 et seq.**

**5. Jury § 183 (NCI4th)— first-degree murder—jury selection—challenges for cause**

The trial court did not err in a trial in which defendant was convicted of a first-degree murder, first-degree rape, and first-degree sexual offense in failing to excuse prospective jurors for cause where defendant contended that answers on *voir dire* revealed that jurors held views that would substantially impair their ability to follow the jury instructions and the law. Defendant did not object to any jurors after exercising his last peremptory challenge nor did he renew his challenge for cause against prospective juror Slate, but instead asked for additional peremptory challenges or to be allowed to use one of the peremptories allotted for selection of alternates and failed to preserve any error for appeal by failing to comply with the procedure made mandatory by the statute. Moreover, defendant did not establish

that Slate's views on capital punishment would substantially impair the performance of his duties as a juror. N.C.G.S. § 15A-1214.

**Am Jur 2d, Jury §§ 213 et seq.**

6. **Jury §§ 202, 215 (NCI4th)— first-degree murder—jury selection—knowledge of previous trial—belief in capital punishment**

The trial court did not abuse its discretion in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by not excusing two prospective jurors for cause on its own motion where a prospective juror recalled seeing in the paper that defendant had previously been tried in Forsyth County but indicated that he had formed no opinion of this case and could disregard any information he had previously obtained and decide the case solely on the evidence presented, and another prospective juror initially indicated that he would vote for the death penalty if the jury found defendant guilty, but indicated that he could follow the law after it was explained by the judge.

**Am Jur 2d, Jury §§ 279 et seq., 289, 290, 294 et seq.**

**Comment Note.—Beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.**

7. **Criminal Law §§ 423, 465 (NCI4th)— first-degree murder—prosecutor's closing arguments—reasonable doubt and presumption of innocence—failure of defense to present witnesses**

The trial court did not err in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by refusing to intervene *ex mero motu* during the prosecutor's closing arguments at the guilt-innocence phase where defendant contended that the prosecutor impermissibly defined reasonable doubt and the presumption of innocence and repeatedly referred to the State's evidence as being uncontradicted and to the failure of the defense to present any witnesses.

**Am Jur 2d, Trial §§ 605 et seq., 640 et seq.**

**Counsel's right in criminal prosecution to argue law or to read lawbooks to the jury. 67 ALR2d 245.**

**8. Evidence and Witnesses § 213 (NCI4th)— first-degree murder—defendant dancing at club with victim prior to crime—relevant—not prejudicial**

The trial court did not err in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by allowing a witness to testify that he contacted law enforcement officers after seeing on television that defendant had been charged with another murder to say that he had seen defendant dancing with the victim on the night she disappeared at the same club from which the other victim had disappeared. The testimony was relevant to explain why the witness did not contact the police until three months after the murder and to explain why he ultimately recognized defendant, rather than for the improper purpose of demonstrating defendant's character. The evidence was not unfairly prejudicial in that extensive evidence of the other murder was admitted and there was considerable additional evidence linking defendant to this victim. N.C.G.S. § 8C-1, Rules 404 and 403.

**Am Jur 2d, Evidence §§ 363 et seq.**

**9. Evidence and Witnesses § 116 (NCI4th)— first-degree murder—evidence of guilt of another—speculation and conjecture**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by refusing to admit testimony that the victim was assaulted by someone other than defendant on the night she was murdered where the excluded testimony cannot be said to give rise to more than mere speculation and conjecture of another's guilt.

**Am Jur 2d, Evidence § 587.**

**10. Evidence and Witnesses § 2211 (NCI4th)— murder and rape—DNA testing—exclusion of others**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by allowing an SBI serologist to testify that DNA testing excluded two individuals as donors of the semen found in the victim where the agent testified that DNA samples were taken from the victim's former boyfriend, her friend's boyfriend, and defendant, that DNA analysis excluded the

other two men, and that defendant's DNA profile matched on five of the six autorads analyzed. DNA analysis provides direct evidence that defendant was the source of the semen found in the victim's body and the State did not offer the DNA analysis for the proposition that defendant is established as the perpetrator by excluding others.

**Am Jur 2d, Expert and Opinion Evidence § 300.**

**Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids. 75 ALR4th 897.**

**Admissibility of DNA identification evidence. 84 ALR4th 313.**

**11. Evidence and Witnesses § 1070 (NCI4th)— flight—evidence sufficient**

There was sufficient evidence in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense to instruct the jury on flight where defendant did not object or allege plain error, but the merits of the issue were considered under a plain error analysis and the jury could reasonably infer flight from the evidence that defendant left the victim's naked body in a dark, secluded rural area; removed her clothing and jewelry to delay identification; left the scene; and was not apprehended until more than three months later, efforts which indicate an attempt by defendant to evade detection and capture.

**Am Jur 2d, Evidence §§ 532 et seq.**

**12. Appeal and Error § 490 (NCI4th)— murder—prior offense—findings of fact—supported by the evidence**

The findings of the trial court as to admission of another offense were binding when they were clearly supported by plenary competent evidence.

**Am Jur 2d, Appeal and Error §§ 818, 819.**

**13. Evidence and Witnesses § 318 (NCI4th)— murder—evidence of another murder—identity, plan, and common modus operandi—probative value not outweighed by prejudice**

The trial court did not err in a prosecution which resulted in convictions for first-degree murder, first-degree rape, and first-

degree sexual offense by admitting evidence of another murder of which defendant was convicted where defendant contended that the probative value of the evidence was substantially diminished and substantially outweighed by the danger of unfair prejudice, but the evidence was highly probative of the identity of the murderer and of the existence of a plan and common *modus operandi* and the trial court repeatedly gave limiting instructions to the jury. N.C.G.S. § 8C-1, Rule 403.

**Am Jur 2d, Homicide § 312.**

**14. Evidence and Witnesses § 1693 (NCI4th)— murder—photographs of victims—admissible**

The trial court did not abuse its discretion in a prosecution which resulted in convictions for first-degree murder, first-degree rape, and first-degree sexual offense by admitting photographs and slides into evidence during the guilt-innocence phase and the sentencing phase where there was no evidence that the photographs were used excessively and solely to arouse the passions of the jury. The photographs of this victim, and the victim from another trial where defendant was also convicted, including photographs of their genitalia, were introduced to illustrate the theory that both victims were killed by the same person and that that person was defendant.

**Am Jur 2d, Evidence § 974; Homicide §§ 417 et seq.**

**Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.**

**15. Criminal Law § 467 (NCI4th)— murder—closing arguments—prosecutor's use of photographs**

There was no error in a prosecution which resulted in convictions for first-degree murder, first-degree rape, and first-degree sexual offense by allowing prosecutors to use photographs of this victim and the victim in another trial during the closing arguments in the guilt-innocence phase and the sentencing phase where defendant did not object and the arguments were not so grossly improper as to constitute a denial of defendant's due process rights.

**Am Jur 2d, Trial §§ 505 et seq.**

**Admissibility of visual recording of event or matter giving rise to litigation or prosecution. 41 ALR4th 812.**

**Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR4th 877.**

**16. Evidence and Witnesses § 1693 (NCI4th)— murder—photographs of victims—sentencing phase**

There was no plain error in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense in the trial court's failure to give a limiting instruction during the sentencing hearing on the use of photographs of the victim in another trial in which defendant was also convicted where the evidence had been properly admitted. The jury is properly permitted to consider all the evidence presented during the guilt-innocence phase and it was appropriate for the jury to consider the evidence in finding the course of conduct aggravating circumstance.

**Am Jur 2d, Evidence § 974; Homicide §§ 417 et seq.**

**Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.**

**17. Evidence and Witnesses § 370 (NCI4th)— murder and rape—testimony of defendant's ex-wife regarding sexual acts—admissible**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by admitting the testimony of defendant's ex-wife that defendant had anally assaulted her during their marriage where, although there are dissimilarities, the similarities tend to support a reasonable inference that defendant committed the assaults on both women and the probative value of the similarities was sufficient to outweigh the risk of unfair prejudice to defendant.

**Am Jur 2d, Evidence §§ 435 et seq.; Rape § 71.**

**Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.**

**Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offenses. 88 ALR3d 8.**

**18. Evidence and Witnesses § 353 (NCI4th)— murder and rape—evidence of another offense—admissible as to motive**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by admitting testimony of defendant's prior sexual assault on another victim where the trial court found from the uncontradicted evidence that the attacks bore several similarities; there were sufficient similarities to support a reasonable inference that the same persons committed both acts; the occurrences were not so temporally remote as to diminish the probative value of the evidence; the admission of prior acts tending to show motive is clearly supported by N.C.G.S. § 8C-1, Rule 404(b) and our case law; and this testimony showed that defendant knew from his past experience that his crime would be reported and that he would suffer the consequences if he left his victim alive.

**Am Jur 2d, Evidence §§ 435 et seq.; Rape § 71.**

**Admissibility, in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.**

**Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offenses. 88 ALR3d 8.**

**19. Evidence and Witnesses § 2264 (NCI4th)— murder—opinion of pathologist—torture and overkill**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by allowing the pathologist who performed the autopsy of the victim in another trial in which defendant was also convicted to testify that that victim's wounds were torture wounds and characteristic of overkill. The pathologist did not testify that the victim had been tortured, merely that her wounds were consistent with torture, and did not testify that defendant had inflicted the wounds, merely that the wounds were consistent with overkill. Finally, the testimony was relevant in that the injuries sustained by both victims were remarkably similar and an FBI agent testified that overkill was the signature present in both murders.

**Am Jur 2d, Expert and Opinion Evidence § 244.**

**20. Rape and Allied Offenses § 147 (NCI4th)— first-degree rape and murder—lack of consent—sufficiency of evidence**

The trial court did not err by failing to dismiss a first-degree rape charge where defendant conceded that the pathologist found sperm in the victim's vagina but defendant contended that the evidence showed that the victim left a club voluntarily with defendant and that, absent evidence of forcible abduction, the subsequent murder of the victim raises no more than a conjecture that any sexual conduct was nonconsensual. However, there was evidence that the victim was beaten while she was alive and the jury could reasonably infer that she was forced to have sexual intercourse against her will.

**Am Jur 2d, Rape §§ 88 et seq.**

**21. Criminal Law § 452 (NCI4th)— first-degree murder—sentencing hearing—prosecutor's argument—mitigating circumstances**

There was no plain error in a sentencing hearing for first-degree murder where defendant contended that the prosecutor argued that the mitigating circumstances submitted by defendant were in fact aggravating circumstances because defendant had denied his victim mitigating circumstances but the argument in context was that the mitigating circumstances had little value when compared to the circumstances of defendant's crime and his character.

**Am Jur 2d, Trial §§ 554 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**22. Criminal Law § 452 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—mitigating circumstances**

It would have been improper, and possibly prejudicial, for a prosecutor in a first-degree murder sentencing hearing to argue that mitigating circumstances must justify or excuse a killing or reduce it to a lesser degree of crime; however, no such argument was made in this case.

**Am Jur 2d, Trial §§ 554 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial**

**violate due pprocess or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**23. Criminal Law § 447 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—reference to victim**

The prosecutor's argument in a first-degree murder sentencing hearing did not require intervention *ex mero motu* where the prosecutor argued that "it's time we do something for the victims."

**Am Jur 2d, Trial §§ 648 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**24. Criminal Law § 442 (NCI4th)— first-degree murder—sentencing—prosecutor's argument—jury as conscience of community**

There was no error in a first-degree murder sentencing hearing where defendant contended on appeal that the prosecution had argued at trial that the jury should convict defendant because of public sentiment, but the prosecutors were merely reminding the jurors that they would be the voice and conscience of the community, which is not improper.

**Am Jur 2d, Trial §§ 567 et seq.**

**Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction. 85 ALR2d 1132.**

**25. Criminal Law § 1056 (NCI4th)— first-degree murder—sentencing hearing—allocution**

There was no error in a first-degree murder sentencing hearing where defendant's motion for allocution had been granted before jury selection but the court never afforded defendant the opportunity to speak to the sentencing jury. Since defendant does not have a constitutional, statutory, or common law right to allocution and failed to remind the court of his desire to speak to the jury at the appropriate stage of the case, there was no error.

**Am Jur 2d, Criminal Law § 530.**

**Necessity and sufficiency of question to defendant as to whether he has anything to say why sentence should not be pronounced against him. 96 ALR2d 1292.**

**26. Criminal Law § 1337 (NCI4th)— first-degree murder—sentencing—previous felonies involving violence—not redundant**

There was no error in a first-degree murder sentencing hearing where the jury was permitted to find as separate aggravating circumstances that defendant had previously been convicted of assault with a deadly weapon inflicting serious injury and attempted second-degree sexual offense where defendant contended that both convictions arose from the same course of conduct against one victim and that submission of both was redundant. Aggravating circumstances are not redundant absent a complete overlap in the evidence supporting them; here, defendant was convicted of separate offenses with each offense being supported by distinct evidence. Any overlap in the evidence did not rise to the level of complete redundancy.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**27. Criminal Law § 1339 (NCI4th)— first-degree murder—sentencing—murder committed while engaged in sexual offense and rape—two aggravating circumstances**

There was no error in a first-degree murder sentencing hearing where the trial court instructed the jury that it could consider as two aggravating circumstances that the murder was committed while defendant was engaged in a first-degree sexual offense and first-degree rape of the same victim. The elements of first-degree sexual offense and first-degree rape are different and the aggravating circumstances were supported by distinct and separate evidence. The only overlap was that both crimes were committed against the same victim. The evidence did not overlap to the point of redundancy.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**28. Criminal Law § 1320 (NCI4th)— first-degree murder—sentencing—instructions—same evidence for more than one circumstance—omission of instruction not plain error**

There was no plain error in a first-degree murder sentencing hearing where the trial court did not instruct the jury that it could not consider the same evidence to find more than one aggravating circumstance, as it should have done, but defendant neither objected to the instructions given nor requested limiting instruc-

tions and there was clearly sufficient, independent evidence to support each of the aggravating circumstances in question.

**Am Jur 2d, Trial §§ 1441 et seq.**

**29. Criminal Law § 1324 (NCI4th)— first-degree murder—sentencing—issues—weighing circumstances**

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that it was to continue to issue four if the mitigating circumstances were of equal weight to the aggravating circumstances.

**Am Jur 2d, Trial §§ 1441 et seq.**

**30. Criminal Law § 1343 (NCI4th)— first-degree murder—sentencing—particularly heinous, atrocious, or cruel circumstance—not unconstitutional**

The aggravating circumstance that a murder was especially heinous, atrocious or cruel was not unconstitutional on its face or as applied, and there was sufficient evidence to warrant submitting the circumstance to the jury.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.**

**31. Criminal Law § 1347 (NCI4th)— first-degree murder—sentencing hearing—course of conduct—not unconstitutional**

The course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), is not unconstitutional.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**32. Criminal Law § 458 (NCI4th)— first-degree murder—sentencing—parole eligibility**

The trial court did not err in a first-degree murder sentencing hearing by denying defendant's request to argue parole eligibility.

**Am Jur 2d, Trial §§ 522 et seq.**

**33. Criminal Law § 1373 (NCI4th)— first-degree murder— death sentence—not disproportionate**

A sentence of death for a first-degree murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the aggravating circumstances were supported by the evidence, and the death sentence was not disproportionate. Defendant had already been sentenced to death in a similar case, the death penalty has been upheld in many of the cases where the jury found that the murder was especially heinous, atrocious or cruel, the proportionality pool includes numerous affirmed death cases in which the jury found that defendant had previously been convicted of a felony involving the use of violence, and the Supreme Court has never found to be disproportionate any death sentence where the defendant has been convicted of multiple murders.

**Am Jur 2d, Criminal Law § 628.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments entered by McHugh, J., at the 25 January 1993 Special Criminal Session of Superior Court, Stokes County, imposing a sentence of death upon a jury verdict of guilty of first-degree murder and imposing consecutive sentences of life imprisonment for first-degree sexual offense and first-degree rape. Heard in the Supreme Court 15 September 1994.

*Michael F. Easley, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.*

*James R. Parish for defendant-appellant.*

MEYER, Justice.

Defendant was tried for the first-degree murder of Dorothy Louise Woods Johnson. The State's evidence showed that Ms. Johnson went to the SRO, a country-western dance club in Winston-

Salem, on the evening of 12 April 1991. Ms. Johnson lived with her parents, and when she did not return home, they called the Sheriff's Department and reported Ms. Johnson missing. Defendant was also at the SRO on 12 April 1991, and he and Ms. Johnson had talked and danced together during the evening. Ms. Johnson was last seen alive at the SRO Club.

Ms. Johnson's naked body was found the next day, 13 April 1991, lying beside a secluded cul-de-sac in a new development known as Friendship Forest, in a rural area of Stokes County. She had been savagely beaten with a blunt force object, cut with a sharp object, sexually assaulted with a blunt instrument, raped, and manually and ligaturally strangled.

The jury found defendant guilty of first-degree murder, first-degree sexual offense, and first-degree rape. After a capital sentencing proceeding, the jury recommended that defendant receive the death penalty for the murder conviction, and Judge McHugh sentenced defendant accordingly. He additionally sentenced defendant to consecutive terms of life imprisonment for the convictions for first-degree sexual offense and first-degree rape.

Additional facts will be presented as necessary for the discussion of the issues.

JURY SELECTION AND PRETRIAL MOTIONS ISSUES

**[1]** In his first assignment of error, defendant contends that the trial court erroneously denied his motion for a change of venue. Defendant filed a pretrial motion and a supplemental motion at the close of jury selection for a change of venue, arguing that he could not receive a fair trial in Stokes County, in violation of his state and federal constitutional rights, because of the extensive media coverage his case had received. For the reasons discussed herein, we find this assignment of error to be without merit.

In support of his initial pretrial motion, defendant presented affidavits from two local television stations detailing the number of broadcasts in the four months prior to this trial in which they had coverage of either this case or of defendant's conviction of first-degree murder that occurred in neighboring Forsyth County. Defendant also introduced into evidence copies of numerous newspaper articles from the *Winston-Salem Journal* and other area papers dealing with this case and defendant's earlier conviction in Forsyth County. Defendant argued that the underlying facts of the Forsyth County

case would likely be introduced into evidence by the prosecution in this case under North Carolina Evidence Rule 404(b), N.C.G.S. § 8C-1, Rule 404(b) (1992), and that the extensive media coverage of the earlier Forsyth County trial would make a fair trial in this case impossible in Stokes County. The State presented testimony of a private attorney in Stokes County, Mike Bennett; Stokes County Sheriff Mike Joyce; Stokes County Clerk of Superior Court Wic Southern; and Stokes County Sheriff Deputy James Joyce to the effect that in each witness' opinion, defendant could receive a fair and impartial trial in Stokes County. The trial court denied defendant's pretrial motion.

The statute pertaining to change of venue motions provides:

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the prosecutorial district as defined in G.S. 7A-60 or to another county in an adjoining prosecutorial district as defined in G.S. 7A-60, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.
>
> The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue.

N.C.G.S. § 15A-957 (1988). In *State v. Yelverton*, 334 N.C. 532, 434 S.E.2d 183 (1993), this Court stated:

> The test for determining whether venue should be changed is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pre-trial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." [*State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983).] The burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried rests upon the defendant. *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). "In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial." *Jerrett*, 309 N.C. at 255, 307 S.E.2d at

> 348. The determination of whether a defendant has carried his burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. *Madric*, 328 N.C. at 226, 400 S.E.2d at 33. The trial court has discretion, however, only in exercising its sound judgment as to the weight and credibility of the information before it, including evidence of such publicity and jurors' averments that they were ignorant of it or could be objective in spite of it. When the trial court concludes, based upon its sound assessment of the information before it, that the defendant has made a sufficient showing of prejudice, it must grant defendant's motion as a matter of law. *See State v. Abbott*, 320 N.C. 475, 478, 358 S.E.2d 365, 368 (1987).

*Id.* at 539-40, 434 S.E.2d at 187.

During jury selection, the trial court permitted the individual *voir dire* of prospective jurors on the media exposure issue. Almost all of the potential jurors indicated they had been exposed to some pretrial publicity in this matter. In denying defendant's supplemental motion for a change of venue, the trial court made, *inter alia*, the following findings of fact:

> The Court finds that none of the jurors presently seated as jurors or alternate jurors are subject to bias or pretrial publicity, and that each and every one of the jurors seated in and each and every one of the jurors examined in this cause, save and except a single juror that [sic] was excused for pretrial publicity, expressed a clear and abiding certainty that the effect of pretrial publicity or notice could be stricken from his consideration; and that the jurors each expressed a clear and abiding conviction that the juror could base his verdict solely upon the evidence presented during the trial and upon the law as instructed by the Court.

After reviewing the two affidavits submitted by defendant in the record on appeal, the newspaper articles presented by defendant to the trial court, the testimony of the State's witnesses, and the transcript of the jury selection *voir dire*, we are satisfied that the trial court did not err in denying defendant's motion for a change of venue. The affidavits submitted in the record on appeal indicate only that one television station covered developments in defendant's Forsyth County trial approximately fifty times and that the other station covered developments eleven times. The affidavits do not suggest in any way that the televised coverage of defendant's cases was inflamma-

tory. While defendant has presented numerous newspaper accounts of the cases against him, we note that "[t]his Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Gardner*, 311 N.C. 489, 498, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985). The bulk of the articles submitted by defendant were factually based and expressed no opinions regarding defendant's guilt or innocence. Defendant included among the newspaper articles two excerpts from the "Readers Speak Up" page of the *Surry Scene*, dated 13 October 1992, and 20 October 1992. In those two excerpts, ten anonymous callers had editorialized about the Forsyth County case. However, it cannot be said that these opinions prejudiced defendant in any way. Further, the State put on credible evidence in rebuttal of defendant's claims of prejudicial media coverage.

This Court has noted that the potential jurors' responses to questions on *voir dire* are the best evidence of whether pretrial publicity was prejudicial or inflammatory. *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). If each juror states unequivocally that he can set aside what he has heard previously about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, the trial court does not err in refusing to grant a change of venue. *State v. Moore*, 335 N.C. 567, 586, 440 S.E.2d 797, 808, *cert. denied*, — U.S. —, 130 L. Ed. 2d 174, *reh'g denied*, — U.S. —, 130 L. Ed. 2d 532 (1994). In this case, to assure a fair and impartial venire, the trial court permitted individual *voir dire* of prospective jurors to discuss pretrial publicity. The transcript demonstrates that the twelve jurors and two alternates who ultimately heard defendant's case were thoroughly questioned on their exposure to pretrial publicity. The transcript further shows that each juror unequivocally stated that he or she could put aside anything read, seen, or heard about defendant and that he or she would decide defendant's case solely upon the evidence presented in the courtroom.

Defendant has not established a reasonable likelihood that pretrial publicity prevented him from receiving a fair and impartial trial in Stokes County. We hold, therefore, that the trial court did not err in denying defendant's motion for a change of venue.

**[2]** Defendant next assigns error to the trial court's denial of defendant's motion for funds to employ a pathologist to assist in his defense, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments

to the United States Constitution; Article I, Sections 19, 23, and 27 of the North Carolina Constitution; and applicable North Carolina law. We disagree.

Defendant filed a written pretrial motion requesting funds to hire a pathologist to assist in his defense. Defendant noted that Dr. Pat Lantz performed the autopsy on the body of Ms. Johnson in the case at bar. Thereafter, Dr. Lantz supervised the autopsy of Deborah Henley in a homicide investigation in Forsyth County. Defendant was arrested, indicted, tried, and convicted in Forsyth County for the first-degree murder of Deborah Henley and received a sentence of death. During the Forsyth County trial, Dr. Lantz was qualified by the State as an expert in pathology and testified that there were similarities in the deaths of Ms. Johnson and Ms. Henley because of the nature and location of the injuries to their bodies. This testimony by Dr. Lantz was admitted in the Forsyth County trial, under North Carolina Evidence Rule 404(b), for the limited purpose of showing that both crimes were committed by the same person and that person was defendant. Dr. Lantz demonstrated his testimony with a series of slides comparing the wounds of both victims. Also, Dr. Lantz testified that some of the wounds inflicted on the bodies of both victims were torture wounds. Defendant argued that these alleged similarities as to the manner of the killings of the two victims were critical to evidence of Ms. Henley's murder being admitted in this case under Rule 404(b). Additionally, during the Forsyth County trial, questions arose regarding the time of death of the victims.

Defendant argued to the trial court in this case that he anticipated the prosecutor similarly would introduce evidence of Ms. Henley's death in this trial, pursuant to N.C.G.S. § 8C-1, Rule 404(b), for the purpose of establishing defendant as the perpetrator. Therefore, a pathologist was needed by the defense to review the autopsies and the slides in order to determine whether the locations and types of wounds on the two victims were in fact similar. Defendant also contended that a pathologist was needed to assess whether the wounds on the two victims were torture wounds and to analyze the time of death of the victims. The trial court summarily denied defendant's motion. At trial, evidence of Ms. Henley's murder was admitted under Evidence Rule 404(b), and Dr. Lantz testified using the slides and photographs on the issues of identity, common scheme or plan, and *modus operandi*.

The relevant statutory provisions provide that "[t]he court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State." N.C.G.S. § 7A-454 (1989). Further, N.C.G.S. § 7A-450(b) provides that "[w]henever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." N.C.G.S. § 7A-450(b) (1989).

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the United States Supreme Court held that

> when [an indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

*Id.* at 83, 84 L. Ed. 2d at 66. This Court has followed *Ake* and required, upon the threshold showing of a specific need of expert assistance, the provision of funds for an expert. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). In determining whether the defendant has made the necessary showing, the trial court should consider all the facts and circumstances known to it at the time the motion is made. *State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992). The decision of whether defendant has demonstrated a specific need is one properly left to the sound discretion of the trial judge. *State v. Holden*, 321 N.C. 125, 136, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

In order to establish the threshold showing of specific need for the assistance of an expert, defendant must show that he will be deprived of a fair trial without the expert assistance or that there is a reasonable likelihood that the expert assistance will materially assist him in the preparation of his defense. *State v. Phipps*, 331 N.C. 427, 446, 418 S.E.2d 178, 187 (1992). The "mere hope or suspicion of the availability of certain evidence that might erode the State's case or buttress a defense will not suffice to satisfy the requirement that defendant demonstrate a threshold showing of specific necessity for expert assistance." *State v. Tucker*, 329 N.C. 709, 719-20, 407 S.E.2d 805, 811-12 (1991). Similarly, undeveloped assertions that the request-

ed expert assistance would be beneficial or even essential to the preparing of an adequate defense are insufficient to satisfy this threshold requirement. *Phipps*, 331 N.C. at 446, 418 S.E.2d at 187-88.

In this case, defendant did not demonstrate a sufficient showing of particularized need to warrant expert assistance under *Ake*. Defendant failed to demonstrate that the assistance of a pathologist would have materially aided him in the preparation of his defense or that the lack thereof deprived him of a fair trial. Instead, a review of the record, the transcripts, and the slides and photographs at issue reveals that the similarities between the location and types of wounds of the two victims are obvious and self-explanatory, even to the ordinary lay juror. There was nothing so mysterious or difficult about the comparison of the victims' multiple wounds as to prevent the ordinary lay juror from determining whether the State's expert had reached the right conclusion.

Further, there was substantial additional evidence that demonstrated the similarities between the two crimes from which the jury could find that they were committed by the same person. In addition to the similarities in the wounds of the victims, both Ms. Johnson and Ms. Henley were last seen alive at the SRO Club. Both women were seen with defendant at the SRO on the night of their disappearances, and both women were of small stature and suffered from speech impediments.

Also, the State presented uncontradicted evidence of blood typing and DNA testing which linked defendant to Ms. Johnson on the night she was murdered. Indeed, testimony by the State's DNA expert indicated that the chance that defendant was not the donor of semen found in Ms. Johnson was approximately one in 274 million. Defendant was provided with a DNA expert to reevaluate and challenge, if appropriate, this conclusion. Thus, even though defendant's identity as the perpetrator of the crime in this case was critical, and the State's case was built on circumstantial evidence, defendant still has not demonstrated that a pathologist could have offered anything to his defense. The assistance of the pathologist sought by defendant would have been of little, if any, value to him. Therefore, defendant has failed to satisfy his burden of showing either that the assistance of a pathologist would have materially aided him in the preparation of his defense or that the lack thereof deprived him of a fair trial.

Defendant also argues that a pathologist was necessary to examine Dr. Lantz's conclusion that both victims sustained torture wounds

and were subjected to overkill. However, this conclusion is similarly readily apparent to even a lay juror upon viewing the photographs and slides introduced into evidence. The photographs and slides clearly illustrate that both victims were very brutally beaten from head to toe, in addition to being strangled.

While defendant contends that an expert was necessary in this trial to provide an opinion concerning the time of death of the victims, this Court finds, after reviewing the transcript, that time of death was not a material issue in this case. Therefore, the trial court's refusal to grant defendant's motion did not deprive him of a fair trial, nor did it deprive defendant of material assistance in the preparation of his defense. There was no risk of an erroneous deprivation of expert assistance as a result of the trial court's denial of defendant's motion. Therefore, we hold that the trial court did not err in denying defendant's motion for funds to hire a pathologist.

**[3]** Defendant next asserts error in the trial court's limitation of questions by defendant during the *voir dire* of several potential jurors. Defendant contends that the trial court unconstitutionally limited the scope of defendant's *voir dire* questions about the extent of jury exposure to pretrial publicity and the content of the information heard by the jurors, by repeatedly sustaining the prosecutors' objections to defendant's questions, thus rendering the *voir dire* inadequate under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). As a result, defendant argues that he was prevented from developing a basis for challenges for cause and was inhibited in the intelligent exercise of peremptory challenges. Defendant also argues that the trial court's actions precluded defendant from making informed peremptory challenges, in violation of defendant's statutory rights under N.C.G.S. § 15A-1214. After a careful review of the transcript, we find no error.

A defendant has the statutory right to "personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge." N.C.G.S. § 15A-1214(c) (1988). Further, "part of the [constitutional] guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. at —, 119 L. Ed. 2d at 503, *quoted in State v. Yelverton*, 334 N.C. 532, 541, 434 S.E.2d 183, 188 (1993). However, within these broad principles, the trial judge has wide discretion to see that a competent,

fair, and impartial jury is impaneled. *State v. Yelverton*, 334 N.C. at 541, 434 S.E.2d at 188. The trial court's rulings in this regard will not be disturbed absent a showing of abuse of discretion. *Id.*

Defendant's reliance on the United States Supreme Court decision in *Morgan v. Illinois* for the proposition that the trial court improperly precluded him from inquiring into the extent and content of juror exposure to pretrial publicity in violation of the United States and North Carolina Constitutions is misplaced. In *Morgan*, the Supreme Court held that a defendant is "entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." 504 U.S. at —, 119 L. Ed. 2d at 507. The Supreme Court further held that a defendant must be allowed the opportunity through jury *voir dire* "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would always impose death following conviction." *Id.* at —, 119 L. Ed. 2d at 506 (emphasis omitted).

In *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), we considered the applicability of *Morgan* to the trial court's sustaining of the prosecutor's objections to the form of defendant's *voir dire* questions, "Under the factual situation that I have explained to you, would you have any trouble giving--if the evidence and mitigating circumstances so warranted, and other evidence—the defendant life imprisonment. Or, under those facts or situations, would you be prone to give the defendant the death penalty?" *Id.* at 100, 443 S.E.2d at 316. In so doing, we noted that "[i]n *Morgan*, the defendant's question was whether the juror would 'automatically vote to impose the death penalty no matter what the facts are,' " *id.* (quoting *Morgan*, 504 U.S. at —, 119 L. Ed. 2d at 499), and concluded that the question in *Robinson* bore little resemblance to the question specifically authorized in *Morgan*. In the case at bar, defendant's assignment of error relates to *voir dire* questions regarding pretrial publicity, questions that clearly bear no resemblance to that specifically authorized in *Morgan*.

Defendant argues in his brief that the United States Supreme Court's recent remand of *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *sentence vacated*, — U.S. —, 122 L. Ed. 2d 113 (1993), for reconsideration in light of *Morgan v. Illinois* signals the Supreme Court's intent that *Morgan* be construed broadly. However, on remand, this Court held that the *voir dire* question at issue in *Price*

was whether prospective jurors felt it necessary for the State to show additional aggravating circumstances before they would vote to impose the death penalty. *State v. Price*, 334 N.C. 615, 617, 433 S.E.2d 746, 747 (1993), *sentence vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888, *on remand*, 337 N.C. 756, 448 S.E.2d 827 (1994), *cert. denied*, 63 U.S.L.W. 3690 (1995). The question in *Price* is closely related to the *voir dire* question at issue in *Morgan*: whether a prospective juror would automatically impose the death penalty upon finding the defendant guilty. Therefore, we conclude that the Supreme Court's remanding of *Price* does not signal the broad construction of *Morgan* sought by defendant.

*Morgan* does not create a constitutional right to ask *voir dire* questions about the specifics of juror exposure to pretrial publicity and the content of that publicity. Indeed, the Supreme Court noted that "since peremptory challenges are not required by the Constitution, this benefit cannot be a basis for making 'content' questions about pretrial publicity a constitutional requirement." *Mu'Min v. Virginia*, 500 U.S. 415, 424-25, 114 L. Ed. 2d 493, 505 (citation omitted), *reh'g denied*, 501 U.S. 1269, 115 L. Ed. 2d 1097 (1991).

Moreover, a careful review of the transcript reveals that the trial court did not abuse its discretion in curtailing defendant's *voir dire* inquiries. In the individual *voir dire* of prospective jurors Holder (Robin), Montgomery, Willard, Inman, and Boles on publicity issues, defendant attempted to ask specifically about the content of pretrial publicity heard by these individuals. The prosecutor objected, and the trial court sustained the objection. However, in each instance, prior to the defendant's content question, all prospective jurors had unequivocally indicated that they had neither formed nor expressed any opinion of defendant's guilt or innocence as a result of pretrial publicity, and that they were certain they could disregard entirely anything they had heard or read about the case and decide the verdict solely on the evidence presented. Furthermore, defendant did not peremptorily excuse prospective juror Inman, and Mr. Inman sat as a juror in this case. The trial judge did not err in sustaining the prosecutor's objections.

**[4]** Defendant also argues that his *voir dire* of prospective juror Barlow was improperly limited by the trial court. Prospective juror Barlow indicated that he was a neighbor of the victim's family and that he had spoken with the family about the case approximately one year earlier, but had not talked with them about the case since that

time. During the individual *voir dire* of prospective juror Barlow on the publicity issue, defendant attempted to ask Mr. Barlow how far from the victim he lived. The prosecutor objected to the question, and the trial court sustained the objection, stating that "[t]his is not strictly what we are inquiring into at this time . . . . That would be an issue for inquiry at a later time." Later in the individual *voir dire*, the following colloquy occurred:

> [DEFENDANT]: After discussing this case with them [family of the victim] wouldn't it make you feel uncomfortable to return a verdict of not guilty if the evidence so showed?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: At this inquiry objection be [sic] sustained.
>
> [DEFENDANT]: Have you yourself expressed an opinion about this case?
>
> MR. BARLOW: What do you mean? Explain.
>
> [DEFENDANT]: Well, have you formed an opinion in your own mind and have you then expressed that opinion to someone else?
>
> MR. BARLOW: I think whoever did, did the, did it should be punished.
>
> [DEFENDANT]: Have you formed an opinion as to what that punishment should be?
>
> [PROSECUTOR]: Well objection, at this stage.
>
> THE COURT: Objection at this stage is sustained.

Defendant had the opportunity to question Mr. Barlow about this issue during group *voir dire*, and in fact did so. Defendant was not prohibited from probing extensively into whether Mr. Barlow would be uncomfortable or embarrassed to return a verdict of not guilty because of his connections with the victim's family. Mr. Barlow indicated that he would "try to be fair." After several questions along these lines, the prosecution objected to the questions because they had been asked and answered. The trial court sustained the objection.

Under these circumstances, we find that the trial court acted well within its discretion. Defendant was not prohibited from eliciting information that would have disqualified Mr. Barlow as a juror. Further, during the individual *voir dire* and prior to being questioned by

defense counsel, Mr. Barlow had said, in response to the court's inquiries, that if he were seated as a juror, he could decide the case solely on the evidence presented and could disregard any prior information. Mr. Barlow also indicated that his prior knowledge of the case would not make rendering a decision solely on the evidence difficult.

Defendant also argues that his *voir dire* of prospective jurors Martin and Thomas was improperly hampered by the trial court. We disagree. After a careful review of the transcript, we find no error in this regard.

**[5]** Defendant further argues in this assignment of error that the trial court failed to excuse for cause jurors whose answers revealed that they held views that would substantially impair their ability to follow the jury instructions and the law. However, defendant has failed to preserve this issue for appeal. N.C.G.S. § 15A-1214 provides:

> In order for a defendant to seek reversal of the case on appeal on the grounds that the judge refused to allow a challenge made for cause, he must have:
>
> (1) Exhausted the peremptory challenges available to him;
>
> (2) Renewed his challenge as provided in subsection (i) of this section; and
>
> (3) Had his renewal motion denied as to the juror in question.

N.C.G.S. § 15A-1214(h) (1988).

In this case, defendant challenged for cause two prospective jurors, Mr. Holden and Mr. Slate. The trial court excused Mr. Holden for cause but did not so excuse Mr. Slate. Defendant thereafter peremptorily challenged Mr. Slate. Defendant then used all of his remaining peremptory challenges, the last one being used to excuse prospective juror Whicker. Defendant contends in his brief that he attempted to challenge for cause a final juror who was seated, and thereby effectively preserved this issue. However, a close reading of the transcript reveals that defendant did not object to any jurors, either for cause or peremptorily, after exercising his last peremptory challenge on prospective juror Whicker; nor did defendant renew his challenge for cause against prospective juror Slate. Instead, defendant asked the trial court for additional peremptory challenges or, alternatively, to be allowed to use one of his two peremptory challenges allotted for the selection of the alternates. The trial court

denied both requests. Juror Bundy was the last juror selected, and the trial court specifically asked defendant if he accepted this juror. Defendant did not attempt to exercise an additional peremptory challenge, but instead only responded, "Your Honor, we have no other challenges at this time."

"The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a defendant's challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review." *State v. Sanders*, 317 N.C. 602, 608, 346 S.E.2d 451, 456 (1986). By failing to comply with the procedure made mandatory by the statute, defendant failed to preserve any such purported error for appellate review.

Additionally, even had defendant complied with the statute in this case, he would not be entitled to relief. The standard for determining whether a prospective juror may properly be excused for cause for his views on capital punishment is whether those 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). Our reading of the transcript reveals that defendant did not establish that Mr. Slate's views on capital punishment would substantially impair the performance of his duties as a juror; therefore, the trial court properly denied defendant's challenge.

The questioning of prospective juror Slate during individual *voir dire* proceeded as follows:

> [DEFENDANT]: Did you express any opinion to anyone what you think or thought should be done with someone convicted of that particular crime?
>
> MR. SLATE: Yeah. Somebody convicted of that crime, yes. I feel like they ought to be probably put to death.
>
> [DEFENDANT]: All right. So is it your opinion that if you were to sit as a juror in this case that you feel the proper punishment would be death if Mr. Moseley was found guilty?
>
> [PROSECUTOR (MR. DELLINGER)]: Objection. Outside the scope of this inquiry.
>
> [PROSECUTOR (MR. YEATTS)]: Objection.

THE COURT: Mr. Slate, were you able to hear the remarks I made yesterday about the procedure involved in a trial on first degree murder charges?

MR. SLATE: Yes, sir, about the life, and life or death.

THE COURT: Yes, sir. The law maintains and provides that the death penalty is not necessarily appropriate, and is not appropriate in every first degree murder case. That whether the death penalty is an appropriate punishment is determined in the second phase of the trial, the sentencing proceeding, where the State and the defendant have the opportunity to offer additional evidence. And that there's [a] continuing burden of proof on the State beyond a reasonable doubt in that second hearing. I think the question at this point is, do you understand that even if a verdict of first degree murder were returned in this case it would not automatically follow as a matter of course that the sentence of death would be appropriate?

MR. SLATE: Yes, sir, I understand that.

THE COURT: You understand it would be necessary for the jury to consider the evidence presented and the arguments of counsel at the sentencing proceeding and then consider the law as the Judge gives it to the jury?

MR. SLATE: Yes.

THE COURT: Do you believe you would be able to abide by that law—

MR. SLATE: Yes, sir.

Thereafter, defendant was permitted to continue questioning Mr. Slate. Mr. Slate then told defendant that his earlier opinion was "probably formed on ignorance of the law and proceedings" and that he would not find it difficult to put that opinion completely out of his mind. Mr. Slate also indicated, in response to the trial court's questioning, that he was certain he could set aside any opinions he may have held and decide the case solely on the evidence presented. The trial court did not err in denying defendant's challenge for cause of prospective juror Slate.

**[6]** Defendant also argues under this assignment of error that the trial court, apparently on its own initiative, should have excused two prospective jurors for cause. Defendant contends that the trial court

should have asked, on its own initiative, additional questions of prospective juror Tilley concerning the fact that Mr. Tilley recalled seeing in the paper where defendant had been previously tried in Forsyth County, in order to more fully develop a potential challenge for cause of Mr. Tilley. Further, defendant contends that the trial court, on its own initiative, should have excused prospective juror Tilley for cause. This argument is without merit. Mr. Tilley indicated that he had formed no opinion of this case and that he could disregard any information he had previously obtained and decide this case solely upon the evidence presented. Similarly, defendant argues that the trial court should have excused prospective juror Whicker for cause. However, defendant never challenged Mr. Whicker for cause. While Mr. Whicker had initially indicated to defendant that if the State asked for the death penalty and the jury found defendant guilty, he would vote to impose the death penalty, after the trial judge explained the applicable law to Mr. Whicker, he indicated that he could follow the law and that he could consider both the death penalty and life imprisonment as sentencing options. Therefore, we also find no error by the trial court in this matter and conclude that the trial court did not abuse its discretion in the conducting of the jury *voir dire*.

GUILT-INNOCENCE PHASE

**[7]** Next, defendant contends that the trial court committed prejudicial error by refusing to intervene *ex mero motu* during the prosecutors' closing arguments to the jury at the guilt-innocence phase of the trial and to preclude prosecutors from making arguments to the jury that were misstatements of the applicable law. Defendant argues that the prosecutors' closing arguments impermissibly defined the legal concepts "reasonable doubt" and "the presumption of innocence," thus undermining defendant's constitutional guarantees by denigrating the presumption of innocence guaranteed to defendant. Defendant further argues that the trial court erred in permitting the prosecutors to repeatedly refer to the State's evidence as being uncontradicted and the failure of the defense to present any witnesses to testify. Defendant notes that he objected once to the prosecutor's statement that the evidence was uncontradicted, but concedes that he did not object to the prosecutors' arguments regarding the meanings of "reasonable doubt" and "the presumption of innocence."

It is well settled that the closing arguments of counsel are left largely to the control and discretion of the trial judge. *State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991). Where a defend-

ant does not object at trial to an allegedly improper jury argument, it is only reversible error for the trial court not to intervene *ex mero motu* where the prosecutor's argument is so grossly improper as to constitute a denial of defendant's due process rights. *Id.* Further, it is well established that the prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993). Upon a review of the record and transcript, we conclude that the prosecutors' arguments in this case were not so grossly improper as to require the trial judge to intervene *ex mero motu*. We further find that the trial court did not err in overruling defendant's objection to the prosecutor's argument. Therefore, we conclude that there was no reversible error.

**[8]** In his next assignment of error, defendant argues that the trial court erred in allowing witness Carter to testify, over defendant's objection, that he contacted law enforcement officers after seeing on television that defendant had been charged with the murder of Deborah Henley in Forsyth County. Chuck Carter, an acquaintance of Dorothy Johnson, testified that he saw defendant and Ms. Johnson dancing together at the SRO Club around midnight on the night of Ms. Johnson's disappearance, 12 April 1991. He further testified that he called law enforcement officers to report seeing Ms. Johnson with defendant. The challenged testimony followed:

Q Tell us why and when this was that you called.

A When—

[DEFENDANT]: Objection.

THE COURT: Objection overruled.

Q You may answer.

A When I seen the second murder —

[DEFENDANT]: Objection.

THE COURT: Objection overruled.

Q You may answer.

A When I seen the second murder that had, someone had—I had kept up with someone had left the SRO. And showed they had charged the defendant, and showed his picture on television. I

recognized him and realized he was the one that was with Ms. Johnson, and proceeded to call Crime Stoppers.

Q Do you know what time length had passed between the time of 12th of April and when you saw him on T.V.?

[DEFENDANT]: Objection.

THE COURT: Objection overruled.

A Roughly three months.

Defendant concedes that the testimony that Carter saw defendant dancing with Ms. Johnson and that Carter called the police is relevant. However, he argues on appeal that this testimony was improperly admitted as evidence of defendant's character, in violation of N.C.G.S. § 8C-1, Rule 404(a). Defendant further contends that the evidence that Carter called the police because he recognized defendant as being with Ms. Johnson only after seeing on television that defendant had been charged with another murder was irrelevant, inflammatory, and improperly prejudicial. We disagree.

North Carolina Evidence Rule 402 provides, in pertinent part, that "all relevant evidence is admissible" and that "[e]vidence which is not relevant is not admissible." N.C.G.S. § 8C-1, Rule 402 (1992). 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 (1992). Rule 404 states, in pertinent part:

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . .
>
> . . . .
>
> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404 (1992).

The list of purposes in the second sentence of subsection (b) of Rule 404 is neither exclusive nor exhaustive. *State v. Morgan*, 315 N.C. 626, 637 n.2, 340 S.E.2d 84, 91 n.2 (1986). The defendant's general objection is ineffective unless there is no proper purpose for which the evidence is admissible. *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986). The burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted. *Id.*

The State argues that the testimony at issue was admitted to show why witness Carter recognized defendant as being with Ms. Johnson on the night she disappeared. The testimony was relevant since Carter might never have realized that he had information concerning Ms. Johnson's murder had he not seen the television report three months later. We find this argument persuasive. The testimony in question was relevant to explain why Carter did not contact the police until three months after the murder of Ms. Johnson. As such, the evidence was not admitted for the improper purpose of demonstrating defendant's character and that defendant acted in conformity therewith.

Defendant cites *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988), for the proposition that the challenged evidence in this case is not admissible under the exceptions of N.C.G.S. § 8C-1, Rule 404(b). In *Cashwell*, defendant was on trial for two counts of first-degree murder. We held that the trial court erred in permitting an inmate, who was in jail with the defendant and who testified as to inculpatory statements made by defendant regarding the murders, to testify that defendant told him he was in jail for the attempted murder of his girlfriend. In so holding, we noted that "[a]lthough the purposes for which evidence of other crimes, wrongs, or acts is admissible are not limited to those enumerated in the rule, we find that this testimony was not relevant to any fact or issue other than the character of the accused." *Id.* at 578, 369 S.E.2d at 568. The State argued in *Cashwell* that the witness' testimony was competent for the purpose of showing the relationship between the witness and defendant that led up to defendant's inculpatory statements, which were made a month after the statements at issue. *Id.* at 577, 369 S.E.2d at 568. The Court rejected this argument, however, stating that "[t]he challenged testimony in no way was necessary to show the full context of defendant's confession, nor was it required in order to show any confidential relationship between defendant and [the witness]." *Id.* at 578, 369 S.E.2d at 568.

We find *Cashwell* distinguishable from the case at bar. Unlike the challenged evidence in *Cashwell*, the testimony at issue here is relevant and necessary to explain why Carter did not contact the police until three months after the time of the murder and to explain why he ultimately recognized defendant.

Although defendant in his brief does not refer to Evidence Rule 403, it appears that he also argues that the testimony in question should have been excluded, even if relevant, because its probative value is substantially outweighed by its prejudicial effect. North Carolina Evidence Rule 403 provides: "[A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992).

Rule 403 requires the court to balance the proffered evidence's probative value against its prejudicial effect. *State v. Mercer*, 317 N.C. 87, 93, 343 S.E.2d 885, 889 (1986). Necessarily, evidence that is probative in the State's case will have a prejudicial effect on the defendant. The question, however, is one of degree. *Id.* at 93-94, 343 S.E.2d at 889. Relevant evidence is admissible, despite its prejudicial effect, unless the evidence is unfairly prejudicial. *Id.* In this instance, the proffered evidence was not unfairly prejudicial. Extensive evidence of the murder of Deborah Henley in Forsyth County was admitted in this case under N.C.G.S. § 8C-1, Rule 404(b). In light of the extensive testimony regarding the murder of Deborah Henley, witness Carter's isolated statement was not unfairly prejudicial. Furthermore, there was considerable additional evidence against defendant, including DNA evidence linking defendant to Ms. Johnson and the testimony of another witness, Mark Lamb, that defendant was at the SRO Club with Ms. Johnson on 12 April 1991. Therefore, we conclude that the testimony at issue was properly admitted by the trial court as relevant evidence and that the testimony did not unfairly prejudice defendant.

**[9]** By another assignment of error, defendant contends that the trial court erred in refusing to admit testimony that Ms. Johnson was assaulted by someone other than defendant on the night she was murdered. During the cross-examination of the State's witness, Mark Lamb, who had testified on direct examination that he saw defendant with Ms. Johnson at the SRO on 12 April 1991, defense counsel attempted to elicit testimony that a black-haired man had also

approached Ms. Johnson at the SRO Club that night, pushed her, and told her, "You better stop or I'm going to get you." The prosecutor objected to this line of questioning, and the trial judge, after a hearing, sustained the objection. Defendant made an offer of proof. During the *voir dire*, Mr. Lamb testified that Ms. Johnson indicated to him that the black-haired man was the boyfriend of her cousin and that the man thought Ms. Johnson was trying to break up his relationship with her cousin. Mr. Lamb further indicated that Ms. Johnson was frightened.

Defendant argues that the pathologist who performed the autopsy on Ms. Johnson testified later during the trial that a dark hair was found under the chipped fingernail of Ms. Johnson's left index finger. Defendant contends that the testimony of Mr. Lamb, especially when coupled with the evidence of the black hair, was relevant and thus admissible under N.C.G.S. § 8C-1, Rule 401. He argues that under *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), the testimony should have been admitted to show that someone else committed the crime.

Before such evidence is admissible, it must tend to both "implicate [the guilt of] another *and* be inconsistent with the guilt of the defendant." *Id.* at 667, 351 S.E.2d at 279-80. The evidence must do more than raise conjecture or speculation of another's guilt. Rather, "[i]t must point directly to the guilt of the other party." *Id.* at 667, 351 S.E.2d at 279.

In the case *sub judice*, the excluded testimony cannot be said to give rise to more than mere speculation and conjecture of another's guilt. The excluded testimony of Mr. Lamb fails to point directly to another person as the perpetrator of the crime with which defendant is charged, the murder of Dorothy Johnson. Further, at the time defendant attempted to introduce the excluded testimony, there was no evidence before the jury that a dark hair had been found under Ms. Johnson's fingernail. Defendant never developed any connection between the dark hair found under Ms. Johnson's fingernail and the unnamed black-haired man at the SRO Club. Additionally, the excluded testimony is not inconsistent with the guilt of defendant. For these reasons, this assignment of error is overruled.

**[10]** In his next assignment of error, defendant argues that the trial court erred in allowing an SBI serologist, Special Agent Budzynski, to testify that DNA testing excluded two individuals as donors of the semen found in Ms. Johnson's body. In essence, defendant argues that

the State was erroneously attempting to prove the guilt of defendant by establishing the innocence of others originally suspected of the crime, relying on *State v. England*, 78 N.C. 552 (1878). We find no merit in this contention.

Special Agent Budzynski was qualified as an expert in DNA analysis by the State and testified that DNA tests were performed on blood samples taken from Ms. Johnson, defendant, and also from two other individuals: Danny Cannady (a former boyfriend of Ms. Johnson) and William Mabe (the boyfriend of Ms. Johnson's friend, Sherry Hoss). The DNA samples from defendant, Danny Cannady, and William Mabe were compared to semen taken from Ms. Johnson's vagina. Special Agent Budzynski testified, without objection, that DNA analysis excluded Mr. Cannady and Mr. Mabe as the source of the semen found in Ms. Johnson's vagina. He further testified that on five of the six autorads of DNA analyzed, defendant's DNA profile matched the sperm taken from Ms. Johnson's vaginal cavity.

In *State v. England*, the defendant's brother had originally been arrested for burning a stable. *Id.* at 554. During defendant's trial, the solicitor asked a State's witness if the tracks found near the burnt stable matched defendant's brother's foot. Defendant objected to the evidence, but the trial court allowed it. *Id.* The tracks did not correspond to the brother's foot. *Id.* This Court held that the trial court erred and that the evidence was inadmissible. *Id.* In so doing, however, the Court noted: "The proposition of the State is simply this: A. did not commit the offense; therefore, B. did. It is impossible to see how evidence tending to establish the innocence of A. tends to establish the guilt of B., except in that very remote degree that it lessens, by one, an indefinite number, some one of whom might have been guilty." *Id.* (emphasis omitted). This case is readily distinguishable from *England*. In *England*, the State apparently had no direct evidence of defendant's guilt. However, in the case *sub judice*, DNA analysis provides direct evidence that defendant was the source of the semen found in Ms. Johnson's body and thus is evidence of defendant's guilt. The State did not offer the DNA analysis excluding Mabe and Cannady for the proposition that by excluding others as the culprit, defendant is established as the perpetrator. Therefore, we find no error.

**[11]** Defendant next contends that he is entitled to a new trial because there was insufficient evidence to support the trial court's

jury instruction on flight by defendant. Following a charge conference, the trial court instructed the jury on flight as follows:

> In this case, ladies and gentlemen, the state contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether to combine circumstances to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. And further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. It must not be considered by you as evidence of premeditation or deliberation.

Defendant failed to object to the trial court's instruction and does not claim that plain error exists. North Carolina Rules of Appellate Procedure Rule 10(b)(2) states, in pertinent part:

> *Jury Instructions; Findings and Conclusions of Judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . .

Rule 10(c)(4) further provides: "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." Since defendant did not object or allege plain error, he has failed to properly preserve this issue for appeal. However, since this is a case in which the death penalty was imposed, we will consider the merits of the issue under a plain error analysis.

A trial court may properly instruct on flight " '[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Green*, 321 N.C. 594, 607, 365 S.E.2d 587, 595 (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). "[T]he relevant inquiry [is] whether there is evidence that defendant left the scene of the murder and took steps to avoid apprehension." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 434 (1990). In *Levan*, we stated that where the defendant attempted to conceal the victim's body by ordering a cohort to drag it

further into the woods, ordered the cohort to wipe fingerprints off the gun and throw it into a river, and disposed of the victim's clothing and where defendant was not apprehended for almost a year, the evidence was "clearly sufficient to support the trial court's instruction on flight." *Id.*

Similarly, in this case, there was sufficient evidence to warrant an instruction on flight. The jury could have reasonably inferred flight from the evidence that defendant left Ms. Johnson's naked body in a dark, secluded rural area; removed her clothing and jewelry to delay her identification; left the scene; and was not apprehended until more than three months later. These efforts indicate an attempt by defendant to evade detection and capture. We find, therefore, no error, much less plain error.

**[12]** Defendant next assigns error to the trial court's findings of fact on the State's motion to admit evidence of the murder of Deborah Henley, alleging that the findings are not supported by competent evidence. However, after a careful review of the transcript of the lengthy *voir dire* hearing on the motion to admit evidence of the Henley murder and of the trial court's findings of fact, we conclude that the findings were clearly supported by plenary competent evidence. Defendant concedes, as he must, that the findings of fact of the trial court are binding upon the appellate court if supported by competent evidence. *See, e.g., State v. Perry*, 250 N.C. 119, 124, 108 S.E.2d 447, 451, *cert. denied*, 361 U.S. 833, 4 L. Ed. 2d 74 (1959). This assignment of error is overruled.

**[13]** In his next assignment of error, defendant argues that the trial court erred in admitting evidence of the murder of Deborah Henley because the evidence fails the balancing test mandated by North Carolina Evidence Rule 403. N.C.G.S. § 8C-1, Rule 403.

Evidence of Ms. Henley's murder was admitted by the trial court under Evidence Rule 404(b) to show identity, plan, and the existence of a common *modus operandi* between the two murders. Testimony indicated that both the victim in this case and Ms. Henley were last seen alive at the SRO Club. The body of each victim had similar wounds, and both victims died from strangulation. Further, a foreign object had been forced into the genitalia of both Ms. Johnson and Ms. Henley. The naked bodies of both victims were found in a rural area. A special agent of the Federal Bureau of Investigation testified that the signature to a crime is that behavior at the crime scene which is not necessary to commit the crime. That signature is a projection

of the offender's personality. In both of these murders, the signature was overkill. The murderer in both instances had inflicted far more injuries to the victim than were necessary to kill. Additionally, a pathologist testified that the wounds on both victims indicated they were beaten in a similar, brutal fashion.

Defendant does not argue that the evidence from the Henley murder is irrelevant. Instead, he contends that in light of the additional, strong evidence linking defendant to the death of Ms. Johnson, the probative value of the evidence of Ms. Henley's murder is substantially diminished and is "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403. During the course of the trial, testimony placed both Ms. Johnson and defendant at the SRO Club on 12 April 1991, talking and dancing together. Testimony also indicated that defendant was familiar with the area where Ms. Johnson's body was found and that he had in fact frequented the area with a former girlfriend. A serologist with the State Bureau of Investigation testified that blood was detected on defendant's clothing. The DNA analysis expert testified that DNA analyses linked defendant to the semen found inside the vagina of Ms. Johnson and that "for this particular case the chance of finding somebody else unrelated to Mr. Moseley having a similar DNA profile in the white population is approximately one in 274 million for North Carolina."

In *State v. Moseley*, 336 N.C. 710, 719, 445 S.E.2d 906, 911 (1994), we upheld the admission of evidence from Ms. Johnson's murder in the trial of defendant for the murder of Ms. Henley. Similarly, in this case, we find no error in the trial court's admission of evidence of Ms. Henley's murder in this trial. The evidence of Ms. Henley's murder was highly probative of the identity of the murderer of Ms. Johnson and of the existence of a plan and a common *modus operandi*. The trial court repeatedly gave limiting instructions to the jury explaining the limited purpose for which the evidence of Ms. Henley's murder could be considered. Circumstantial evidence of defendant's identity is admissible even though direct evidence by a witness identifies the defendant. *State v. Perry*, 275 N.C. 565, 570, 169 S.E.2d 839, 843 (1969). We conclude that the probative value of this evidence was not substantially outweighed by the risk of unfair prejudice to defendant.

**[14]** Defendant next assigns error to the admission of photographs and slides during the guilt-innocence phase and the sentencing phase and to the prosecutor's use of photographs during closing arguments

in both phases of the trial. First under this assignment of error, defendant argues that he was denied his constitutional right to a fair trial by the redundant use of photographs and slides for the improper purpose of inflaming the jury. During trial, the following photographs and slides were admitted into evidence: three photographs of Dorothy Johnson (one in life and two in death); five photographs of Deborah Henley (one in life and four in death); nine autopsy slides of Ms. Johnson; and two simultaneously shown carrousels of comparative slides, twenty each of Ms. Johnson and Ms. Henley, used during the testimony of Dr. Lantz to illustrate the similarity of the wounds sustained by Ms. Johnson and Ms. Henley.

We have held that photographs may be introduced as evidence "even if they are gory, gruesome, horrible, or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). In a murder trial, photographs may be admitted "to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Id.* Photographs showing the body's condition when found and the location and surrounding conditions at the time the body was found have been held admissible despite their portrayal of gruesome and horrifying events. *State v. Wynne*, 329 N.C. 507, 517, 406 S.E.2d 812, 816 (1991). The decisions of whether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in light of the illustrative value of each are within the sound discretion of the trial court. An abuse of discretion results only where the court's ruling is "so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

We find no abuse of discretion in the admission of the photographs and slides in the case at bar. There is no evidence that the photographs were used excessively and solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988). Instead, the photographs and slides of Dorothy Johnson were used to identify her as the deceased and to illustrate the manner of killing in order to prove circumstantially the elements of first-degree murder. The photographs of Deborah Henley and the carrousels of slides comparing the wounds of Ms. Johnson and Ms. Henley were admitted to illustrate the State's theory that both victims were killed by the same person and that that person was defendant. Therefore, we find no merit in defendant's argument.

Defendant also argues under this assignment of error that during the testimony of Dr. Lantz, a slide of Deborah Henley's genitalia was introduced solely for the purpose of inflaming the jury and prejudicing defendant. However, the slide of Ms. Henley's genitalia was exhibited beside a slide of Ms. Johnson's genital region in order to demonstrate the similarities of the attacks on the two victims and that the same person committed both attacks. This argument is rejected.

**[15]** Defendant next argues under this assignment of error that the prosecutors improperly used the photographs during their closing arguments at the guilt-innocence phase for the singular purpose of inflaming the jury. Defendant also contends that during the sentencing phase, photographs of Deborah Henley were improperly used in the prosecutors' closing arguments to bolster their arguments on the issue of the "especially heinous, atrocious, or cruel" aggravating circumstance. However, defendant did not object to the prosecutors' closing arguments on either ground. We do not find the prosecutors' arguments to be so grossly improper as to constitute a denial of defendant's due process rights, requiring the trial court to intervene *ex mero motu*. *Robinson*, 330 N.C. at 31, 409 S.E.2d at 305. Absent an objection by defendant or gross impropriety sufficient to require the trial court's intervention *ex mero motu*, we find no error.

**[16]** Lastly, under this assignment of error, defendant argues that the trial court erred in not limiting the jury's utilization of these photographic exhibits during the sentencing phase. At the beginning of the sentencing phase, the State resubmitted all the exhibits from the guilt-innocence phase in the sentencing hearing, pursuant to N.C.G.S. § 15A-2000(a)(3). The only other evidence presented by the State at the sentencing phase was certified copies of defendant's prior felony convictions, pursuant to N.C.G.S. § 15A-2000(e)(2). The trial court did not reinstruct on the limited purposes for which the testimony and photographic exhibits resubmitted from the guilt-innocence phase could be considered.

Specifically, defendant assigns error to the trial court's failure to give a limiting instruction on the use of photographs and testimony regarding the murder of Deborah Henley in determining the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance. Defendant contends that the photographs and testimony regarding Ms. Henley's murder were only relevant on the issue of the course of conduct aggravating circumstance. We agree.

We note, however, that defendant neither requested any limiting instructions nor objected to the instructions given, despite the trial court's presenting the opportunity for counsel to do so. Absent an objection at trial, defendant's claim must be reviewed under the plain error standard.

In applying the plain error standard, we have been careful to emphasize that before granting relief, the appellate court must be convinced that absent the error, the jury probably would have reached a different result. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). The test for plain error places a much heavier burden upon the defendant than that imposed by N.C.G.S. § 15A-1443 upon the defendant who has preserved his rights by timely objection. *Id.* Plain error is found only where the claimed error is a " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). It is rare that an improper instruction will justify a finding of plain error sufficient to warrant a reversal of a criminal conviction. *Id.* at 661, 300 S.E.2d at 378.

In the present case, the testimony and photographic exhibits of Ms. Henley's murder were properly admitted into evidence during the sentencing phase. At sentencing, the jury is properly permitted to consider all the evidence presented during the guilt-innocence phase. N.C.G.S. § 15A-2000(a)(3) (1988); *State v. Syriani*, 333 N.C. 350, 396, 428 S.E.2d 118, 143, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994). Furthermore, it was appropriate for the jury to consider the evidence of Ms. Henley's murder in finding the course of conduct aggravating circumstance. N.C.G.S. § 15A-2000(e)(11) (1988). We conclude that the trial court's failure to submit a limiting instruction to the jury in this case does not rise to the level of plain error entitling defendant to relief.

**[17]** In defendant's next two assignments of error, he argues that the trial court improperly admitted the testimony of two witnesses regarding prior acts by defendant. First, defendant argues that this evidence was irrelevant and was introduced only to show a character trait of defendant and that he acted in conformity therewith. Alternatively, defendant argues that even if the evidence has probative value, that value is slight and is substantially outweighed by the risk of unfair prejudice resulting from the admission of the evidence. The

State contends that the trial court properly admitted the evidence in question under Evidence Rule 404(b). N.C.G.S. § 8C-1, Rule 404(b).

Melissa Dawson, defendant's ex-wife, testified that during their marriage, defendant anally assaulted her with his penis and by inserting foreign objects into her rectum. This sexual conduct began in late 1989 and ended in October 1990. The trial court admitted the testimony of Ms. Dawson on the State's theory that the testimony demonstrates that there existed in the mind of the defendant a plan, scheme, or design to anally assault Ms. Johnson.

Defendant argues that the acts committed on the victim in this case are markedly dissimilar to defendant's acts committed on his ex-wife because, unlike his ex-wife, the victim in this case was a complete stranger. Therefore, the evidence lacked probative value. Even if there was probative value, it was minimal due to the remoteness in time between the assault and death of Ms. Johnson and defendant's relationship with his ex-wife. Any minimal probative value was substantially outweighed by the risk of unfair prejudice. Further, defendant argues that the prosecutor improperly elicited testimony from Ms. Dawson that defendant told her that he would ram the object as far as her throat. This statement lacked any relevancy and was elicited for inflammatory purposes only.

In addition to the purpose of proving identity, we have held in several cases that evidence of prior sexual acts may have some relevance to the issue of defendant's guilt if it tends to show a relevant state of mind such as intent, motive, plan, or opportunity. *See State v. Boyd*, 321 N.C. 574, 364 S.E.2d 118 (1988); *State v. Gordon*, 316 N.C. 497, 342 S.E.2d 509 (1986); *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986). Under Rule 404(b), evidence of prior acts is admissible "so long as it is relevant to any fact or issue other than the character of the accused." *Boyd*, 321 N.C. at 577, 364 S.E.2d at 119. Nevertheless, the ultimate test for determining the admissibility of such evidence is whether the prior incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of N.C.G.S. § 8C-1, Rule 403. *State v. Cotton*, 318 N.C. at 665, 351 S.E.2d at 278-79. We hold the evidence of defendant's sexual relations with his ex-wife to be probative of defendant's state of mind at the time Ms. Johnson was sexually assaulted and murdered.

We acknowledge, as defendant points out in his brief, that there are dissimilarities between the crimes charged and defendant's con-

duct with Ms. Dawson. Ms. Dawson was not beaten or strangled, the assaults on Ms. Dawson did not occur outdoors, and Ms. Dawson was not a stranger to defendant. However, a prior act or crime is sufficiently similar under N.C.G.S. § 8C-1, Rule 404(b) to warrant admissibility if there are " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes.' " *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986) (quoting *State v. Moore*, 309 N.C. 102, 106, 305 S.E.2d 542, 545 (1983)). It is not necessary that the similarities between the two situations "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. at 604, 365 S.E.2d at 593. Rather, the similarities must tend to support a reasonable inference that the same person committed both the earlier and later acts. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991).

Ms. Dawson suffered repeated rectal assaults by defendant using foreign objects. The assaults on Ms. Dawson continued until only six months before Ms. Johnson's assault and murder. The trial court found, based on the expert testimony of a pathologist, that Ms. Johnson's body exhibited signs of rectal assault with a foreign object. The similarities in the sexual assaults of both Ms. Dawson and Ms. Johnson tend to support a reasonable inference that defendant committed the assaults on both women. Further, the probative value of the similarities was sufficient to outweigh the risk of unfair prejudice to defendant. The sexual assaults on Ms. Dawson were not so temporally remote to the assault and murder of Ms. Johnson as to render Ms. Dawson's testimony more prejudicial than probative.

The testimony by Ms. Dawson that defendant on one occasion told her he would ram the object until it came out of her throat was also properly admitted. Ms. Dawson testified that defendant made this statement to her when she protested his actions. The testimony was not elicited for purely inflammatory purposes. Instead, the statement also demonstrates defendant's state of mind. It shows an intent by defendant to sexually assault his victims, despite their protests to stop, and a plan to further injure his victims.

We therefore conclude that the evidence of defendant's sexual assaults on Ms. Dawson was sufficiently similar and close in time to the crimes charged in this case to warrant its admission into evidence.

**[18]** Defendant next argues that evidence of defendant's assault and sexual assault on Denise Fletcher in June 1989 was improperly admit-

ted by the trial court in violation of Rule 404(b) and Rule 403. The trial court admitted the evidence to show that defendant had a motive for the crime charged in this case. Defendant contends, however, that although evidence tending to establish the existence of motive is normally admissible, the State is not required to prove the motive for the murder of the victim. He argues that since motive need not be proven, the testimony of Denise Fletcher to establish motive is unduly prejudicial to defendant. Defendant also contends that there were so many dissimilarities between the assaults of Ms. Fletcher and the assault and murder of Ms. Johnson that the evidence should not have been admitted.

Denise Fletcher testified that in June 1989, she met defendant and agreed to go riding with him in his vehicle. Defendant drove the vehicle down a secluded road and stopped. He and Ms. Fletcher began talking and kissing. Defendant attempted to put his hand down Ms. Fletcher's shirt, and she protested and resisted. When Ms. Fletcher continued to refuse defendant's advances, he opened the glove compartment and brandished a gun. Defendant then ordered Ms. Fletcher to undress completely, and he undressed. He ordered Ms. Fletcher to perform fellatio on him. She refused and struggled with defendant for the gun. During the struggle, defendant pulled the trigger, and the gun fired, injuring Ms. Fletcher's finger. Defendant ordered Ms. Fletcher to wrap her finger in her underwear and get dressed. He told her he knew she would tell the authorities about him and that he would get in trouble. However, defendant took Ms. Fletcher home. The trial judge stated in his findings of fact

> that the statement . . . by the defendant to Denise Fletcher that he knew she would report the attack and then he would be in trouble[] is substantial evidence [from] which the jury could infer the defendant was particularly aware of and sensitive to the fact that any victim he assaulted might report it; that the jury could reasonably infer therefrom that such concerns provided the defendant with a motive for killing the victim in the present case.

As noted above, it is only necessary that there be sufficient similarities between the prior acts and the crimes charged to support a reasonable inference that the same person committed both the earlier and later acts. *Stager*, 329 N.C. at 304, 406 S.E.2d at 891. The trial court found from the uncontradicted evidence that the attack on Denise Fletcher and the attack on Dorothy Johnson bore several similarities: In each instance, the crime scene was a secluded and iso-

lated road; in each instance, the victim was rendered completely nude; and defendant attempted to sexually assault Ms. Fletcher and physically injured her, while Ms. Johnson was physically beaten, sexually assaulted, raped, and murdered. We find that the evidence contained sufficient similarities to the crimes charged to support a reasonable inference that the same person committed both acts. Further, the occurrences were not so temporally remote as to diminish the probative value of the evidence. Lastly, the plain language of N.C.G.S. § 8C-1, Rule 404(b) and our case law clearly support the admission of evidence of prior acts tending to show motive. *See, e.g.*, *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990). In the case *sub judice*, the testimony of Ms. Fletcher was properly offered to show defendant's motive for killing Ms. Johnson: From his experience with Ms. Fletcher, defendant knew that his crime would be reported to law enforcement authorities and that he would suffer the consequences if he left his victim alive. We find no error.

**[19]** Defendant next contends that the trial court erred in allowing Dr. Gregory Davis, the pathologist who performed the autopsy on Deborah Henley, the victim of the Forsyth County murder, to testify that in his opinion, Ms. Henley's wounds were torture wounds and that the number of wounds sustained by Ms. Henley was characteristic of overkill. Defendant argues that the testimony regarding whether Ms. Henley sustained torture wounds resulted in Dr. Davis testifying as to the existence of criminal intent. Further, Dr. Davis' opinion regarding overkill was paramount to him testifying to the presence of a specific intent to kill, premeditation, and deliberation. Defendant argues that because he was charged with first-degree murder on the theory of premeditation and deliberation, it was error to admit the testimony regarding torture and overkill because it constituted a relevant legal conclusion or standard. Defendant further contends that Dr. Davis' testimony regarding Deborah Henley exceeded the permissible scope of N.C.G.S. § 8C-1, Rule 404(b) and was grossly improper in this trial for the murder of Dorothy Johnson. We find no error.

Recently, in *State v. Jennings*, 333 N.C. 579, 600, 430 S.E.2d 188, 198, *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993), we held that the trial court did not err in admitting testimony by the pathologist that the victim was tortured. In so doing, we noted that the pathologist gave his expert medical opinion about the types of injuries he observed during the autopsy and did not testify that defendant had tortured the victim. *Id.* at 599, 430 S.E.2d at 198. Further, the challenged testimony in *Jennings* was merely a summation of the pattern

of injuries sustained by the victim and a medical conclusion that the pathologist was fully qualified to give. *Id.*

Similarly, in the case at bar, Dr. Davis did not testify that Ms. Henley was tortured by defendant, but merely that her injuries were consistent with torture. Like the expert in *Jennings*, Dr. Davis was fully qualified, as a pathologist, to give such an opinion.

We also stated in *Jennings* that to the extent the pathologist addressed a legal conclusion or standard,

> the term "torture" is not a legal term of art which carries a specific meaning not readily apparent to the witness. "Torture" does not denote a criminal offense in North Carolina and therefore does not carry a precise legal definition as "murder" and "rape" do, involving elements of intent as well as acts.

*Id.* We conclude that the trial court did not err in allowing the testimony regarding torture.

Additionally, we find the reasoning stated in *Jennings* regarding the term "torture" equally applicable to Dr. Davis' testimony regarding "overkill." "Overkill" also is not a legal term of art and does not denote a criminal offense in North Carolina. Dr. Davis did not testify that defendant inflicted the wounds on Ms. Henley that were consistent with overkill. Instead, he merely opined that the wounds inflicted on Ms. Henley were, in his medical opinion, consistent with overkill.

Lastly, it was not grossly improper for Dr. Davis to testify as to the nature of the wounds inflicted on Ms. Henley. His testimony was well within the scope permitted under N.C.G.S. § 8C-1, Rule 404(b). The injuries sustained by Ms. Henley, which Dr. Davis opined were indicative of torture and overkill, were remarkably similar to the injuries sustained by Dorothy Johnson. Special Agent Gregory Cooper of the FBI testified that overkill was the signature present in the murders of both Ms. Henley and Ms. Johnson. Therefore, the testimony at issue was relevant in establishing the identity of the perpetrator of the murder of Ms. Johnson and thus was properly admitted.

We hold that the trial court did not err by allowing this testimony. This assignment of error is therefore overruled.

**[20]** At the close of the State's evidence, defendant moved to dismiss all the charges against him. Defendant chose to not present any evidence, and at the close of all the evidence, defendant renewed his motion to dismiss all charges. These motions were denied. Defendant

argues in his next assignment of error that the trial court erred in failing to dismiss the first-degree rape charge because there was not substantial evidence to support a reasonable inference that vaginal intercourse took place by force and against the will of the victim.

We stated in *State v. Olson*, 330 N.C. 557, 411 S.E.2d 592 (1992):

> On a defendant's motion for dismissal, the trial court must determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). What constitutes substantial evidence is a question of law for the court. *Id.* To be "substantial," evidence must be existing and real, not just "seeming or imaginary." *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Vause*, 328 N.C. at 236, 400 S.E.2d at 61. In ruling on a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment that can be drawn therefrom. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *Id.*

*Id.* at 564, 411 S.E.2d at 595.

With this framework in mind, we turn to the merits of defendant's contention. The offense of first-degree rape occurs when a person engages in vaginal intercourse with another person by force and against the will of the other person and inflicts serious personal injury upon the other person. N.C.G.S. § 14-27.2 (1993). The element "by force and against the will of the other person" does not require actual physical force. Fear, fright, or duress may take its place. *State v. Hall*, 293 N.C. 559, 561, 238 S.E.2d 473, 475 (1977).

In the case *sub judice*, the evidence reasonably supports the inference that the victim had vaginal intercourse with defendant by force and against her will. Defendant concedes that the pathologist found sperm in Ms. Johnson's vagina. However, defendant contends that the evidence tends to show that Ms. Johnson left the SRO Club voluntarily with defendant. Absent evidence of a forcible abduction, the fact that Ms. Johnson was later murdered raises no more than a conjecture that any sexual conduct between defendant and her was

nonconsensual. While the evidence may support defendant's argument, it also is clearly sufficient to reasonably support the inference that defendant forcibly, and against the will of Ms. Johnson, engaged her in sexual intercourse. Ms. Johnson's body was severely beaten. Testimony indicated that she was alive during the beating. The jury could reasonably infer from this evidence that Ms. Johnson was forced, both physically and by fear and intimidation, to have sexual intercourse with defendant against her will. Any possible discrepancies in the evidence are for the jury to resolve. *Id.*

The trial court did not err in failing to dismiss the first-degree rape charge.

SENTENCING PHASE

Defendant next argues that the trial court erred in not intervening in several portions of the prosecutors' closing arguments during the sentencing phase. We address each of defendant's contentions individually.

Defendant did not object to the portions of the arguments to which he first assigns error. Therefore, "review [of these arguments] is limited to an examination of whether the argument[s] [were] so grossly improper that the trial court abused its discretion in not intervening *ex mero motu.*" *State v. Quesinberry*, 325 N.C. 125, 140, 381 S.E.2d 681, 690 (1989) (quoting *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)), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991).

**[21]** First, defendant argues that the prosecutor repeatedly argued, without objection, that the mitigating circumstances submitted by defendant were in fact to be considered by the jury as aggravating circumstances because defendant, by killing Dorothy Johnson, denied her the right to submit the same mitigating circumstances. Defendant contends that the following excerpts demonstrate the egregious nature of the prosecutors' arguments in this regard:

> You talk about mitigating circumstances. You talk about mitigating circumstances.
>
> Look at it, ladies and gentlemen of the jury. I don't never [sic] want you to forget while you're back there in that jury room. She wanted to live just as much as you and I do today. And yet look what happened to her.

> Who decided what happened to her? You talk about mitigating circumstances? Life is mitigating circumstances, ladies and gentlemen of the jury. These mitigating circumstances that they want you to consider here, these things here that they want you to think about and consider, every one of those mitigating circumstances he took from that woman.

The prosecutor then addressed specifically each mitigating circumstance submitted by defendant:

> Because, you see, ladies and gentlemen of the jury, is the age of the defendant at the time of this murder a mitigating factor? What about her age? He took it away from her. And how did he take it away from her? And for what did he take it away, ladies and gentlemen of the jury? He took it for an eternity. Forever more.
>
> . . . .
>
> Now, let's read them again. Is the age of the defendant at the time of this murder a mitigating factor? Is it? Was her age a mitigating factor? Didn't she have an age too?
>
> . . . .
>
> You don't think, ladies and gentlemen of the jury, that that woman wouldn't like to have a little boy like this [referring to defendant's son]? You don't think that that woman wouldn't have wanted this? You don't think that she wouldn't have screamed out, let me live long enough to have something like this, something as precious as this is.
>
> . . . .
>
> Next one, is the defendant a loving father to his son? You don't think this woman wouldn't have been loving to a child if he had given her a chance to have one?
>
> . . . .
>
> Is the defendant considerate and loving to his mother, father and sister? Did she not have that mitigating factor? You saw her parents. Do you not believe this woman—you can see by her picture she's been through nine operations, nine operations. And yet she still has trouble eating is why she is so small, and trouble with her speech. You don't think that she was considerate and thankful of her parents for trying to correct that problem she had? You

don't think she wasn't considerate and loving to her mother and father when she lived that kind of life under those circumstances?

. . . .

. . . How dare Carl Stephen Moseley say he has mitigating circumstances. How dare him say that.

Here is the woman with mitigating circumstances. All she wanted to do was live and enjoy some life, and have a relationship with somebody like this maybe sometime in her life. Or be able to write to a man as Carl Stephen Moseley got to receive from a loving wife, letters that say, I love you . . . .

We disagree with defendant's interpretation of these arguments. On appeal, particular prosecutorial arguments are not viewed in an isolated vacuum. *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *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). "Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *Id.* A review of the excerpted arguments in context reveals that the prosecutors were in essence arguing that the mitigating circumstances proffered by defendant had little value when compared to the circumstances of defendant's crime and his character. We do not find these remarks so egregious as to require intervention by the trial court *ex mero motu.*

**[22]** Defendant next contends that the prosecutors improperly implied, albeit without objection by defendant, that mitigating circumstances must justify or excuse a killing or reduce it to a lesser degree of crime. We agree that such an argument would be improper, and it may, depending upon the circumstances, even rise to the level of prejudicial error. However, after a careful review of the transcript, we find no such grossly improper arguments by the prosecutors in this case.

**[23]** Defendant also asserts that the prosecutors improperly argued that "[i]t's time we do something for the victims. It's time we do something for the Dorothy Louise Johnsons of this world." However, we have held repeatedly that brief references to victims or their families during prosecutors' closing arguments do not rise to the level of gross impropriety necessary to warrant the trial court's intervention *ex mero motu. See State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989) (finding no gross impropriety in the prosecutor's statement that he represented the victim), *sentence vacated on other grounds,*

494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 328, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991); *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976) (finding no gross impropriety in the prosecutor's statement that "everybody is concerned about the rights of the defendants . . . . When in God's name are we going to start getting concerned about the rights of the victims?"). The prosecutors' isolated statements in this case did not warrant the trial court's intervention *ex mero motu*.

**[24]** Next, defendant claims that the following arguments by the prosecutors were improper because they went outside the record and appealed to the jury to convict defendant because of public sentiment:

> You are justice. The eyes of Stokes County are on you. You[] are the conscience of our justice system. You are that justice system. What will you do with Carl Stephen Moseley, a multiple killer?
>
> . . . .
>
> It's time we say, it's time for this jury to send a message to the community.
>
> [DEFENDANT]: Objection.
>
> THE COURT: Objection overruled.
>
> [PROSECUTOR]: What will your verdict be? Send a message to them that this kind of thing can't be tolerated. That this kind of thing can't be done and just let go.
>
> . . . .
>
> You[] are the moral conscience of this community. I ask you to send a message.
>
> [DEFENDANT]: Objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: The eyes of the community are upon you. Why is this case less deserving of [the] extreme punishment of death? I can't think of a single reason why. I can't think of a single true mitigating circumstance that would save his life under any circumstances.
>
> . . . .

. . . Do something about it. Don't throw away a life like an old shoe. That's what's wrong with this country.

[DEFENDANT]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: That's what's wrong with this system. It's time we did something. It's time we had the back bone and the courage to do what's the right thing.

[DEFENDANT]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: Sometimes it's the hard thing. In these hot seats that you sit in now I understand it's not easy.

. . . .

I won't ask you to take his life. But I will tell you this, ladies and gentlemen of the jury, that somewhere, somewhere when this trial is over you're going to go down to the country store, or you're going to go to church, or the golf course, or go anywhere where people gather, and you know what you're going to hear? You're going to hear these words, or something to this effect—

[DEFENDANT]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: You're going to hear, did you hear what they did in Danbury in that poor girl, Dot Johnson's case?

[DEFENDANT]: Objection.

THE COURT: Overruled.

[PROSECUTOR]: And you know something, ladies and gentlemen of the jury? All the lawyers in the world can suggest to you how you are going to answer that question. But only you can fill in the blanks. You were told that this case was a puzzle. But, ladies and gentlemen of the jury, the puzzle has been solved. It will be up to you to answer the question. Did you hear what they did down in Danbury? You are the voice. You are the conscience of the community.

Defendant argues that this type of argument is prejudicial because it reminded the jurors that they needed to heed the senti-

ments of the community because they would have to return to the community and explain their verdict. In *State v. Scott*, 314 N.C. 309, 312, 333 S.E.2d 296, 298 (1985), we held that the prosecutor's argument to the jury was improper because it asked the jury to decide the case on the basis of public sentiment. However, in *Scott*, the Court emphasized that it was not improper for the prosecutor to remind the jury that people often say, "My God, they ought to do something about [drunk driving]. . . . Well, ladies and gentlemen, the buck stops here. You twelve judges in Cumberland County have become the 'they.' " *Id.* at 311, 333 S.E.2d at 297. These statements asked the jury only to act as the voice and conscience of the community, which is not improper. The prosecutor in *Scott* fell into improper argument only in pointing out to the jury specifically that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." *Id.* at 312, 333 S.E.2d at 298. This statement was improper because it went outside the record and appealed to the jury to convict the defendant because drunk drivers had caused other accidents. *Id.*

We find the arguments at issue here to be analogous to the statements in *Scott* that were held to be proper. The prosecutors in the case *sub judice* were not asking the jurors to decide the verdict based on community sentiment. Rather, the prosecutors were merely reminding the jurors that, like it or not, they were the jurors in that case, and as such, they would be the voice and conscience of the community. "We have upheld arguments by prosecutors suggesting to juries that they are the 'voice and conscience of the community' and that they have an obligation to do something about serious crime." *State v. McNeil*, 324 N.C. at 53, 375 S.E.2d at 921. Therefore, we find no error.

**[25]** Defendant contends by another assignment of error that the trial court erred in never affording defendant the opportunity to speak to the sentencing jury after granting his motion for allocution. However, we have recently held that a defendant does not have a constitutional, statutory, or common law right to make unsworn statements of fact to the jury at the conclusion of a capital sentencing proceeding. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994). Although the trial court indicated to defendant prior to jury selection that the "allocution right will be afforded, but must be exercised before arguments of counsel at any sentencing hearing," after the charge conference at sentencing, the following occurred:

THE COURT: All right. At this time the defendant is present in court with his attorneys, and the Issues and Recommendation form has been finalized. And are we now ready to argue to the jury, counsel?

[PROSECUTOR]: Yes. State's ready.

THE COURT: Defendant ready?

[DEFENDANT]: We have one brief motion we'd like [you] to hear.

THE COURT: All right, sir.

The court then heard defendant's motion to "preclude improper argument by the prosecutor." Thus, when given the opportunity at the appropriate stage of the proceedings, defendant failed to remind the trial court of his wish to allocute. Since defendant does not have a constitutional, statutory, or common law right to allocution and since defendant failed to remind the court of his desire to speak to the jury at the appropriate stage of the case, we conclude that there was no error.

**[26]** In his next assignment of error, defendant argues that the trial court should not have permitted the jury to find as separate statutory aggravating circumstances that defendant had previously been convicted of assault with a deadly weapon inflicting serious injury, a felony involving the use or threat of violence to the person, and that defendant had previously been convicted of attempted second-degree sexual offense, a felony involving the use or threat of violence to the person. N.C.G.S. § 15A-2000(e)(3) (1988). Defendant contends that both convictions arose from his conduct against Denise Fletcher and that he pled guilty to the related charges at the same time and received a consolidated sentence. According to defendant, the submission of two aggravating circumstances based on this course of conduct was redundant. He argues that if more than one conviction or enumerated offense were found by the jury, this should go to the weight given to the aggravating circumstance, rather than a finding of the same statutory aggravating circumstance twice. We do not agree.

Aggravating circumstances are not considered redundant absent a complete overlap in the evidence supporting them. *State v. Sanderson*, 336 N.C. 1, 21, 442 S.E.2d 33, 45 (1994); *State v. Jennings*, 333 N.C. at 628, 430 S.E.2d at 214. In the case at bar, the evidence underlying the submission of the two aggravating circumstances was

not the same. Defendant was convicted of committing two separate offenses against Denise Fletcher. Each offense was supported by distinct evidence. The attempted second-degree sexual offense was supported by evidence that defendant, while brandishing a gun, attempted to force Ms. Fletcher to perform fellatio on him. The assault offense was supported by evidence that defendant injured Ms. Fletcher's hand when she and defendant struggled for his gun, and he fired it. Any overlap in the evidence supporting the two convictions was slight and certainly did not rise to the level of complete redundancy. Therefore, we find no error.

**[27]** Also under this assignment of error, defendant raises a similar argument as to the trial court's instructions to the jury that it could consider as two separate aggravating circumstances that the murder was committed while defendant was engaged in the commission of first-degree sexual offense and that the murder was committed while defendant was engaged in the commission of first-degree rape against Dorothy Johnson. N.C.G.S. § 15A-2000(e)(5) (1988). However, again, the submission of both aggravating circumstances was supported by distinct and separate evidence. The first-degree sexual offense was supported by evidence that defendant penetrated Ms. Johnson's rectum with a foreign object. The first-degree rape was supported by evidence that defendant penetrated Ms. Johnson's vagina. Further, the elements of first-degree sexual offense and first-degree rape are different. *See* N.C.G.S. §§ 14-27.4, -27.2 (1993). Defendant committed two separate crimes. The only overlap between the two convictions was that defendant committed both crimes against the same victim, and the evidence did not overlap to the point of redundancy. Accordingly, each crime supported the submission of a separate aggravating circumstance. This assignment of error is overruled.

**[28]** Defendant next assigns error to the trial court's failure to give limiting instructions on the aggravating circumstances during the sentencing phase. The trial court erred in not instructing the jury that it could not consider the same evidence to find more than one aggravating circumstance. However, defendant neither objected to the instructions given nor requested limiting instructions. Therefore, defendant's claims must be reviewed under the plain error standard.

First, defendant contends that the trial court failed to instruct the jury that the evidence of defendant's convictions for attempted second-degree sexual offense and for assault with a deadly weapon inflicting serious injury against Denise Fletcher, which supported the

two aggravating circumstances that defendant had been convicted of felonies involving the use or threat of violence to the person, could not be considered by the jury in determining whether the murder was part of a course of conduct in which defendant engaged and which included the commission of other violent crimes against other persons. Second, defendant argues that the trial court failed to instruct the jury that evidence that defendant raped and sexually assaulted Dorothy Johnson, which supported the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a first-degree rape and the aggravating circumstance that the murder was committed while defendant was engaged in the commission of a first-degree sexual offense, could not be considered in finding either the especially heinous, atrocious, or cruel aggravating circumstance or the course of conduct aggravating circumstance.

While the trial court should have instructed the jury that it could not use the same evidence as the basis for finding more than one circumstance, we do not believe that if the jury had been so instructed, the result would have been different. There was clearly sufficient, independent evidence to support each of the aggravating circumstances in question. Over half the evidence introduced in this proceeding dealt with the murder of Deborah Henley. This evidence does not overlap in any way with the evidence of defendant's assault and attempted sexual assault of Denise Fletcher or with the evidence of defendant's sexual offense or rape of Dorothy Johnson. Furthermore, the evidence demonstrated that the murder of Deborah Henley was dramatically similar to the murder of Dorothy Johnson. This evidence was admitted during the guilt-innocence phase expressly for the purpose of demonstrating to the jury that defendant had a plan, scheme, or *modus operandi* in committing the two murders. There existed, therefore, plenary evidence from which the jury could properly find the course of conduct aggravating circumstance. Additionally, there was a wealth of evidence, independent of evidence of defendant's rape or sexual assault of Ms. Johnson, to support the especially heinous, atrocious, or cruel aggravating circumstance. The evidence showed that Ms. Johnson was severely beaten from head to toe, was cut repeatedly with a sharp object, and was strangled to death, both manually and ligaturally. The evidence also showed that Ms. Johnson would have been conscious during the time she suffered the beating. Further, testimony indicated that death by strangulation would have been frightening and that it would have taken between one and five minutes for Ms. Johnson to die. We thus decline to find

plain error in the trial court's failure to give limiting instructions. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises four additional issues that he concedes this Court has decided against his position.

**[29]** First, defendant argues that the trial court erred in instructing the jury in the penalty phase that, as to issue three of the issues and recommendation form, the jury was to continue to issue four if the mitigating circumstances were of equal weight to the aggravating circumstances. This argument was directly addressed by this Court and answered against defendant's position in *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, — U.S. —, 120 L. Ed. 2d 913 (1992). We find no compelling reason to depart from our prior holding. Therefore, this assignment of error has no merit.

**[30]** Second, defendant contends that the trial court erred in submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel because that aggravating circumstance is unconstitutional on its face and as applied. We have recently decided that this aggravating circumstance is not unconstitutional on its face. *State v. Syriani*, 333 N.C. at 388-92, 428 S.E.2d at 139. We further hold that the aggravating circumstance is not unconstitutional as applied in this case and that there was sufficient evidence to warrant submitting the circumstance to the jury. This assignment of error is overruled.

**[31]** Third, defendant argues that the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11) (1993), is unconstitutional. However, defendant admits that this Court has rejected this argument. *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982). While defendant argues that the trial court's instructions in this case were less precise than those upheld in *Williams* because the trial court here failed to limit the evidence that could be considered in support of this aggravating circumstance, we still find *Williams* controlling. This argument is without merit.

**[32]** Fourth, defendant argues that the trial court erred in denying defendant's request to argue parole eligibility and to present evidence of the same to the jury. This Court has established a policy of prohibiting information concerning parole in capital cases. *State v.*

*Robbins*, 319 N.C. 465, 518, 356 S.E.2d 279, 310, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Recently, we have declined to abandon our prior authority on this issue, despite the legislature's amendment of N.C.G.S. § 15A-2002 to require the trial court, in cases of offenses occurring on and after 1 October 1994, 1994 N.C. Extra Sess. ch. 24, § 14(b), to instruct the jury during a capital sentencing proceeding concerning parole eligibility of a defendant sentenced to life without parole, 1993 N.C. Sess. Laws ch. 538, § 29. *Green*, 336 N.C. at 157, 443 S.E.2d at 23. Therefore, we reject this argument.

PROPORTIONALITY REVIEW

**[33]** Finding no error in either the guilt-innocence phase or the capital sentencing proceeding, it is now the duty of this Court to review the record and determine (1) whether the record supports the jury's finding 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).

The following aggravating circumstances were submitted to the jury:

(1) Had the defendant been previously convicted of the felony of assault with a deadly weapon inflicting serious injury being a felony involving the use or threat of violence to the person? [N.C.G.S. § 15A-2000(e)(3) (1988).]

. . . .

(2) Had the defendant been previously convicted of the felony of attempted second degree sexual offense being a felony involving the use or threat of violence to the person? [*Id.*]

. . . .

(3) Was this murder committed while the defendant, Carl Stephen Moseley, was engaged in the commission of a first degree sexual offense? [N.C.G.S. § 15A-2000(e)(5) (1988).]

. . . .

(4) Was this murder committed while the defendant, Carl Stephen Moseley, was engaged in the commission of a first degree rape? [*Id.*]

. . . .

(5) Was this murder especially heinous, atrocious, or cruel? [N.C.G.S. § 15A-2000(e)(9) (1988).]

. . . .

(6) Was the murder for which the defendant stands convicted part of a course of conduct in which the defendant Carl Stephen Moseley engaged in the commission of other crimes of violence against another person or persons? [N.C.G.S. § 15A-2000(e)(11) (1988).]

The jury responded "yes" to each of these inquiries, thus finding these aggravating circumstances to exist. We have previously concluded herein that each of these aggravating circumstances was readily supported by the evidence.

After conducting a thorough review of the transcript, record on appeal, and briefs and oral arguments of counsel, we further conclude that the jury did not sentence defendant to death while under the influence of passion, prejudice, or any other arbitrary factor.

Our final duty is to determine whether the punishment of death in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. N.C.G.S. § 15A-2000(d)(2).

As this Court has frequently noted, the purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. at 164-65, 362 S.E.2d at 537. Proportionality review is necessary to serve "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980). 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 by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

We begin our analysis by comparing the instant case with those seven cases in which this Court has determined that the sentence of death was disproportionate: *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 by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

In *State v. Benson*, the defendant was convicted of first-degree murder based solely upon the theory of felony murder; the victim died of a cardiac arrest after being robbed and shot in the legs by the defendant. The only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain. This Court determined that the death sentence was disproportionate based in part on the fact that it appeared defendant was simply attempting to rob the victim, 323 N.C. at 329, 372 S.E.2d at 523, and defendant "pleaded guilty during the trial and acknowledged his wrongdoing before the jury." *Id.* at 328, 372 S.E.2d at 523.

In *State v. Stokes*, the defendant was one of four individuals who was involved in the beating death of a robbery victim. Defendant was found guilty of first-degree murder under the theory of felony murder, and only one aggravating circumstance was found, that the crime was especially heinous, atrocious, or cruel. This Court, in finding that the death sentence was disproportionate, noted that none of the defendant's accomplices were sentenced to death, although they committed the same crime in the same manner. 319 N.C. at 27, 352 S.E.2d at 667.

In *State v. Rogers*, the defendant was convicted of first-degree murder based on a shooting of the victim in a parking lot during an argument. Only one aggravating circumstance was found, that "[t]he murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." 316 N.C. at 234, 341 S.E.2d at 731.

In *State v. Young*, the defendant stabbed and robbed a man. The Court noted that in armed robbery cases where death is imposed, the jury has found the aggravating circumstance that the defendant was engaged in a course of conduct that included the commission of violence against another person and/or that the crime was especially heinous, atrocious, or cruel. 312 N.C. at 691, 325 S.E.2d at 194. Neither of these circumstances was found by the jury in *Young*.

In *State v. Hill*, the defendant shot a police officer while engaged in a struggle near defendant's automobile. This Court found the death sentence disproportionate because of

> the somewhat speculative nature of the evidence surrounding the murder here, the apparent lack of motive, the apparent absence of any simultaneous offenses, and the incredibly short amount of time involved, together with the jury's finding of three mitigating circumstances tending to show defendant's lack of past criminal activity and his being gainfully employed, and the unqualified cooperation of defendant during the investigation . . . .

311 N.C. at 479, 319 S.E.2d at 172.

In *State v. Bondurant*, the defendant shot his victim after defendant had spent the night drinking; there was no motive for the killing, and immediately after the victim was shot, defendant made sure the victim was taken to the hospital. 309 N.C. at 694, 309 S.E.2d at 182-83.

In *State v. Jackson*, the victim had been shot twice in the head. The defendant had earlier flagged down the victim's car, telling his companions that he intended to rob the victim. This Court found the death sentence disproportionate because there was "no evidence of what occurred after defendant left with McAulay [the victim]," and there was no evidence to show that the murder was "especially heinous" within the meaning of the statute. 309 N.C. at 46, 305 S.E.2d at 717.

We conclude that this case is not similar to any of the above cases, where death was found to be a disproportionate sentence. Most notably, in none of the cases where the death sentence has been determined to be disproportionate did the sentencing jury find as many aggravating circumstances as were found by the jury in this case. Indeed, our research has revealed no cases in which the sentencing jury has found six aggravating circumstances to exist. Furthermore, we conclude that the murder in this case was more brutal and torturous than those cases where we have found the death penalty to be disproportionate. Of the cases in which this Court has found the death penalty disproportionate, only two involved the especially heinous, atrocious, or cruel aggravating circumstance. *Stokes*, 319 N.C. 1, 352 S.E.2d 653; *Bondurant*, 309 N.C. 674, 309 S.E.2d 170. *Stokes* and *Bondurant* are not similar to the instant case. In this case, defendant offered companionship to a small, trusting woman but then took her to a secluded place, where he sexually assaulted her; raped

her; and brutally beat, tortured, stabbed, and strangled her until she was dead.

In reviewing the proportionality of a sentence, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *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). However, we "will not undertake to discuss or cite all of those cases" we have reviewed. *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, — L. Ed. 2d —, 1994 WL 459889 (1994). In examining the pool, we review cases with similar facts and with similar aggravators and mitigators.

Here, defendant was convicted of first-degree murder on the theory of premeditation and deliberation. As noted earlier, the jury found the existence of the six aggravating circumstances submitted in this case. The jury also found two of the eight submitted nonstatutory mitigating circumstances to exist. The mitigating circumstances found were: that defendant is considerate and loving to his mother, father, and sister and that defendant was cooperative with law enforcement officers in not resisting arrest and voluntarily assisting in the search of his bedroom at his parents' house. The following circumstances were submitted to the jury but not found: the age of defendant at the time of the murder, N.C.G.S. § 15A-2000(f)(7) (1988); that defendant was a loving father to his son; that defendant has been a productive member of society having sought education and consistently been gainfully and responsibly employed; that defendant sought to exert a good religious influence on the life of his son; that the offense is out of character for defendant; and the catchall mitigating circumstance, N.C.G.S. § 15A-2000(f)(9) (1988).

We begin our comparison of this case to others in the proportionality pool by noting, as we have before, that " 'juries have tended to return death sentences in murder cases where the defendant also sexually assaulted his victim.' " *State v. Artis*, 325 N.C. 278, 340, 384 S.E.2d 470, 505 (1989) (quoting *State v. Holden*, 321 N.C. at 167, 362 S.E.2d at 538), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). While we do not rely on statistics alone, a comparison of this case to other cases involving sexual assaults where we have held the death sentence proportionate reveals that the death penalty is an appropriate sentence in this case.

Recently, we affirmed the death penalty in a case similar to the one at bar. In *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994), the defendant strangled the victim after raping and sexually assaulting her. Testimony indicated that, like the victim in this case, it would have taken several minutes for the victim in *Sexton* to die from strangulation. *Id.* at 373, 444 S.E.2d at 909. The jury found three statutory aggravators, two of which were also found in this case: that the murder was committed while defendant was engaged in the commission of a first-degree rape, first-degree sexual offense, first-degree kidnapping, and common-law robbery, N.C.G.S. § 15A-2000(e)(5); that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and 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 also found nineteen of the twenty-seven nonstatutory mitigating circumstances submitted.

Also, in *State v. Rose*, 335 N.C. 301, 439 S.E.2d 578, *cert. denied*, — U.S. —, 129 L. Ed. 2d 883 (1994), we upheld the death penalty where the victim died as the result of sharp trauma and blunt force trauma to the head, as well as manual strangulation. Additionally, there was evidence of several incised wounds on the victim's body which were inflicted prior to death. The body was burned after death. In *Rose*, the jury found two aggravating circumstances: that the defendant had been previously convicted of a felony involving the use or threat of violence to the person and that the murder was especially heinous, atrocious, or cruel. The jury found none of the statutory mitigating circumstances submitted but found all nine of the nonstatutory mitigating circumstances.

In both *Sexton* and *Rose*, evidence indicated that the female victim was alone and vulnerable. There was evidence that both victims survived their initial wounds, that their injuries were painful, and that they remained conscious for a period of time prior to death. We find this case to be factually strikingly similar to *Sexton* and *Rose*. Further, however, unlike the juries in *Sexton* and *Rose*, which recommended death despite finding a number of mitigating circumstances, the jury in this case declined to find most of the mitigating circumstances submitted by defendant.

We also note that defendant has already been convicted and sentenced to death for the similar first-degree murder of Deborah Henley, and that sentence has been affirmed by this Court. *State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906.

We have upheld the death penalty in many of the cases where the jury has found that the murder was especially heinous, atrocious, or cruel. *See Artis*, 325 N.C. at 341, 384 S.E.2d at 506. The proportionality "pool also includes numerous affirmed death penalty cases in which the jury found that the defendant had previously been convicted of a felony involving the use of violence." *Id.* at 341-42, 384 S.E.2d at 506. While the presence of these aggravators is not determinative, it is an indication that the imposition of the death sentence was neither excessive nor arbitrary. We have never found to be disproportionate any sentence of death where the defendant has been convicted of multiple murders. We are convinced that based on the characteristics of this defendant and the crimes he committed, the death sentence imposed was not excessive or disproportionate.

In summary, we have carefully reviewed the transcript of the trial and sentencing proceeding as well as the record and briefs and oral arguments of counsel. We have addressed all of defendant's assignments of error and conclude that defendant received a fair trial and a fair sentencing proceeding free of prejudicial error before an impartial judge and jury. The conviction and the aggravating circumstances are fully supported by the evidence. The sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor and was not disproportionate.

NO ERROR.

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STATE OF NORTH CAROLINA v. DAVID JUNIOR WARD

No. 158A92

(Filed 3 November 1994)

**1. Criminal Law § 244 (NCI4th)— first-degree murder—newspaper article about co-participant's conviction—denial of continuance—no violation of right to fair trial**

A defendant charged with first-degree murder was not denied his Sixth and Fourteenth Amendment right to a fair trial before an impartial jury by the trial court's denial of his motion for a continuance based upon a newspaper article published in the county the day after the mailing of notice for jury duty which revealed that a co-participant in the murder had been convicted of first-degree murder of the victim and sentenced to life imprisonment where the State meticulously asked members of the venire

whether they recalled reading, seeing, or hearing anything about the two cases; none had read the newspaper article, and only eleven recalled reading, seeing, or hearing anything about the incident when it happened one year earlier; all jurors who were impaneled stated that they had not formed an opinion about this case and would be able to set aside whatever they had read, heard, or seen about the cases and decide this case entirely upon the evidence presented at trial; and defendant did not exhaust his peremptory challenges and does not now contend that any juror impaneled was objectionable to him.

**Am Jur 2d, Continuance § 40.**

**Pretrial publicity in criminal case as affecting defendant's right to fair trial—federal cases. 10 L. Ed. 2d 1243.**

**2. Jury §§ 111, 114 (NCI4th)— capital trial—jury selection—death penalty views—pretrial publicity—sequestration and individual voir dire not required**

The trial court did not err by denying defendant's motion for sequestration and individual voir dire of prospective jurors in a capital trial on the ground that the Eighth and Fourteenth Amendments to the U.S. Constitution required individual voir dire to ensure the sincerity of the responses of potential jurors with respect to their views on capital punishment. Nor did the trial court err by denying the motion on the ground that pretrial publicity about the case was so widespread that sequestration and individual voir dire were necessary in order to allow inquiry into the extent of the familiarity prospective jurors had with the case without exposing the entire panel to the prior knowledge of some individuals.

**Am Jur 2d, Jury § 197.**

**3. Jury § 226 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause without questioning by defendant**

The trial court did not err by excusing for cause in a capital trial prospective jurors who stated that they would be unable to vote for the death penalty but that they could follow the law as to sentence recommendation without affording defendant the opportunity to question them where all of the jurors unambiguously stated that they could not or would not vote to return a verdict of guilty of first-degree murder knowing that death is one of

the possible penalties, or that they would not be able to vote for the death penalty even though they were satisfied beyond a reasonable doubt that one or more of the aggravating circumstances prescribed by statute existed, the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, and any mitigating circumstances found to exist were insufficient to outweigh the aggravating circumstances found. Because the jurors were unequivocal about their inability to vote for the death penalty, additional questioning by defendant would not likely have produced different answers.

**Am Jur 2d, Jury §§ 289, 290.**

**Comment Note.—Beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.**

**4. Jury § 154 (NCI4th)— capital case—jury selection—understanding about consideration of death penalty—questions disallowed—no prejudicial error**

The trial court did not err by refusing on two occasions to permit defense counsel to ask prospective jurors in a capital trial whether they understood that "our law only requires you to consider the death penalty" since the questions and defense counsel's prefatory comments were confusing and did not follow the statute as the trial court recommended to defense counsel. Assuming *arguendo* that the trial court was required under *Morgan v. Illinois*, 504 U.S. —, 110 L. Ed. 2d 492 (1992) to allow these two questions to determine whether jurors would automatically vote to impose the death penalty upon conviction, any error in excluding these two questions was harmless because defendant was allowed through further voir dire to engage in the line of inquiry that must be allowed under *Morgan*.

**Am Jur 2d, Jury §§ 201, 202.**

**5. Criminal Law § 537 (NCI4th)— murder trial—emotional outburst by victim's husband—denial of mistrial not error**

The trial court did not err by denying defendant's motion for mistrial in a first-degree murder trial after an emotional outburst by the victim's husband during defendant's opening statement where the husband spoke no words but only sobbed and immediately left the courtroom; the incident was over quickly and caused minimal interruption; the court reporter never noted its

occurrence as he transcribed defendant's opening statement; counsel for defendant gave the entire opening statement without pause and only noticed that the jurors looked leftward at some point during his opening statement; and defendant was thus not prejudiced by the husband's emotional outburst. Nor did the trial court err by failing to give a curative instruction with regard to the victim's outburst absent a request by defendant for such an instruction.

**Am Jur 2d, Trial §§ 252 et seq., 1077 et seq.**

**Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial. 31 ALR4th 229.**

**6. Evidence and Witnesses § 184 (NCI4th)— first-degree murder—incarceration of victim's husband on drug charges—irrelevancy to show absence of intent to kill**

Evidence that a murder victim's husband was incarcerated on felony drug charges on the night of the murder was not relevant to show that defendant did not have the specific intent to kill the victim and was properly excluded by the trial court in this first-degree murder trial since (1) this evidence had no logical tendency to show that there were drugs hidden in the victim's house and could not reasonably support an inference that defendant was at the victim's house to steal cocaine and did not plan to kill the only person who could lead him to the cocaine, and (2) such an inference was contradicted by defendant's own statement that a co-participant told him that he had a job to do, namely, to rob and perhaps kill the victim; that he waited, armed with a rifle, with the co-participant in a bush behind the victim's house; and that he started shooting when the victim got out of her truck.

**Am Jur 2d, Evidence §§ 556 et seq.**

**7. Evidence and Witnesses § 175 (NCI4th)— rifle telescope—admissibility to show premeditation and deliberation**

Evidence of a rifle telescope was relevant and admissible in a first-degree murder trial to show that defendant and a co-participant armed themselves to hit a distant target at night in low light and thus that defendant premeditated and deliberated the killing where the evidence at trial showed that the victim had been shot at night from a distance of more than three or four feet by bullets from a .22 caliber rifle and that the shots were fired in

rapid succession; defendant told a deputy sheriff that he fired a .22 caliber rifle at the victim and supplied information as to where the rifle was located; a duffel bag containing, among other things, the .22 caliber rifle used in the shooting and the dismounted telescope was found at the co-participant's residence; "scrape marks" on the mounting bracket of the rifle corresponded to "scrape marks" on the telescope; defendant stated that he and the co-participant waited until night to commit the robbery-murder; and a killing done from a distance in low light is the type of situation that would call for a telescopically equipped weapon.

**Am Jur 2d, Evidence §§ 556 et seq.**

**8. Evidence and Witnesses § 3090 (NCI4th)— prior inconsistent statement—witness who heard statement second hand—testimony inadmissible**

Testimony by the medical examiner that she heard second hand from a deputy that a neighbor of the victim told the deputy that he heard between three and five gunshots on the night of a murder was inadmissible to prove a prior inconsistent statement by the neighbor who testified that he heard five gunshots and that he did not recall telling anyone that he heard between three and five gunshots.

**Am Jur 2d, Witnesses §§ 604 et seq.**

**Use of prior inconsistent statements for impeachment of testimony of witnesses under Rule 613, Federal Rules of Evidence. 40 ALR Fed 629.**

**9. Criminal Law § 423 (NCI4th)— jury argument—defendant's failure to produce forecasted evidence**

The prosecutor's remarks in his jury argument in a capital trial concerning defendant's failure to produce exculpatory evidence forecasted by defense counsel were not improper comments on defendant's failure to testify but constituted fair and proper comments on defendant's failure to present any evidence since (1) defendant was not the only witness who could have produced the forecasted evidence, and defendant argued that the evidence presented by the State, reasonable inferences therefrom, and gaps and deficiencies therein supported defendant's version, and (2) the prosecutor directed the remarks at counsel for defendant and never commented on defendant's failure to testify or suggested that defendant should or could have testified.

**Am Jur 2d, Trial §§ 577 et seq., 605 et seq.**

**Violation of federal constitutional rule *(Griffin v. California)* prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.**

**10. Criminal Law § 447 (NCI4th)— jury argument—facts about victim and victim's family—no gross impropriety**

The prosecutor's argument in a capital trial of facts about the victim and the victim's family did not so grossly overstep the evidence or amount to so grossly improper an appeal to the jury's sympathy for the victim or the victim's family as to require the trial court to recognize and correct it *ex mero motu*. Moreover, evidence supporting defendant's guilt was overwhelming, and therefore any impropriety in the remarks was not prejudicial.

**Am Jur 2d, Trial §§ 664 et seq.**

**Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.**

**11. Criminal Law § 468 (NCI4th)— jury argument—characterizations of defendant's case—no impropriety**

Statements by the prosecutor characterizing defendant's case as "an ingenuity of counsel" and a "fairy tale" were not improper where it is apparent that the prosecutor was commenting on defendant's failure to present forecasted exculpatory evidence rather than unfairly denigrating the defense.

**Am Jur 2d, Trial §§ 683 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**12. Evidence and Witnesses § 2241 (NCI4th)— psychiatric testimony—opinion of alcohol or drug abuse—conversations with defendant—admissibility to show basis for opinion**

Where a forensic psychiatrist who conducted a thorough and professional examination of defendant to determine his competency to stand trial for first-degree murder stated his opinion that defendant suffered from possible alcohol or drug addiction, the

trial court erred by refusing to permit defendant to elicit testimony by the psychiatrist that defendant reported to him that he was a drug abuser and was unable to remember what happened the night of the crime in order to show the basis for the psychiatrist's opinion. However, this error was harmless where substantially the same information was admitted when the psychiatrist testified about defendant's history of substance abuse and stated that he diagnosed cocaine or alcohol addiction based on defendant's history, and where no reasonable juror would have given any weight to defendant's statement that he was unable to remember what happened the night of the crime in light of defendant's confession to law officers the day after the victim was killed.

**Am Jur 2d, Expert and Opinion Evidence §§ 228 et seq.**

**13. Criminal Law § 1360 (NCI4th)— capital trial—impaired capacity mitigating circumstance—insufficient evidence to require submission**

The trial court did not err by refusing to submit the statutory impaired capacity mitigating circumstance to the jury in a first-degree murder sentencing hearing where the evidence tended to show that defendant historically abused drugs; defendant's psychiatric expert could not conclude unconditionally that defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired; and although there was testimony that defendant smoked an indeterminate amount of crack cocaine over the course of, at most, one-half hour more than eight hours before he committed the murder, defendant's sister testified that he was acting "normal" within one and one-half hours of the murder.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**14. Criminal Law § 1363 (NCI4th)— capital trial—nonstatutory mitigating circumstances—impaired capacity to plan—influence of drugs—insufficient evidence to require submission**

The trial court in a first-degree murder sentencing hearing did not err by refusing to submit as possible nonstatutory mitigating circumstances that (1) defendant's capacity to make and carry out plans on the day of the crime was impaired, and (2) the influence of drugs greatly affected defendant's participation in the crime where there was evidence that defendant was seen smok-

ing crack by his sister two days before the killing; he was seen smoking an indeterminate amount of crack in a car with a co-participant eight hours before the killing; later in the evening of the same day, he was observed playing with his sister's children in a normal manner within one and one-half hours of the killing; he did not suffer from psychosis, clinical depression, or any other disorders; he had elevated liver enzymes that were consistent with either acute hepatitis or drug abuse, but physicians never ruled out hepatitis; defendant had an I.Q. of eighty-five, slightly below normal; he was a slow learner in school, or learning disabled, but not even mildly retarded; and defendant's own psychiatric expert opined that defendant had the capacity to make and carry out plans on the day of the killing. Nothing in the evidence would permit the jury to speculate as to the effect of drugs on defendant's participation in the killing.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**15. Criminal Law § 1357 (NCI4th)— capital trial—mental or emotional disturbance mitigating circumstance—evidence insufficient to require submission**

The trial court did not err by failing to submit to the jury in a first-degree murder sentencing hearing the statutory mitigating circumstance that defendant was under the influence of mental or emotional disturbance when the murder was committed based on evidence that defendant had a history of drug addiction and that he smoked some amount of crack cocaine eight hours before the murder, and on the testimony of a forensic psychiatrist tending to show that defendant was of average intelligence and was not psychotic; defendant suffered no hallucinations related to organic impairment of the brain; defendant's irritability and tenseness arose from underlying personality difficulties that made him have particular trouble coping with the murder charge, or from his lack of access to drugs or alcohol, or from feelings of a hopeless and depressive mood, but he was not clinically depressed; defendant presented shortcomings in his self-awareness and insight, but his understanding of his surroundings and reality was not impaired; defendant was capable of making and carrying out plans the night of the killing based on the description of his actions that night; the psychiatrist refused to opine that defendant was under the influence of mental or emotional disturbance the night of the murder but could state only that defendant was under the influence of some drugs or

alcohol; and defendant was a "person with a short fuse." Defendant's inability to control his drug habit or temper is neither mental nor emotional disturbance as contemplated by N.C.G.S. § 15A-2000(f)(2). Any error in the trial court's failure to submit this mitigating circumstance was harmless beyond a reasonable doubt since the jurors must have considered the foregoing evidence when they considered and found the catch-all mitigating circumstance and when they considered five other nonstatutory mitigating circumstances dealing with defendant's alleged mental condition and substance abuse.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.**

**16. Criminal Law § 1363 (NCI4th)— capital sentencing—life sentence of co-participant not mitigating circumstance**

The trial court did not err by refusing to allow defendant to present evidence in a capital sentencing proceeding concerning the life sentence received by a co-participant for the same murder and to submit this proposed mitigating circumstance to the jury. The decision of *Parker v. Dugger*, 498 U.S. 308, *reh'g denied*, 499 U.S. 932, did not impliedly hold that the sentence received by a codefendant is relevant evidence in mitigation as a matter of federal law.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**17. Criminal Law § 1310 (NCI4th)— capital sentencing—defendant's refusal to testify at co-participant's trial—evidence and argument—harmless error**

Assuming *arguendo* that the trial court committed constitutional error in a capital sentencing proceeding by allowing the prosecutor to elicit testimony concerning defendant's refusal to testify at the trial of his co-participant and to comment upon that testimony during closing arguments, this error was harmless beyond a reasonable doubt where the prosecutor argued that defendant's refusal to testify in his co-participant's trial obviated the mitigating value of evidence that defendant rendered assistance to law officers to effect the apprehension of the co-participant, but the jury rejected this argument and found both the statutory mitigating circumstance that defendant aided in the apprehension of a capital felon and the nonstatutory circum-

stance that defendant confessed and cooperated with law officers the day following the crime.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**18. Criminal Law § 1323 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—finding of mitigating value**

The trial court did not err by instructing the jury in a capital sentencing proceeding that it could exclude evidence of nonstatutory mitigating circumstances from its consideration if it deemed the evidence to have no mitigating value.

**Am Jur 2d, Trial §§ 1441 et seq.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.**

**19. Criminal Law § 447 (NCI4th)— capital sentencing—jury argument—sympathy for victim and family—no gross impropriety**

The prosecutor's closing argument in a capital sentencing proceeding that defendant contends was intended to evoke sympathy for the victim and her family, if improper, was not so grossly prejudicial as to require the trial court to intervene *ex mero motu.*

**Am Jur 2d, Trial §§ 648 et seq., 664 et seq.**

**Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.**

**20. Criminal Law § 455 (NCI4th)— death penalty—specific deterrence jury argument**

The prosecutor's closing argument in a capital sentencing proceeding that the jury should recommend the death penalty for defendant as a deterrent to his killing again was not improper.

**Am Jur 2d, Trial §§ 572 et seq.**

**Propriety, under Federal Constitution, of evidence or argument concerning deterrent effect of death penalty. 78 ALR Fed 553.**

**21. Criminal Law § 1316 (NCI4th)— capital sentencing— defendant's evidence of good character—rebuttal evidence of prior crimes**

Where the defendant offered evidence in a capital sentencing proceeding that he had been a loving and responsible son, sibling, and father, the prosecutor could properly cross-examine defendant's mother about defendant's prior convictions to rebut his good character evidence offered in mitigation. Rebuttal evidence about defendant's prior crimes was not limited to record evidence of those crimes but could include the circumstances of the crimes.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**22. Criminal Law § 536 (NCI4th)— outburst by defendant— denial of mistrial**

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a capital sentencing proceeding after defendant's profane outburst during the State's cross-examination of his mother about his prior convictions since the questions to defendant's mother were proper to rebut defendant's good character evidence offered in mitigation; if defendant was prejudiced, it was because of his own misconduct at trial, for which he cannot now complain; and following defendant's outburst, the court acted promptly and decisively to restore order by excusing the jury and allowing a short recess to dispel emotions.

**Am Jur 2d, Trial §§ 252 et seq.**

**Disruptive conduct of accused in presence of jury as ground for mistrial or discharge of jury. 89 ALR3d 960.**

**23. Criminal Law § 1373 (NCI4th)— first-degree murder— death penalty not disproportionate**

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where the jury found defendant guilty upon theories of lying in wait, premeditation and deliberation, and felony murder; the evidence supported the jury's finding of the aggravating circumstance that the murder was committed for pecuniary gain; the jury found it mitigating that defendant aided in the apprehension of his co-participant, confessed guilt to and cooperated with law officers the day following the crime, and that it was never

proven as to which firearm the defendant fired, but the jury refused to find any of the mitigating circumstances dealing with defendant's alleged drug abuse and drug intoxication on the night of the murder; the case involves a particularly cold, calculated, unprovoked and passionless killing committed to obtain the meager proceeds from the small convenience store the victim owned; defendant determined prior to the killing that he was going to rob and perhaps kill the victim, spent the day of the killing riding around with his co-participant, and when night came, armed himself with a semi-automatic rifle equipped with a telescope for better sighting and hid in a bush outside the back door of the victim's house; when the victim got out of her truck, defendant did not demand her possessions but simply started shooting; the victim suffered at least three non-fatal wounds before she was rendered unconscious by a fatal wound to the head from a shot fired from the semi-automatic rifle; the co-participant picked up the victim's money box and ran with defendant to their waiting car; and defendant displayed no remorse or contrition for his act.

**Am Jur 2d, Criminal Law § 628.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.**

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Sumner, J., at the 30 March 1992 Criminal Session of Superior Court, Pitt County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for conspiracy to commit murder, robbery with a dangerous weapon, and conspiracy to commit armed robbery was granted 16 March 1993. Execution stayed 29 April 1992 pending defendant's appeal. Heard in the Supreme Court 14 September 1993.

*Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.*

*DeLyle M. Evans and W. Gregory Duke for defendant-appellant.*

WHICHARD, Justice.

Defendant was tried capitally on an indictment charging him with the first-degree murder of Dorothy Mae Smith. The jury returned a

verdict finding defendant guilty of first-degree murder upon the theories of premeditation and deliberation, lying in wait, and felony murder. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death.

The jury also found defendant guilty of conspiracy to commit murder, robbery with a dangerous weapon, and conspiracy to commit armed robbery. The trial court sentenced defendant to thirty years for the conspiracy to commit murder and forty years for the robbery, the sentences to run consecutively. It arrested judgment on the conspiracy to commit armed robbery conviction. For the reasons discussed herein, we conclude that the jury selection, guilt-innocence, and sentencing phases of defendant's trial were free from prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show that the victim, Dorothy Mae Smith, and her husband, Seymour Smith, owned a convenience store. On 3 April 1991 the victim and her brother, William Earl Brown, closed the store around 10:30 p.m. Seymour Smith usually worked at the store, but he was in jail at the time on drug-related charges. Dorothy Mae Smith filled a money box with $4,000 in cash and an undetermined number of checks. She collected her personal belongings—including fruit, crackers, a comb, and a magazine—which she placed in a white plastic bag. She also picked up her husband's .38 caliber pistol. She got in her pickup truck and headed toward her house a short distance down the road from the store; her brother followed her home. At the house Smith turned into the driveway and went to the back of her house; her brother stopped in the road and watched until he saw her brake lights turn on.

At about 10:30 p.m. Lonnie Daniels, who lived next to the Smith house, was watching television. He heard sounds that at first he thought were exploding firecrackers, but he immediately realized they were gunshots—five shots fired in rapid succession. He went outside to investigate and saw only Smith's pickup truck parked at the back door of her house. He saw no one, and becoming concerned, he brought his friend Roy Roach to the Smith house, where they discovered Smith's body lying on the ground near the back door. There was blood coming from the back of her head, and she did not respond when they called her name. Roach telephoned 911 for assistance.

Pitt County Deputy Sheriff Kelvin Wilson arrived at 10:41 p.m. He found no vital signs in Smith. At 11:00 p.m., Deputy Sheriff Billy Tripp

arrived. The deputies observed Smith's body, fully clothed, lying two feet and eight inches from the back door of the house, with her feet nearest the house, her head away from the house, and a set of keys and prescription glasses on the ground near her hand. The pickup truck was parked on the drive near her head. They found an apple, some fruit, crackers, a comb, a deed, and four spent shell casings strewn in the driveway. Later, they found a .32 caliber bullet and a .22 caliber bullet at the base of an air conditioning unit, also near the house.

On 4 April 1991 Dr. M. G. F. Gilliland, the regional medical examiner, performed an autopsy on Smith. She testified Smith had been shot five times with small caliber firearms. She found gunshot wounds on the left side of the back of the head and neck area, on the left arm near the shoulder, on the left side of the chest, on the left side of her body near the back and just below the waist, and on the left arm. All the gunshots had been fired from a distance exceeding three to four feet from Smith. The wound to Smith's head would have been immediately incapacitating and the wounds to the chest and shoulder fatal if left untreated. The hematoma (bruise) on the right side of Smith's forehead, as well as the bruise to her right elbow, led Dr. Gilliland to conclude that Smith was immediately incapacitated by the gunshot wound to the head and died very quickly. Further, the angle of the other wounds, in conjunction with the hematoma, led her to conclude that the head wound occurred after the others.

Defendant was soon arrested on unrelated charges and gave the following oral statement, later reduced to writing by Detective Ivan Harris:

> David stated that yesterday he came to Greenville and got up with Wesley Harris. David said Wesley said he had a job to do that night. David said Wesley said they were going to rob Seymour Smith's wife when she closed the store. He stated that they went by the store and she was there so they rode around until it got dark. David said about 10:00 p.m. that they parked Wesley's blue Saab car on the road that runs off between the store and the Smith house. We ran across the road and got in the bushes next to the driveway. I had a rifle and Wesley had a pistol. The rifle was a .22 caliber and the pistol was a .32 caliber. When Mrs. Smith pulled in the driveway and pulled around back and got out of the truck, we started shooting. Wesley ran and got the money box after she fell and we ran across the road and got in the car and

> left. We put the money in the ditch near Empire Brushes. We got a money box and a white plastic bag. I called a cab and went to my girlfriend's house near Belvoir. Before I could get up with Wesley the next day, the cops got me. David said Wesley kept both guns that were used.

Defendant also signed a waiver of rights form and made the following written statement:

> I David J. Ward come to Greenville yesterday and got in touch with Wesley Harris and he told me that he had a job to do he said that he was going to rob Seymour Smith's wife that night and he said that he might have to take her out. So we went by the store and she was there. We went riding until it got dark and when she close the store that night we went across the road we sat in the bushes and she pulled around the back and got out and that is when we started shooting. He went got the money box and ran across the road drove off and put the money up until the next day.

Based on information provided by defendant, and with defendant in the backseat of the sheriff's automobile, Deputy Sheriff Phillip Moore and three detectives drove to a rural area near Empire Brushes, Inc., to search for the money and checks stolen from Smith. Defendant physically assisted the officers in looking for the cash and checks.

Defendant also told officers that Harris might have placed the guns used in the murder at his residence. Defendant, while in the sheriff's car, pointed out Harris' blue Saab automobile. The officers immediately stopped the Saab and arrested Harris. Approximately $1004 in cash was located in Harris' automobile, as well as some marijuana. A moneybag and a box of .32 caliber automatic rounds were found on the side of a rural Pitt County road; some $2,429 in cash was found strewn nearby. A deputy retrieved—from a crawlspace under Harris' residence—a green duffel bag containing a .32 caliber semi-automatic pistol, two ammunition clips, one .22 caliber Ruger semi-automatic rifle, one .22 Westpoint bolt-action rifle, an unmounted Redfield power scope, three ammunition clips, and some .22 caliber long-rifle rounds.

S.B.I. Agent Ronald N. Marrs, who was assigned to the Firearm and Tool Mark Section of the Crime Laboratory, examined the shell casings and bullet fragments found in Smith's body, as well as the three firearms. He determined that the four .22 caliber casings found in the driveway were fired from the .22 caliber Ruger semi-automatic

rifle, and the .32 caliber projectile was fired from the .32 caliber handgun found in the duffel bag. He could not, however, determine whether the .22 caliber projectile found near the air conditioning unit or the .22 caliber bullet fragments from Smith's body were fired from the Ruger; he stated that he could determine that they were not fired from the .22 caliber bolt action single-shot Westpoint rifle.

At the capital sentencing proceeding, defendant's younger brother, James Ward, testified that their father was a farm worker and defendant had picked cucumbers and worked in tobacco to support the impoverished family. Defendant began this farm work when he was eight years old. Defendant was profoundly affected by the death of their father when defendant was fifteen. Defendant assisted his family—for example, traveling great distances on foot to care for James when he was hospitalized with asthma.

Defendant's mother, Doris Ward, testified that defendant supported her financially. Defendant provided care for his blind grandmother and for his disabled uncle who was in a wheelchair—bathing the uncle, shaving him, and cutting his hair.

Defendant has one daughter for whom he has provided financial and emotional support.

Defendant's sister, Brenda Williams, testified that two days before the shooting defendant had been smoking crack in her mother's house, and that on the day of the shooting, she found a soda bottle used for smoking crack. Larry Perry saw defendant smoking crack with Harris the day of the shooting.

Dr. Patricio Lara, a forensic psychiatrist at Dorothea Dix Hospital, examined defendant and testified that defendant was of average intelligence; that defendant was not psychotic, although he did demonstrate an episode of agitation where he was suspicious and fearful of being harmed by others upon discharge from Dorothea Dix Hospital; and that defendant suffered no organic hallucinations related to organic impairment of the brain. Dr. Lara testified that defendant's irritability and tenseness suggested underlying personality difficulties that made him have particular trouble coping with the murder charges; or, given his supposed history of substance abuse, that his irritability and tenseness could have arisen from his then lack of access to drugs or alcohol, forcing him to face difficulties and cope without assistance of the previously available drugs or alcohol. His irritability and tenseness also could have arisen from probable feel-

ings of hopeless and depressive mood, but defendant was not clinically depressed.

Dr. Lara also testified that there were findings consistent with drug addiction; that defendant presented shortcomings in his self-awareness and insight, but his understanding of his surroundings and the reality he was living with was not impaired; and that defendant was capable of making and carrying out plans the night of the killing.

Defendant scored the lowest on the verbal portion of the intelligence test which in part measured judgment. He scored above average on other portions of the test. While in school, defendant was assigned to special education classes and classified as a slow learner.

Susan Clark, the court clerk in the Harris trial, testified that Harris was convicted of the same charges for which defendant was convicted. Over defendant's objection, she testified that defendant had been called to testify in the Harris trial and he refused.

Following the capital sentencing hearing, the jury found one aggravating circumstance—that the murder was committed for pecuniary gain; one statutory mitigating circumstance—that defendant aided in the apprehension of another capital felon; and two non-statutory mitigating circumstances—that defendant confessed guilt to and cooperated with law enforcement officers the day following the crime, and that it was never proven which firearm defendant fired on 3 April 1991.

Upon finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstance, and that the aggravating circumstance was sufficiently substantial to call for the death penalty, the jury recommended, and the court imposed, a sentence of death.

PRE-TRIAL ISSUES

**[1]** Defendant first contends the trial court erred in denying his motion for a continuance because of allegedly prejudicial pretrial publicity, thereby denying him his rights to a fair trial before an impartial jury under the Sixth and Fourteenth Amendments of the United States Constitution. The motion was filed in response to the publication, on the first page of an interior section in a Greenville newspaper, of an article which revealed that co-participant Harris had been convicted of the first-degree murder of Dorothy Mae Smith and sentenced to life imprisonment, and that

> [t]estimony during the trial showed Harris and another man hid in the backyard of Mrs. Smith's home and ambushed her as she returned from Smith's Convenience Store which she operated with her husband.
>
> A second suspect in the killing, David Junior Ward, thirty, of Route 6 Greenville, is scheduled to be tried March 30. Testimony showed bullets from Ward's gun killed Mrs. Smith. A bullet from Harris' gun was found near an air conditioner.

The article appeared the day after the mailing of notices for jury duty. The trial court denied the motion, stating, however, that "in the event we begin jury selection . . . and it appears that the venire is tainted somewhat, . . . there will be other appropriate remedies available to the defendant . . . to insure that the defendant . . . receives a fair trial from twelve fair and impartial jurors."

" '[D]ue process requires that the accused receive a trial by an impartial jury free from outside influences.' " *State v. Johnson*, 317 N.C. 343, 370, 346 S.E.2d 596, 611 (1986) (quoting *State v. Boykin*, 291 N.C. 264, 269, 229 S.E.2d 914, 917 (1976)). " '[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.' " *Id.* (quoting *State v. Richardson*, 308 N.C. 470, 478, 302 S.E.2d 799, 804 (1983) (motion for continuance because of prejudicial pretrial publicity)). The test for determining whether a continuance should be allowed or venue changed is whether " 'it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impression they might have formed.' " *State v. Yelverton*, 334 N.C. 532, 539-40, 434 S.E.2d 183, 187 (1993) (quoting *State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983) (motion for change of venue because of prejudicial pretrial publicity)).

> The burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried rests upon the defendant. "In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial." The determination of whether a defendant has carried his

> burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. The trial court has discretion, however, only in exercising its sound judgment as to the weight and credibility of the information before it, including evidence of such publicity and jurors' averments that they were ignorant of it or could be objective in spite of it. When the trial court concludes, based upon its sound assessment of the information before it, that the defendant has made a sufficient showing of prejudice, it must grant defendant's motion as a matter of law.

*Id.* at 540, 434 S.E.2d at 187 (*quoting Jerrett*, 309 N.C. at 255, 307 S.E.2d at 348) (citations omitted).

Defendant contends that the content and timing of the article here ensured that the jury would base its decision upon pretrial information rather than upon the evidence presented at trial, and thus precluded a fair and impartial trial. We disagree. We have recognized that " 'there may be cases where widespread, word-of-mouth publicity may be as damaging to a defendant's right to an impartial trial as mass media publicity.' " *Id.* (quoting *Boykin*, 291 N.C. at 271, 229 S.E.2d at 918). The record here, however, reveals that the State meticulously asked members of the venire whether they recalled reading, seeing, or hearing anything about the cases (defendant's and Harris'). None had read the recent article. Only eleven recalled reading, seeing, or hearing anything about the incident when it happened one year earlier. One had been called by the attorney for co-participant Harris and asked to be a character witness for Harris, who was her former student. One recalled hearing co-workers discuss the case. One had discussed the case with her husband after the first day of jury voir dire, and the trial court summarily excused her. All who remained and were impaneled stated without exception that they had not formed an opinion about the case and would be able to set aside whatever they had read, heard, or seen about the cases and decide this case entirely and completely upon the evidence presented at trial. Further, defendant did not exhaust his peremptory challenges and does not now contend that any juror impaneled was objectionable to him.

For these reasons, we hold that defendant has failed to carry his burden of showing a reasonable likelihood that pre-trial publicity might have affected the fairness of his trial, and that the trial court therefore properly denied defendant's motion for a continuance. *Compare Yelverton*, 334 N.C. at 540-41, 434 S.E.2d at 187-88 (defend-

ant failed to carry his burden and court properly denied his motion for a change of venue where counsel scrupulously asked venire members whether they had read or heard about the case from any source; those who admitted to having difficulty putting aside previously formed opinions were excused for cause; and those who remained and were impaneled stated without exception either that they had formed no opinion or that they could put what they had heard or read out of their minds and listen objectively to the evidence) *with Jerrett*, 309 N.C. at 250-58, 307 S.E.2d at 345-49 (defendant met his burden of showing, under the totality of the circumstances, that a reasonable likelihood existed that he could not receive a fair trial where the crimes occurred in a small, rural, closely-knit county; several attorneys, a magistrate, and a deputy sheriff testified it would be extremely difficult, if not impossible, to select a jury of individuals who had not heard about the case, due to the publicity surrounding the case; due to the publicity surrounding the case, potential jurors were likely to have formed preconceived opinions about defendant's guilt; and jury voir dire, conducted after the trial court denied defendant's motion for sequestration and individual voir dire, revealed that many potential jurors stated they knew the victim or potential State's witnesses, had already formed opinions in the case, or could not give defendant a fair trial). This assignment of error is overruled.

**[2]** Defendant next contends the trial court erred by denying his motion for sequestration and individual voir dire of prospective jurors. He basically argues that the presence of all the prospective jurors during voir dire allowed many jurors to observe others being excused for cause due to their opposition to the death penalty and to frame their responses so as to achieve disqualification as well. Defendant contends that, for this reason, the Eighth and Fourteenth Amendments to the United States Constitution require individual voir dire to ensure the sincerity of the responses of potential jurors with regard to their views on capital punishment.

"In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time." N.C.G.S. § 15A-1214(j) (1988). "This statute gives neither party an absolute right to such a procedure." *State v. Murphy*, 321 N.C. 738, 740, 365 S.E.2d 615, 617 (1988). Instead, whether to grant individual voir dire is within the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. *Id.* In *State v. Wilson*, 313 N.C. 516, 523-24, 330 S.E.2d 450, 456-57 (1985), we held that the argument defendant now propounds is speculative and does not suffice to show

that denial of the motion for individual voir dire was an abuse of discretion. We find no compelling reason to depart from our prior holding.

Defendant basically contends, in the alternative, that pre-trial publicity concerning the case was so widespread that sequestration and individual voir dire were necessary in order to allow inquiry into the extent of the familiarity prospective jurors had with the case without exposing the entire panel to the prior knowledge of some individuals. We disagree. The State inquired collectively of all potential jurors whether any recalled reading, hearing, or seeing anything about the case before coming to court. As to those who answered in the affirmative, the State inquired further whether they had, as a result, formed an opinion about the case, or whether, if selected, they could set aside whatever they recalled and decide the case entirely upon the evidence. All responded that they had not formed an opinion and could set aside whatever they recalled and decide the case entirely upon the evidence. One stated that she had discussed the case with her husband the previous evening after the trial court had charged potential jurors not to discuss the case. The court summarily excused her; she did not relate the nature of the discussion. Further, during the questioning only the panel members seated in the jury box were in the courtroom; all other selected or potential jurors were sequestered outside the courtroom. Defendant did not pursue the inquiry about pre-trial publicity, and he accepted three jurors who had recalled seeing, hearing, or reading something about the case, as well as the one juror who knew something about the case because she had been contacted by counsel for co-participant Harris as a potential character witness.

Further, defendant did not exhaust his peremptory challenges and therefore was not forced to accept any juror objectionable to him. Further still, potential jurors who recalled seeing, hearing, or reading something about the cases were not asked to recite what they recalled. Thus, it cannot be said that those jurors exposed the others present in the courtroom to any prejudicial pre-trial publicity or that the jury selection process resulted in the contamination of other jurors by information from jurors previously exposed to such pre-trial publicity.

For these reasons, we conclude that defendant has failed to show that the trial court abused its discretion by denying his motion for sequestration and individual voir dire. This assignment of error is overruled.

JURY SELECTION ISSUES

**[3]** Defendant contends the trial court erred by excusing certain jurors for cause for their views on the death penalty without affording him an opportunity to examine the jurors excused, thereby denying him his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Prospective jurors cannot be excused for cause simply because they voice general objections to capital punishment, but can be so excused if they express an unmistakable commitment to vote against the death penalty regardless of the facts and circumstances. *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968). A juror cannot properly be excused for cause for his views on capital punishment unless those 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)). In *Wainwright* the Court recognized that

> [t]he state of th[e] case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial.

*Id.* at 421, 83 L. Ed. 2d at 850 (emphasis in original omitted). We have recognized that a prospective juror's bias may not always be "provable with unmistakable clarity" and that "[i]n 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." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

"Both the defendant and the State have the right to question prospective jurors about their views on capital punishment." *State v. Brogden*, 334 N.C. 39, 43, 430 S.E.2d 905, 908 (1993). The extent and manner of such inquiry, however, lies within the trial court's discretion, and its ruling will not be disturbed absent abuse of discretion. *Id.* Moreover, the trial court does not abuse its discretion

> "[w]hen challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the

> court, . . . 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 [about the same matter]."

*Id.* at 44, 430 S.E.2d at 908 (quoting *State v. Hill*, 331 N.C. 387, 403, 417 S.E.2d 765, 772 (1992), *cert. denied*, — U.S.—, 122 L. Ed. 2d 684, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993)).

The trial court here extensively prefaced its questions about capital punishment and described the procedure followed in a capital sentencing proceeding. Addressing each juror individually, the court explained: "If the jury finds the defendant guilty of first-degree murder, the law of North Carolina requires that the jury then consider evidence of aggravating and mitigating circumstances and determine whether the defendant should be sentenced to death." The court paused and asked whether the juror understood. It then continued:

> The law further provides that it is the duty of the jury to recommend that the defendant be sentenced to death if the State satisfies the twelve jurors beyond a reasonable doubt of three things: First, that one or more of the aggravating circumstances prescribed by statute exists. Second, that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty. And third, that any mitigating circumstances found to exist are insufficient to outweigh the aggravating circumstances found.

The court paused again and asked whether the juror understood. It then explained: "If the State fails to satisfy the jury of all of these three things, it is the duty of the jury to recommend life imprisonment." The court asked whether the juror understood, and if the juror understood, only then asked the juror the following three questions, as illustrated through the questioning of prospective juror McCrae:

> COURT: If you are satisfied beyond a reasonable doubt of those things necessary to constitute first degree murder, can and will you vote to return a verdict of guilty of first degree murder, can and will you vote to return a verdict of guilty of first degree murder even though you know that death is one of the possible penalties?
>
> JUROR MCCRAE: Yes.

COURT: Ms. McCrae, considering your personal beliefs, ma'am, about the death penalty, please state for me whether you would be able or unable to vote for a recommendation of the death penalty even though you are satisfied beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances previously mentioned?

JUROR MCCRAE: No, I could not.

COURT: Is that an able or an unable response, ma'am?

JUROR MCCRAE: I would be unable.

COURT: You would be unable?

JUROR MCCRAE: Yes.

COURT: If the defendant is convicted of first degree murder, ma'am, can and will you follow the law of North Carolina as to the sentence recommendation to be made by the jury as the court will explain it to you?

JUROR MCCRAE: Yes, I could.

COURT: Ms. McCrae, I'm going to excuse you for cause. Madame Clerk, the Court finds the fact that Ms. McCrae is being excused for cause. The reason is as a matter of conscience, regardless of the facts and circumstances, she would be unable to render a verdict with respect to the charge and with respect to G.S. 15A-1212(8).

Defendant contends that these responses—and the similar responses of seventeen other potential jurors, six of whom answered that they could not and would not vote to return a verdict of guilty of first-degree murder knowing that death is one of the possible penalties—were ambiguous. All, defendant contends, responded that they would be unable to vote for the death penalty, but that they could and would follow the law as to the sentence recommendation. Therefore, defendant concludes, these prospective jurors were improperly excused for cause, and additional questioning by defendant would have shown that they were qualified to sit as jurors under the *Witherspoon-Witt* standard.

The record discloses that the jurors unambiguously stated that they could not or would not vote to return a verdict of guilty of first-degree murder knowing that death is one of the possible penalties, or that they would not be able to vote for the death penalty even though they were satisfied beyond a reasonable doubt that one or more of the

aggravating circumstances prescribed by statute existed, the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, and any mitigating circumstances found to exist were insufficient to outweigh the aggravating circumstances found. *See State v. Oliver*, 302 N.C. 28, 39, 274 S.E.2d 183, 191 (1981) (excusal for cause is proper when a juror admits "a specific inability to impose the death penalty under any circumstances"). Because the jurors were unequivocal about their inability to vote for the death penalty, additional questioning by defendant would not likely have produced different answers. Therefore, we hold that the trial court properly excused the jurors for cause and did not abuse its discretion by refusing to allow defendant to question them. *See Hill*, 331 N.C. at 402-03, 417 S.E.2d at 771-72 (juror unequivocally stated she would not be able to follow the law; no abuse of discretion to deny further questioning, defendant did not show that such would likely have produced different answers); *Johnson*, 317 N.C. at 376-78, 346 S.E.2d at 614-15 (although juror initially stated that her views on capital punishment would not affect her ability to reach a decision at the guilt phase, she then said she would not under any circumstances later vote to impose the death penalty at the sentencing phase; held, the trial court properly allowed the challenge for cause and properly denied defendant's request to rehabilitate her, because she expressed a clear refusal to invoke the death penalty). This assignment of error is overruled.

**[4]** In his next assignment of error, defendant contends that the trial court erred by sustaining objections to certain of his questions to jurors, thereby precluding him from examining those jurors concerning the non-mandatory nature of the capital sentencing statute. On the second day of jury selection, counsel for defendant attempted to ask the following question:

> [DEFENSE COUNSEL TO PROSPECTIVE JURORS]: A real important question is do all of you understand that our law only requires you to consider death, the death penalty. It does not require you to be for the death penalty. It does not require you to go back and find the death penalty. All these questions that you have been hearing from the Judge only mean can you consider death. You don't have to be 100 percent for death or any fraction for death. All you do is consider.
>
> [PROSECUTOR]: I would object. That's not the statutory [sic].
>
> COURT: Ladies and gentlemen, at the appropriate time I will instruct you on the law that you are to apply, if and when we

> reach that stage. Mr. Evans, if you want to talk with them about that matter, sir, you need to follow the statute as outlined.

Counsel for defendant then rephrased the question. On the fourth day, counsel for defendant attempted to ask a similar question: "Do you understand that the law only requires *you to consider the death penalty* and it is up to you and the other jurors whether or not our client gets it?" The court sustained the objection and suggested that counsel avoid confusion by "giv[ing] it to them in the context of the statute." Counsel for defendant, however, did not rephrase the question.

Defendant contends he was attempting both to educate potential jurors about their role in the capital sentencing proceeding and to determine whether they fully understood their obligations and could consider a life sentence. By sustaining the objection, defendant contends, the court denied him his rights under our Criminal Procedure Act to question each prospective juror concerning his or her fitness and competency to serve as a juror, and under the Sixth and Fourteenth Amendments to the United States Constitution, as enunciated in *Morgan v. Illinois*, 504 U.S. —, 119 L. Ed. 2d 492 (1992), to an adequate voir dire to determine whether prospective jurors could consider a life sentence. We disagree.

The Criminal Procedure Act provides:

> The prosecutor and the defense counsel, or the defendant if not represented by counsel, may personally question prospective jurors individually concerning their fitness and competency to serve as jurors in the case to determine whether there is a basis for a challenge for cause or whether to exercise a peremptory challenge.

N.C.G.S. § 15A-1214(c) (1988). This statute

> does not preempt the exercise of all discretion by the trial judge during the jury selection process. . . . The trial judge has broad discretion "to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion."

*State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980) (quoting *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979)).

In *Morgan* the United States Supreme Court held that a defendant is "entitled, upon his request, to inquiry discerning those jurors

who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Morgan*, 504 U.S. at —, 119 L. Ed. 2d at 507. The trial court must give a defendant, through jury voir dire, an opportunity "to lay bare the foundation of [his] challenge for cause against those prospective jurors who would always impose death following conviction." *Id.* at —, 119 L. Ed. 2d at 506. In *Morgan* the defendant had unsuccessfully attempted to ask whether the juror would "automatically vote to impose the death penalty no matter what the facts are." *Id.* at —, 119 L. Ed. 2d at 499.

The questions and prefatory comment here bear no resemblance to the question that must be allowed under *Morgan*. Further, the trial court apparently sustained the objection only as to the form of the question and allowed counsel for defendant to rephrase the question. Counsel for defendant expansively explained what he meant by "our law requires you only to consider the death penalty" across more than six pages of the transcript after the first question, but declined to do so after the second. We conclude that the trial court properly sustained the objections to these questions. Both were confusing and did not "follow the statute" as the trial court recommended to defense counsel.

Assuming *arguendo* that the trial court was required under *Morgan* to allow these two questions, any error in excluding them was harmless. Defendant was allowed to engage in the line of inquiry that must be allowed under *Morgan*, as illustrated through the questioning of juror Gentry, whom defendant subsequently selected:

[DEFENSE COUNSEL]: You do believe in capital punishment?

[JUROR GENTRY]: Yes.

[DEFENSE COUNSEL]: You think we should have capital punishment for crimes besides murder?

[JUROR GENTRY]: I've not given consideration to that.

[DEFENSE COUNSEL]: Have you discussed your views about capital punishment lately with anybody else?

[JUROR GENTRY]: No.

[DEFENSE COUNSEL]: How do you feel about people who are against capital punishment?

[JUROR GENTRY]: I haven't given any consideration to that either.

[DEFENSE COUNSEL]: Do you have any religious basis for your views on capital punishment?

[JUROR GENTRY]: Well, as I said before, in the beginning an eye for an eye. I think I have my personal views.

[DEFENSE COUNSEL]: So your views are basically based on an eye for an eye, a tooth for a tooth?

[JUROR GENTRY]: Yes.

[DEFENSE COUNSEL]: Are you able to also consider life imprisonment?

[JUROR GENTRY]: Oh, Yes. I think I can lay aside, you know, I think I can.

[DEFENSE COUNSEL]: So you don't think all murderers should be punished by the death penalty?

[JUROR GENTRY]: No.

[DEFENSE COUNSEL]: Have you had a relative or close friend murdered?

[JUROR GENTRY]: No, not that I'm aware of.

We thus hold that any error arising from the objection to the questions previously asked was harmless beyond a reasonable doubt because defendant was allowed to engage in the line of inquiry through further voir dire. This assignment of error is overruled.

GUILT PHASE ISSUES

**[5]** Defendant contends that the trial court erred by denying his motion for mistrial and taking no remedial action after an emotional outburst by the victim's husband during defendant's opening statement. Counsel for defendant made the opening statement without pause, and only afterwards moved for a mistrial, stating that he had "noticed the jurors kept looking to their left and [he] didn't know what was going on." Defendant offered as proof testimony by the prosecutor, Thomas Haigwood, and the victim's spouse, Seymour Smith. Haigwood testified that he was seated three or four feet directly in front of Smith and that he heard Smith sobbing or crying "or some anguish behind me," but did not hear words being said. Smith testified that he just burst out and started crying "because you were just talking wrong about my wife," that somebody took him out of the

courtroom, and that he said something while outside the courtroom door. The trial court denied the motion for mistrial, stating:

> Let the record reflect . . . that . . . Mr. Smith . . . was present in court during the opening statements of both the State and the defendant and that he, in fact, by his own admission was sobbing and crying. . . . In the opinion of the court . . . the jury has not been tainted by the actions of Mr. Smith at this time.

Our statute provides, in pertinent part:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C.G.S. § 15A-1061 (1988). Whether to grant a motion for mistrial rests in the sound discretion of the trial court. *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). "A mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial verdict under the law." *Id.* at 243-44, 333 S.E.2d at 252.

> When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. "Not every disruptive event occurring during the course of trial requires the court automatically to declare a mistrial," *State v. Dais*, 22 N.C. App. 379, 384, 206 S.E.2d 759, 762 (1974), and if in the sound discretion of the trial judge it is possible, despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is

> clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

*State v. Sorrells*, 33 N.C. App. 374, 376-77, 235 S.E.2d 70, 72 (quoted in *Blackstock*, 314 N.C. at 244, 333 S.E.2d at 253).

Defendant contends there was substantial and irreparable prejudice to his case. We perceive no such prejudice. Smith spoke no words but only sobbed and immediately left the courtroom. The incident was apparently over quickly and caused minimal interruption; the court reporter never noted its occurrence as he transcribed defendant's opening statement. Counsel for defendant gave the entire opening statement without pause, and only noticed that the jurors looked leftward at some point during his opening statement. For these reasons, we conclude that Smith's emotional outburst was not so prejudicial to defendant as to render the denial of the motion for mistrial a manifest abuse of discretion reversible on appeal.

Within the same assignment of error, defendant contends the trial court should have given a curative instruction with regard to the outburst. Defendant, however, made no request for a curative instruction. We stated with regard to a similar incident:

> Our rule has long been that where a charge fully instructs the jury on substantive features of the case, defines and applies the law thereto, the trial court is not required to instruct on a subordinate feature of the case absent a special request. The trial judge in this case witnessed the outburst and was in a position to gauge its effect on the jury. . . . Aside from defendant's failure to request a curative instruction, such an instruction may well have highlighted the witness's emotional state; indeed it is possible that the defense attorney declined to request a curative instruction because of the likelihood that it would emphasize the witness's outburst.

*Blackstock*, 314 N.C. at 245, 333 S.E.2d at 253 (citation omitted).

As in that case, we hold that the court here did not err in failing to give, *ex mero motu*, a curative instruction with regard to this matter. *See also State v. Locklear*, 322 N.C. 349, 359-60, 368 S.E.2d 377, 383-84 (1988) (court did not err in failing to give curative instruction; defendant did not request such instruction, and court witnessed outburst and was in a position to gauge its effect on the jury). This assignment of error is overruled.

**[6]** Defendant next contends the trial court erred by prohibiting him from introducing evidence that the victim's husband was incarcerated on felony drug charges the night of the shooting, thereby denying defendant his rights under the Sixth and Fourteenth Amendments to the United States Constitution to present relevant evidence. The prosecutor filed a written motion in limine for an order to prohibit defendant "from offering or eliciting any evidence . . . which directly or indirectly informs or implies the nature of the charges for which Seymour Smith was arrested and imprisoned on or about the time of Dorothy Mae Smith's murder." The trial court ordered defendant to refrain "from making any reference or implying directly or indirectly about the incarceration of Seymour Smith."

The evidence showed that the area in or around Smith's trailer park had a reputation as an area in which drugs were bought and sold; that Seymour Smith owned eleven homes, thirty-five mobile homes, and a Mercedes automobile; and that on the night of the shooting the victim was carrying an unusually large amount of cash and a gun belonging to Seymour Smith. Defendant argues the evidence of pending drug charges against Smith was relevant to show that drugs may have been hidden at the Smith house, from which the jury could have inferred that defendant was at the Smith house to steal the cocaine hidden inside the house, and further, that defendant would not have planned to kill the only person other than Seymour Smith himself who could lead him to the cocaine. Thus, the excluded evidence was relevant to show that defendant did not have the specific intent to kill Dorothy Mae Smith. We disagree.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules." N.C.G.S. § 8C-1, Rule 402 (1992). Relevant evidence is "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 (1992); *see State v. Perry*, 298 N.C. 502, 510, 259 S.E.2d 496, 501 (1979) (evidence is relevant if it has "*any* logical tendency, however slight, to prove a fact in issue in the case").

To convict defendant of first-degree murder on the theory of premeditation and deliberation required proof beyond a reasonable

doubt of a specific intent to kill.[1] The pending criminal charges against Seymour Smith were not relevant to show that defendant did not have the specific intent to kill Dorothy Mae Smith. The evidence had no logical tendency to show that there were drugs hidden in the house, and it thus could not reasonably support an inference that defendant was at the house to steal cocaine and could not have planned to kill the only person who could lead him to the cocaine. Any connection between the pending charges evidence and these inferences was tenuous and remote. Further, these inferences were directly contradicted by defendant's own statement that co-participant Harris told him he had a job to do, namely, to rob, and perhaps kill, Dorothy Mae Smith; that he rode around with Harris; that he waited, armed with a rifle, with Harris in a bush behind the house; and that when Dorothy Mae Smith got out of her truck, he "started shooting." Therefore, we conclude that the pending charges evidence was not relevant and hold that the court did not err in excluding it. This assignment of error is overruled.

**[7]** Defendant next contends the trial court erred in denying his motion in limine to prohibit the State from introducing a Redfield telescope into evidence. The evidence at trial disclosed that the victim had been shot from a distance of more than three or four feet by bullets from a .22 caliber rifle and that the shots were fired in rapid succession. Defendant, when he gave his statement to the deputy sheriff, said he fired a .22 caliber rifle at the victim. Defendant supplied the information as to where the .22 caliber rifle was located. When the premises of the co-participant were searched, a duffel bag was discovered containing, among other things, a .22 caliber Ruger

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1. Murder in the first degree [based upon the theory of premeditation and deliberation] is the unlawful killing of a human being with malice and with premeditation and deliberation. "Premeditation" is defined as thought beforehand, for some length of time, however short. "Deliberation" means an intent to kill carried out by the defendant in a cool state of blood. *A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation.* Proof of premeditation and deliberation is proof of that intent.

*State v. Young*, 324 N.C. 489, 493, 380 S.E.2d 94, 96 (1989) (emphasis added) (citations omitted).

Defendant was convicted also of first-degree murder on the theories of felony murder and lying in wait, neither of which requires proof of a specific intent to kill. *See, e.g., State v. Baldwin*, 330 N.C. 446, 462, 412 S.E.2d 31, 40-41 (1992) ("Like poison, imprisonment, starving, and torture—the other physical acts specified in N.C.G.S. § 14-17—lying in wait is a method employed to kill. *It does not require a finding of any specific intent.*" (emphasis added) (citation omitted)).

semi-automatic rifle with mounting bracket and a Redfield 2½ power telescope used on rifles. There were "scrape marks" on the mounting bracket on the Ruger corresponding to "scrape marks" on the telescope, and at least two of the bullets inflicting fatal wounds on the victim were fired from the Ruger.

Under the rules of evidence set forth under the preceding assignment of error, defendant contends that the evidence of the telescope was not relevant and was therefore inadmissible, and that its admission prejudiced his case because it constituted additional evidence of premeditation and deliberation by tending to show that defendant armed himself with a rapid-firing weapon equipped with a telescopic sight. We disagree.

While there was no direct evidence that defendant mounted the telescope on the rifle, the evidence adduced supports an inference that the telescopic sight had been mounted on the rifle the night of the killing. The physical evidence in the form of shell casings and expended bullets found around the bush connected the Ruger with a killing done from a distance in low light, the type of situation that would call for a telescopically equipped weapon. Further, the dismounted telescope was found the next day in the bag with the other guns and ammunition used in the shooting. Finally, defendant stated that he and Harris waited until night to rob the victim and that he fired a .22 caliber rifle. We conclude that the evidence of the telescope was relevant to show that defendant and Harris armed themselves to hit a distant target at night in low light, and thus that defendant premeditated and deliberated the killing.

Defendant contends, in the alternative, that the trial court erred by admitting evidence of the telescope because the probative value of the evidence was outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury. *See* N.C.G.S. § 8C-1, Rule 403 (1992). In general, the exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court, whose ruling will not be disturbed absent abuse of discretion. *See, e.g., State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied,* — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied,* — U.S.—, 126 L. Ed. 2d 707 (1994). In light of the clear relevance of the telescope, as discussed above, the trial court did not abuse its discretion by failing to exclude the evidence pursuant to the Rule 403 balancing test. This assignment of error is overruled.

**[8]** Defendant next contends the trial court erred by prohibiting the medical examiner from testifying about the number of gunshots reported by a neighbor. During cross-examination defendant asked Dr. Gilliland whether she had any information as to about how many shots were heard by anyone. The State objected to the question, and the trial court sustained the objection. Outside the presence of the jury, Dr. Gilliland testified: "My notes reflect one of the deputies told me that [some neighbor told the deputy that the neighbor heard between three and five shots on the night of 3 April 1991]." Defendant contends the testimony was relevant to impeach the testimony of State's witness Lonnie Daniels, who had testified that he heard five gunshots in rapid succession and, upon cross-examination by defendant, that he did not recall telling anyone he had heard between three and five gunshots. Defendant contends that exclusion of such relevant evidence prejudiced his case because it suggested he was so in control of his faculties that he, with deadly precision, hit Dorothy Mae Smith with each shot fired, and thus undermined his defense that he was "high as a kite" on drugs or alcohol.

"The credibility of a witness may be attacked by any party, including the party calling him." N.C.G.S. § 8C-1, Rule 607 (1992).

> "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts of the case." Any circumstance tending to show a defect in the witness's perception, memory, narration or veracity is relevant to this purpose.

*State v. Looney*, 294 N.C. 1, 15, 240 S.E.2d 612, 620 (1978) (quoting Stansbury, *North Carolina Evidence*, Brandis Rev. §§ 38, 42, 44).

> Unless such impeachment is barred by constitutional principles, or by statute, or by a proper claim of privilege, a witness may be impeached by proof that on other occasions [he] has made statements inconsistent with [his] testimony. Such statements may have been made orally, either extrajudicially or as testimony at a former trial or hearing, or may have been in writing. . . .
>
> Inconsistency does not, *per se*, make statements admissible as substantive evidence or nullify the testimony of the witness. Inconsistent statements are admissible simply for the consideration of the jury in determining the witness's credibility. Hence

> they are not ordinarily admissible until the witness has testified to something with which they are inconsistent . . . .
>
> Inconsistent statements are not made inadmissible for impeachment because of some rule making them inadmissible as substantive evidence. . . . *[But] [t]he making of the statements must be proved by direct evidence and not by hearsay; and a witness may not be impeached by the inconsistent statements of someone else.*

1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 159, at 523-28 (4th ed. 1993) [hereinafter 1 *Broun on Evidence*] (emphasis added). "Proof of a prior statement by a witness who heard it at second hand would clearly be inadmissible." *Id.* § 159, at 528 n.411; *see State v. Whit*, 50 N.C. 224, 230-31 (1858) (improper for counsel, in order to contrast testimony of witnesses at current and former trials, to read to jury the report of the decision of the Supreme Court rendered on appeal from judgment at former trial).

Because the statement defendant alleges the witness made to the deputy relates to material facts in the testimony, namely, the number of gunshots heard on the night of the killing, it may be proved by others—the deputy, for example, or a bystander who overheard the witness make the statement to the deputy. *See* 1 *Broun on Evidence* § 161, at 531. However, defendant sought to prove the prior inconsistent statement by a witness who heard second hand from the deputy that a neighbor told the deputy the neighbor heard between three and five shots. Even assuming that that neighbor was Daniels, such secondhand proof is clearly inadmissible, and the trial court did not err in excluding it. This assignment of error is overruled.

Defendant next contends the trial court erred by failing to intervene *ex mero motu* to correct the prosecutor's grossly prejudicial closing arguments.

> "[C]ounsel [generally] will be allowed wide latitude in the argument of hotly contested cases. 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. Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court."

*State v. Brown*, 320 N.C. 179, 194, 358 S.E.2d 1, 12-13, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987) (quoting *State v. Huffstetler*, 312

N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985) (citations omitted)).

> "In capital cases . . . an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it."

*Id.* at 194-95, 358 S.E.2d at 13 (quoting *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761).

Defendant first complains specifically about the following remarks:

> Now, I'm going to tell you, folks, I didn't hear any of that evidence come from the witness stand. Why would he tell you this, why? Smoke. I mean, if he knows all this—I mean, I'd like for him to put a hand on the Bible, take an oath. He had every opportunity to get up here and tell it, if that is what he knows. He didn't do it.
>
> . . . .
>
> Why did he tell this? Why did he tell you that is what the evidence was going to be? You haven't heard it. And I know yesterday afternoon, certainly, when I stood up and said the State rests—Judge sent you out and you all came back in. The Judge said, All right, Mr. Evans [defense counsel], what is the showing for the defendant—I know you were surprised. I know you were. I was.
>
> Where is all this stuff, Mr. Evans? This case is a year since this murder occurred. Have you—he didn't know what the evidence was going to be? I mean, the co-defendant was tried several weeks ago. He would have you believe he and Mr. Duke weren't sitting here watching every bit of that trial.

Prior to these comments, the prosecutor had referred to the opening statement made by counsel for the defendant:

> He [defense counsel] said to you that there will be evidence that will show that Wesley Thomas Harris thought that there was cocaine in Dorothy Mae Smith's house and that he went and told

> [defendant] about it and said, you know, I'm going to go rob, go down there to Dorothy Mae Smith's house, this house that I think cocaine is in, and we are going to hide there. And when she comes, we are going to force her to go in the house and show us where the cocaine is. This is what he is telling you that the evidence is going to be. . . .
>
> He said that the evidence would show that Wesley dropped the defendant Ward off and came back later that afternoon and picked him up again. And then . . . the defendant . . . smoked some more cocaine. And that then they rode out there to the store, saw the deceased, Dorothy Mae Smith, still in the store and went and parked the car and got in the bushes. And that David Ward was high as a kite. . . . There ain't one scintilla of evidence about that.
>
> And then he goes on to say . . . that Wesley . . . pulled out a .32 and he gave [defendant] the bolt action [single shot Westpoint .22 caliber rifle] and that at that time the deceased . . . drives up in the driveway and she gets out of her car. And he, that is one or both of them, saw this gun, this .38 that she had, and they got scared. Well, did you hear any evidence of that?
>
> And that at that point Wesley pulled out the Ruger too.

**[9]** Defendant contends that by arguing that he failed to produce the forecasted evidence, the prosecutor was improperly commenting on the exercise of his right not to testify, because he is the only witness who could have produced that evidence. We disagree. Defendant was not the only witness who could have produced the forecasted evidence. Defendant himself argued that the evidence presented by the State, reasonable inferences therefrom, and gaps and deficiencies therein, supported defendant's version. Further, and defendant so concedes, the prosecutor directed the remarks at counsel for defendant and never commented directly on defendant's failure to testify or suggested that defendant should have or even could have testified. "The State may not comment upon the defendant's failure to testify but may draw the jury's attention to the failure of the defendant to produce exculpatory evidence or evidence to contradict the State's case." *State v. Erlewine*, 328 N.C. 626, 633, 403 S.E.2d 280, 284 (1991). We conclude that the prosecutor's remarks were not a comment on defendant's failure to testify, but fair and proper comments on defendant's failure to present any evidence. *See id.* (prosecutor argued "[t]here is a huge difference between denying and contradicting. . . . If you think about it . . . there is not one scintilla of evidence

to contradict anything, any testimony or any exhibits presented by the State in this case"; held, arguments were fair and proper commentary on defendant's failure to present any evidence); *State v. Roper*, 328 N.C. 337, 362, 402 S.E.2d 600, 614-15, *cert. denied*, — U.S. —, 116 L. Ed. 2d 232 (1991) (prosecutor argued that "[defendant] tells you—he says I've got a defense. He says it's self-defense. If he's got a self-defense, then let him present it"; noting that the prosecutor was responding to defendant's assertion that the State's case rested solely on a witness's testimony, the Court stated "it was not inappropriate for the prosecutor to point out that the witness to defendant's alleged acts of self-defense had not come forward to testify," and held the remarks were not a comment on defendant's failure to testify).

**[10]** Defendant also excepts to a portion of the prosecutor's closing argument in which he stated:

> I know that you couldn't help but see Mr. Seymour Smith sobbing, leaving the courtroom when he was saying . . . [the] evidence is going to show that they were there to force his wife to find cocaine in the house. And you saw the man walk out sobbing out of the courtroom. Wouldn't you at least expect him, after doing that, to put on some evidence to support it? There is something called principles. Right is right and wrong is wrong. . . .
>
> . . . .
>
> So with that in mind, I want to ask when you look over and you look at [defendant], do you think about what the State is trying to do to him, trying to convict him of first degree murder? I want you to consider, I want you to think what [defendant] did to Dorothy Smith. Every time it even arises up in your subconscious what is the State trying to do to this man, you think what he did to Dorothy Mae Smith. She's just forty-four years old. She's a young woman. Every second that has ticked since April 3, 1991 at 10:30, is one second he robbed her of, every second. And from now until some reasonable time when you think she should have died the natural death she deserved, it is another second.
>
> He's still here. He can look out the window and see the weather warming up, hear the birds chirping, and smell the flowers even through the bars of the jail. Dorothy Mae Smith won't smell any more flowers, not in this world anyway. She won't hear any more birds chirping. So if you ever have any feeling of sympathy for this man, you think about what he did to Dorothy Mae Smith.

> I guess we can just thank God of all the shots one did finish her off, one killed her, so she didn't have to lay there in her own blood, in her own driveway, waiting to die while these people—and I use the word very loosely—rummaged around in her belongings.
>
> . . . .
>
> [Defendant] showed her no mercy. He showed her family no mercy. Today for his defense—the only thing she has left is her memories. What is she going to be remembered of now? First of all, the lady that was shot down in her back yard. That's who she is. She's not Dorothy Mae Smith, wife of Seymour Smith, mother, anymore. . . . Now she is the lady shot down in her back yard who someone said had cocaine in her house. . . . It's not enough to kill her; you've got to ruin her memories.

Defendant contends the prosecutor improperly argued facts about the victim not supported by the evidence, argued personal opinion, and attempted to evoke sympathy for both the victim and the victim's family.

The jury's determination of guilt or innocence must be based on the evidence presented at trial and not upon any suggested accountability to the victim or the victim's family. *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989), *vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, — U.S. —, 116 L. Ed. 2d 174, *reh'd denied*, — U.S. —, 116 L. Ed. 2d 648 (1991). The jury should not focus upon mercy, prejudice, pity or fear, but upon guilt or innocence. *Brown*, 320 N.C. at 196, 358 S.E.2d at 13. The argument here, however, did not so grossly overstep the evidence, or amount to so grossly improper an appeal to the jury's sympathy for the victim or the victim's family, as to require the trial court "to recognize and correct '*ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.' " *Id.* (quoting *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761); *see State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976) (prosecutor's argument that the victim had been " 'a living, breathing human being, just like you and me, and he is gone forever now' was within the bounds of the record evidence"). Moreover, evidence supporting a finding of defendant's guilt was overwhelming, and therefore any impropriety in the remarks was not prejudicial. "In the absence of a showing of prejudice, prosecutorial misconduct in the form of improper jury argument does not require reversal." *State v.*

*Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985).

**[11]** Finally, within the same assignment of error, defendant excepts to statements by the prosecutor characterizing his case as "an ingenuity of counsel" and a "fairy tale." The prosecutor had prefaced his remarks by quoting *State v. Hammonds* on reasonable doubt:

> A reasonable doubt . . . is an honest, substantial misgiving, generated by the insufficiency of the proof. . . . It is not a doubt suggested by the *ingenuity of counsel*, or by your own ingenuity not legitimately warranted by the testimony, or one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him.

*State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954) (emphasis added). The prosecutor emphasized that the opening statement is not evidence but an outline of what counsel believes the competent and admissible evidence will show. The prosecutor then reminded the jury what defendant stated the evidence would show.

Considering the argument in context, it is apparent that the prosecutor was commenting on defendant's failure to present any of the forecasted evidence rather than unfairly denigrating the defense. *Cf. Covington*, 290 N.C. at 328-29, 226 S.E.2d at 641 (language that "[defense counsel] are supposed to do everything they can to sway your mind from justice in this case and get their clients off if they can" disapproved; argument was not supported by the evidence or the law). "The State . . . may draw the jury's attention to the failure of the defendant to produce exculpatory evidence or evidence to contradict the State's case." *Erlewine*, 328 N.C. at 633, 403 S.E.2d at 284. We hold that the remarks were fair and proper comment on defendant's failure to produce the forecasted exculpatory evidence or evidence to contradict the State's case. None of the arguments were so grossly improper as to require the trial court to intervene *ex mero motu*. This assignment of error is overruled.

### SENTENCING PHASE ISSUES

The trial court submitted one aggravating circumstance: that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) (1988). It submitted one statutory mitigating circumstance: that defendant aided in the apprehension of another capital felon, N.C.G.S. § 15A-2000(f)(8) (1988). It submitted fourteen non-statutory

mitigating circumstances, as follows: the defendant confessed guilt to, and cooperated with, law enforcement officers the day following the crime; after the arrest of the defendant, he freely and voluntarily waived his right to remain silent, have an attorney present at any questioning and have an attorney appointed to represent him during any questioning by law enforcement officials; the plan to commit crimes against the victim was not raised or planned by the defendant; the defendant has a history of addiction to drugs and/or alcohol; the defendant used cocaine on the date of the crime; the defendant has less than average intelligence; the defendant was in special education in school; the defendant lost his father when he was fifteen years old; the defendant has been a person with substantial family ties and continues to have support from family members; the defendant was reared as one of eight children and worked to assist his family; the defendant is a loving father and enjoys a good relationship with his daughter; the defendant has done several things during his life to help his immediate family and collateral relatives; the defendant has financially supported his mother and daughter; and any other circumstance or circumstances arising from the evidence which the jury finds to have mitigating value, N.C.G.S. § 15A-2000(f)(9) (1988).

**[12]** Defendant contends the trial court erred by sustaining the State's objection to testimony defendant elicited from Dr. Patricio Lara, a forensic psychiatrist at Dorothea Dix Hospital who, pursuant to a special court order, examined defendant for purposes of determining his competency to stand trial. After being properly qualified as an expert in the field of forensic psychiatry, Dr. Lara testified, first, that such evaluations consisted of initial interviews, physical examinations, and other tests needed to clarify diagnosis, including neurological evaluations if there were questions of head injury or brain damage; around-the-clock observation, for a period of, on average, two to three weeks, but not more than sixty days; investigation of the patient's background, previous treatments, medical records, etc.; and an understanding of the pending charges and circumstances of the alleged crime. Dr. Lara testified that the evaluation of defendant included a routine physical examination, routine laboratory tests (urine analysis, blood tests, screening for hepatitis, etc.), and psychological testing that involved assessment of intellectual skills, screening for possible organic brain impairment, a general personality diagnostic assessment with projective drawing test, a Bender gestalt, incomplete sentence blank test, and interviews. Dr. Lara opined, based, *inter alia*, upon interviews with the patient, that there

were findings consistent with drug addiction. "The findings during interview [sic], the type of behavior presented, again, would be consistent with a person who has presented addiction and was, at the time, under no direct access to drugs." Further, Dr. Lara opined that the elevated liver enzyme levels blood tests disclosed were consistent with both alcohol or drug abuse and acute hepatitis. Although "liver enzyme elevation [from] substance abuse is [generally] mild and not of this severity, . . . [he] could not rule out absolutely that this could [not] have been caused by alcohol or substance abuse."

Defendant, however, was not permitted to elicit from Dr. Lara the content of the conversations between Dr. Lara and defendant that may have formed the basis, in part, for this opinion:

> [DEFENSE COUNSEL]: Did you determine whether or not he is a drug abuser?
>
> DR. LARA: *He reported to me that he was.*
>
> [PROSECUTOR]: Objection.
>
> COURT: Sustained.
>
> . . . .
>
> [DEFENSE COUNSEL]: *Was he able to remember what happened the night of the crime?*
>
> DR. LARA: NO.
>
> [PROSECUTOR]: Objection.
>
> COURT: Sustained.

Defendant contends he was entitled to have the jury know the factual bases for Dr. Lara's opinions, as well as the opinions themselves, even though the opinion is derived in whole or in part through information received from another, including the patient-defendant. We agree.

> A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. . . . If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.

*State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979).

The trial court properly admitted Dr. Lara's opinion. Dr. Lara was not a treating psychiatrist but, upon special order of the court, he conducted a thorough and professional examination of defendant. Apparently, "he took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it." *Id.* at 463, 251 S.E.2d at 412; *see also State v. Franks*, 300 N.C. 1, 6-9, 265 S.E.2d 177, 180-82 (1980) (a psychiatrist who conducted thorough and professional examination of defendant could properly give an opinion based on personal knowledge, although the psychiatrist was not treating defendant in an effort to cure him, but observed, evaluated and diagnosed defendant to prepare himself to testify at defendant's trial).

Having admitted Dr. Lara's findings and diagnosis, the trial court also should have allowed him to testify as to the content of the conversations with defendant in order to show the basis for his diagnosis. We have stated the reason for allowing such testimony as follows:

> "In the same vein to allow a psychiatrist as an expert witness to answer without any explanation . . . would impart a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it. Therefore the psychiatrist should be allowed to relate what matters he necessarily considered as a 'case history' not as to indicate the ultimate truth thereof, but as one of the bases for reaching his conclusion, according to accepted medical practice. The court should therefore exercise care in the manner in which such testimony is elicited, so that the jury may understand that the case history does not constitute factual evidence, unless corroborated by other competent evidence."

*Wade*, 296 N.C. at 463-64, 251 S.E.2d at 412 (quoting *State v. Griffin*, 99 Ariz. 43, 49, 406 P.2d 397, 401 (1965)); *see also* N.C.G.S. § 8C-1, Rule 803(4) *Commentary* ("Under current North Carolina practice, statements of past condition made by a patient to a treating physician or psychiatrist, when relevant to diagnosis or treatment and therefore inherently reliable, are admissible to show the basis for the expert's opinion."). Therefore, the trial court erred in refusing to allow Dr. Lara to testify as to the content of his conversations with defendant in order to show the basis for his diagnosis.

Any error, however, was harmless. Substantially the same information came in when Dr. Lara testified about a history of substance abuse:

> The fact that he had a supposed *history of substance abuse* would be another way [in addition to the stressful situation of being charged with murder, being incarcerated, and being under a period of observation, and underlying personality difficulties] to explain [defendant's irritability, tenseness, and difficulty coping with the ongoing process of the trial]. A person, after stopping substance abuse, has to face difficulties and cope without the assistance of medication. . . . Frequently, people with substance abuse become quite irritable, and have coping difficulties after they stopped using the drug.

He later testified: "The only opinion we could express, based on the information we had from other sources, was *the history obtained that he had been involved in drug abuse.*" On re-direct examination, Dr. Lara testified that he diagnosed possible cocaine or alcohol addiction *based on defendant's history.* Further, considering defendant's confession to law enforcement officers the day after the shooting, no reasonable juror would have given any weight to defendant's statement to Dr. Lara that he was unable to remember what happened the night of the crime. The error probably redounded to defendant's benefit. This assignment of error is overruled.

**[13]** Defendant next contends the trial court erred by refusing to submit the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Impaired mental capacity would exist "if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished)." *State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979). " 'When evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in 15A-2000(b) to submit that circumstance to the jury for its consideration.' " *State v. Price*, 331 N.C. 620, 632, 418 S.E.2d 169, 175-76 (1992) (quoting *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991)), *vacated on other grounds*, — U.S. —, 122 L. Ed. 2d 113, *on remand*, 334 N.C. 615, 433 S.E.2d 746 (1993), *vacated on other grounds*, — U.S. —, 129 L. Ed. 2d 888 (1994). "The test for sufficiency of evidence to support

submission of a statutory mitigating circumstance is whether a jury could reasonably find that the circumstance exists based on the evidence." *Id.* at 632, 418 S.E.2d at 176. Defendant contends there was sufficient evidence of his impaired mental capacity to submit this mitigating circumstance for consideration by the jury. We disagree.

The basis for the submission of this circumstance was the testimony of defendant's sister that defendant had smoked crack on 1 April 1991, some two days before the shooting, and that she found a soda bottle behind a chair in her mother's house which appeared to have a residue of crack on it. She concluded that defendant smoked the crack because she knew her other siblings did not. Larry Perry testified that he saw defendant smoke an unspecified amount of cocaine with Harris in Harris' car around 2:00 p.m. on 3 April 1991, some eight hours before the killing. Perry parted company with them after some five minutes of watching them smoke, and joined them again thirty minutes later. Defendant's sister testified that she saw him later that afternoon at their mother's house. He was playing with her children, eating cookies, and watching television until he left the house at 9:00 p.m., within one-and-one-half hours of the shooting. "He acted normal. . . . He wasn't acting crazy." Defendant returned later that night, picked up some clothes, and got a ride to his girlfriend's house. Defendant's sister also testified that she thought there was one time when he was doing drugs, sometime in 1984, when he was hollering and acting foolish; and again in 1990 when he was walking into pictures. Defendant's mother testified that she never saw defendant take drugs in her house.

Dr. Lara testified for defendant that, based on an interview and the type of behavior presented, there were findings consistent with drug addiction. Elevated liver enzymes were consistent with either drug or alcohol abuse or acute hepatitis, but more likely acute hepatitis because of the severity of the elevation. However, a history of substance abuse might explain defendant's irritability and tenseness; a person, after stopping substance abuse, has to face difficulties and cope without the assistance of drugs or alcohol. Although he was defendant's own expert witness, however, Dr. Lara could not conclude unconditionally that defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired. Rather, he testified:

> [T]he available history obtained from the prosecution, and the patient's attorney, and [the patient] himself, included no features

> that would suggest impairment to his ability to understand the criminality of the act he's accused of. His condition, particularly if the court finds satisfactory evidence that he was involved not only in the effects of cocaine or alcohol that particular day but also if evidence is presented to the satisfaction of the court that this is an ongoing addiction pattern, the opinion would be that those features would represent restriction to an individual's ability to conform his actions within limits of the law.

Although the evidence tended to show that defendant historically abused drugs, there was no evidence that would support an inference that defendant's mental capacity was impaired at the time of the murder. That defendant smoked an indeterminate amount of crack cocaine over the course of, at most, one-half hour, more than eight hours before he committed the murder, considered in light of the testimony of defendant's sister that he was acting "normal" within one-and-one-half hours of the murder, is not sufficient evidence to show diminished capacity to appreciate the criminality of his conduct or to follow the law and refrain from engaging in the illegal conduct. *Cf. Price*, 331 N.C. at 632, 418 S.E.2d at 176 (testimony by psychologist that "defendant's manic-depression, exacerbated by drugs defendant said he was taking around the time of the murder, 'would indeed have put severe limitations on his ability to make judgments, have appropriate mood responses, conform to the law and basically be properly in touch with reality,' " when considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, held to allow a reasonable inference that defendant's capacity to appreciate the criminality of his conduct was impaired); *State v. McLaughlin*, 330 N.C. 66, 68-70, 408 S.E.2d 732, 733-34 (1991) (evidence of I.Q. of seventy-two, and ingestion of marijuana, wine, beer, and "two hits of acid" on the day of the killing held sufficient; "[t]he jury could have found that a person who had ingested this quantity of drugs and alcohol had his judgment impaired and such impairment had affected his ability to appreciate the criminality of his conduct"); *State v. Allen*, 323 N.C. 208, 230, 372 S.E.2d 855, 868 (1988) (evidence that defendant was a heroin user and had taken a drug three or four hours before the shooting, that defendant had taken drugs the day before the shooting and "felt bad," that defendant experienced withdrawal symptoms, was sick and requested a doctor, and that there were beer cans in the van in which defendant was riding, held insufficient to support submission; "[t]he fact that defendant may have taken a drug several hours before the shooting or that he may have

drunk some beer is not sufficient alone to show diminished capacity"), *vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 775, *reh'g denied*, — U.S. —, 123 L. Ed. 2d 503 (1993); *State v. Stokes*, 308 N.C. 634, 654-55, 304 S.E.2d 184, 196-97 (1983) (evidence that defendant had been treated at young age for mental problems, that he had an I.Q. of sixty-three, that by age ten he was being treated for unsocialized aggressive behavior and borderline mental retardation, that he had been unsuccessfully treated with medication for these conditions, and that he had antisocial personality disorder, held sufficient to support submission of circumstance); *Johnson*, 298 N.C. at 375, 259 S.E.2d at 764-65 (evidence of long-standing condition of schizophrenia, considered with evidence that suggested an event which triggered condition at time of murder, held sufficient). Therefore, we hold that the trial court properly refused to submit this mitigating circumstance to the jury. This assignment of error is overruled.

**[14]** Within this same assignment of error, defendant also contends the trial court erred in refusing to submit as possible non-statutory mitigating circumstances that (1) defendant's capacity to make and carry out plans on the day of the crime was impaired, and (2) the influence of drugs greatly affected defendant's participation in the crime. We disagree.

> In order for defendant to succeed on this assignment, he must establish that (1) the nonstatutory mitigating circumstance is one which the jury could reasonably find had mitigating value, and (2) there is sufficient evidence of the existence of the circumstance to require it to be submitted to the jury. Upon such showing by the defendant, the failure by the trial judge to submit such non-statutory mitigating circumstances to the jury for its determination raises federal constitutional issues.

*State v. Benson*, 323 N.C. 318, 325, 372 S.E.2d 517, 521 (1988) (footnote omitted). There is no evidence tending to support either of these proposed mitigating circumstances. As noted above, defendant was seen smoking crack by his sister on 1 April 1991, two days before the killing. He was seen smoking an indeterminate amount of crack in a car with Harris at about 2:00 p.m. on the day of the killing, over eight hours before the event. Later, in the evening of the same day, he was observed playing with his sister's children in a normal manner within an hour-and-a-half of the shooting. He did not suffer from psychosis,

clinical depression, or any other disorders. He had elevated liver enzymes that were consistent with either acute hepatitis or drug abuse, but physicians never ruled out hepatitis. Defendant had an I.Q. of eighty-five, slightly below normal. He was a slow learner while in school, or learning disabled, but not even mildly retarded. Significantly, defendant's own expert witness, Dr. Lara, opined that defendant had the capacity to make and carry out plans on the day of the killing: "I base this on the description of the actions. . . . The person that committed that crime indicated, through the acts committed, that it was a person capable to formulate some planning and some coordinated behavior." Nothing in the evidence would permit the jury to speculate as to the effect of drugs on defendant's participation in the killing. Therefore, we conclude that the trial court did not err by refusing to submit these nonstatutory mitigating circumstances.

**[15]** By another assignment of error, defendant contends that the trial court erred by refusing to submit the statutory mitigating circumstance that defendant was under the influence of mental or emotional disturbance when the murder was committed, N.C.G.S. § 15A-2000(f)(2) (1988). We disagree.

The asserted basis for the submission of this circumstance was the testimony of Dr. Patricio Lara, the forensic psychiatrist who conducted a pretrial evaluation of defendant to determine his competency to stand trial. Dr. Lara testified for defendant that defendant was of average intelligence; that defendant was not psychotic, although he did demonstrate an episode of agitation where he was suspicious and fearful of being harmed by others upon discharge from Dorothea Dix Hospital; that defendant suffered no organic hallucinations related to organic impairment of the brain; that his irritability and tenseness suggested underlying personality difficulties that made him have particular trouble coping with the murder charges; or, further, given his supposed history of substance abuse, his irritability and tenseness arose from his then lack of access to drugs or alcohol, forcing him to face difficulties and cope without assistance of the previously available drugs or alcohol; or, further still, his irritability and tenseness arose from probable feelings of a hopeless and depressive mood, but defendant was not clinically depressed. Dr. Lara also testified that defendant presented shortcomings in his self-awareness and insight, but his understanding of his surroundings and the reality he was living with was not impaired; and that he was capable of making and carrying out plans the night of the killing, based on the description of his actions that night. Dr. Lara pointedly refused to opine that defend-

ant was under the influence of mental or emotional disturbance the night he committed the murder, stating rather that "as far as I can contribute from a medical viewpoint" defendant was under the influence of some drugs or alcohol. On cross-examination, Dr. Lara testified that defendant was a "person with a short fuse." On redirect examination, he explained that

> [a] person who has underlying personality difficulties and has not reached the level of maturity and seasoning of his character will . . . handle adverse situations poorly, would respond in a rather abrupt way, will not measure the consequence of his emotional response and would tend to have also impulsive conduct.

Defendant also points to evidence that he had a history of drug addiction and that he had smoked some indeterminate amount of crack cocaine eight hours before the murder.

This evidence did not sufficiently show that defendant was under the influence of a mental or emotional disturbance at the time he committed the murders. Without evidence suggesting a link between defendant's mental condition and substance abuse,

> voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a mental or emotional disturbance under G.S. 15A-2000(f)(2). Voluntary intoxication, to a degree that it affects defendant's ability to understand and to control his actions . . . is properly considered under the provision for impaired capacity, G.S. 15A-2000(f)(6).

*State v. Irwin*, 304 N.C. 93, 106, 282 S.E.2d 439, 447-48 (1981). Inability to control one's drug habits or temper is neither mental nor emotional disturbance as contemplated by this mitigating circumstance. *Cf. State v. Moose*, 310 N.C. 482, 498-99, 313 S.E.2d 507, 518-19 (1984) (trial court did not err by failing to submit mental or emotional disturbance circumstance where evidence only showed that the defendant's temper controlled his reason, especially when he consumed alcohol, and where circumstance of history of alcohol abuse was submitted and found); *Stokes*, 308 N.C. at 654-55, 304 S.E.2d at 196-97 (evidence that defendant had been treated at young age for mental problems, that he had an I.Q. of sixty-three, that by age ten he was being treated for unsocialized aggressive behavior and borderline mental retardation, that he had been unsuccessfully treated with medication for these conditions, and that he had antisocial personality disorder, held sufficient to support submission of circumstance);

*State v. Pinch*, 306 N.C. 1, 28-29, 292 S.E.2d 203, 224-25, *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) (testimony of psychiatrist that defendant had psychological problems, was a very passive person who exhibited some chronic depression, was mildly depressed due to incarceration and the fact that he was facing two charges of murder, was not basically a violent person, that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence," and no evidence of any thought disorder, held insufficient to show defendant was under the influence of mental or emotional disturbance), *overruled on other grounds by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994) *and by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988). We hold, therefore, that the trial court did not err by refusing to submit the mitigating circumstance that defendant was under the influence of mental or emotional disturbance at the time he committed the murder.

Even assuming *arguendo* that the evidence tended to support these four omitted statutory and non-statutory mitigating circumstances, we conclude that any error was harmless beyond a reasonable doubt. The jurors must have considered the evidence when they considered and found the catch-all mitigating circumstance properly submitted pursuant to N.C.G.S. § 15A-2000(f)(9), and when they considered but rejected the five other non-statutory mitigating circumstances dealing with defendant's alleged mental condition and substance abuse: the plan to commit crimes against the victim was not raised or planned by defendant; defendant had a history of addiction to drugs and/or alcohol; defendant used cocaine on the date of the crime; defendant had less than average intelligence; and defendant was in special education in school. It is inconceivable that, having rejected the evidence as to all other mitigating circumstances dealing with defendant's mental conditions and substance abuse, the jury would have accepted this evidence and found that defendant was under the influence of mental or emotional disturbance when he committed the murder. Thus, any such error did not prevent any juror from considering and giving weight to the mitigating evidence, and therefore was harmless beyond a reasonable doubt. *See State v. Green*, 336 N.C. 142, 185-86, 443 S.E.2d 14, 39 (1994).

For these reasons, we reject defendant's arguments and overrule these assignments of error.

**[16]** Defendant next contends the trial court erred by refusing to allow him to present evidence concerning the life sentence received by co-participant Harris and to submit this proposed mitigating circumstance to the jury. Defendant concedes that we have decided this issue adversely to his position in *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), where we stated:

> The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. *See State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 [(1981)]. The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed. 2d 973 (1978). It bears no relevance to these factors, and thus there was no error in the judge's refusal to submit it to the jury.

*Id.* at 687, 292 S.E.2d at 261-62. "Further, G.S. 15A-2000(d) provides for review by this [C]ourt to ensure that a death sentence, when imposed, is not excessive or disproportionate to the penalty imposed *in similar cases*." *Irwin*, 304 N.C. at 104, 282 S.E.2d at 447 (emphasis added) (evidence of plea bargain and sentencing agreement between the State and a co-defendant was irrelevant and properly excluded from the jury's consideration as a mitigating circumstance, because such evidence had no bearing on defendant's character, record, or the nature of his participation in the offense).

Defendant requests that we reconsider that holding in light of the decision in *Parker v. Dugger*, 498 U.S. 308, 112 L. Ed. 2d 812, *reh'g denied*, 499 U.S. 932, 113 L. Ed. 2d 271 (1991). In that case, the United States Supreme Court held that, after striking two aggravating circumstances, the Florida Supreme Court acted arbitrarily by affirming the defendant's death sentence without considering the mitigating circumstances found by the trial judge, one of which was more lenient sentencing for the perpetrator of the crime. *Id.* at 322, 112 L. Ed. 2d at 827. Defendant contends the Supreme Court thus impliedly held that the sentence received by a co-defendant is relevant evidence in mitigation as a matter of federal law, and therefore that the evidence should have been admitted in his case. We disagree.

Under Florida law evidence of more lenient sentencing for the perpetrator may be submitted and considered in mitigation. *Id.* at

315, 112 L. Ed. 2d at 822 (citing *Malloy v. State*, 382 So. 2d 1190, 1193 (1979)). The Supreme Court simply recognized this to be the law in Florida and concluded that "[t]he trial judge must have at least taken this evidence into account before passing sentence." *Id.* It did not address the underlying rationale of *Williams* or otherwise suggest that exclusion of such evidence was improper as a matter of federal law.

We continue to adhere to our decision in *Williams*. This assignment of error is overruled.

**[17]** Defendant next contends the trial court erred by allowing the prosecutor to elicit testimony concerning defendant's failure to testify at the trial of his co-participant and to comment upon that testimony during closing arguments. Evidence presented during the guilt-innocence phase showed that defendant confessed to the crimes on 4 April 1991 and rendered assistance to law enforcement officers with regard to locating the money stolen, the weapons used, and the co-participant, Harris. During cross-examination of courtroom clerk Susan Clark, whom defendant called to testify that Harris was a capital felon for the purpose of establishing existence of the statutory mitigating circumstance that defendant aided in the apprehension of a capital felon, N.C.G.S. § 15A-2000(f)(8), the following exchange occurred:

> [PROSECUTOR]: In the course of the trial of Wesley Thomas Harris, is it not true that this defendant, David Ward, was called as a witness and refused to testify?
>
> [DEFENSE COUNSEL]: Objection.
>
> COURT: Overruled.
>
> MS. CLARK: Yes, sir.
>
> [DEFENSE COUNSEL]: We move to strike her answer.
>
> COURT: Motion denied.

The prosecutor commented upon the testimony during closing argument as follows:

> There is something else. There is one other little piece . . . to this puzzle. You remember Suzie Clark. The lady who was the Clerk of Court, Deputy Clerk, Assistant Clerk, came up there and testified for the defendant under his mitigating circumstances. And on cross-examination I asked her, well, now isn't it true that

> the defendant in this case was called as a witness in the trial of the co-defendant? Yes. And isn't it true that he refused to testify? Yes.
>
> I mean, folks, let's put things into perspective. You know what they say, proof is in the pudding, talk is cheap. April 4th, sure, yeah, you've got me. This is what I did. That's the other guy. That's where the guns are. Come to court, call you around as a witness, refuse to testify. What weight? What real weight do you put on his cooperation? Wouldn't you love to—sure, he got up there on the stand, pointed the other defendant out, was instrumental in the conviction of the co-defendant. No, no, you didn't hear that. Refused to testify.

Defendant contends the prosecutor thus improperly elicited, and during closing arguments commented upon, the testimony about defendant's exercise of his Fifth Amendment privilege against self-incrimination, which encompasses the prohibition upon comment by the State regarding defendant's failure to take the stand. *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106, *reh'g denied*, 381 U.S. 957, 14 L. Ed. 2d 730 (1965).

Assuming *arguendo* that this was constitutional error under *Griffin*, the State has carried its burden of showing that any error in eliciting or commenting upon the testimony was harmless beyond a reasonable doubt. The prosecutor vigorously argued during closing arguments that the fact that defendant was called as a witness but refused to testify in Harris' trial was significant because it obviated the mitigating value of the evidence that defendant rendered assistance to law enforcement officers to effect the apprehension of Harris. The jury, however, rejected this argument and found both the statutory mitigating circumstance dealing with defendant's assistance rendered—that defendant aided in the apprehension of a capital felon—and the other, more specific nonstatutory mitigating circumstance submitted in this regard—that defendant confessed guilt to, and cooperated with, law enforcement officials the day following the crimes. For this reason, we conclude that any error was harmless beyond a reasonable doubt. This assignment of error is overruled.

**[18]** In his next assignment of error, defendant basically contends the trial court erred by instructing the jury that it could exclude mitigating evidence from its consideration if it deemed the evidence to have no mitigating value. The trial court instructed as follows:

> You should also consider the following circumstances arising from the evidence which you find to have mitigating value. If one or more of you find by a preponderance of the evidence that any of the following circumstances exist and also are deemed by you to have mitigating value, you would so indicate by having your foreperson write "yes" in the space provided.
>
> If none of you find the circumstance to exist or if none of you deem it to have mitigating value, you would so indicate by having your foreperson write "no" in that space.

These instructions were given for all of the nonstatutory mitigating circumstances submitted. Defendant contends the trial court unconstitutionally permitted the jury to exclude relevant mitigating evidence from its consideration.

We have decided this issue adversely to defendant's position in *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), where we stated:

> The language of the instructions clearly permits and instructs the jury to consider any evidence of the nonstatutory mitigating circumstances, as required by *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973, and *Eddings v. Oklahoma*, 455 U.S. 104, 71 L. Ed. 2d 1 (1982). As this Court noted in *State v. Fullwood*, however, "neither *Lockett* nor *Eddings* requires that the sentencer must determine that the submitted mitigating circumstance has mitigating value." *Fullwood*, 323 N.C. at 396, 373 S.E.2d at 533.

*Id.* at 117, 443 S.E.2d at 325. We find no compelling reason to depart from our prior holding. This assignment of error is overruled.

**[19]** Defendant next contends the trial court erred by failing to recognize and correct *ex mero motu* the prosecutor's grossly prejudicial closing arguments at sentencing.

> "[C]ounsel will be allowed wide latitude in the argument of hotly contested cases. [Citation omitted.] 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. [Citation omitted.] Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court."

*Brown*, 320 N.C. at 194, 358 S.E.2d at 12-13 (quoting *Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123). Although defendant raised no objection at trial,

> "[i]n capital cases . . . an appellate court may review the prosecution's argument, . . . but the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it."

*Id.* at 194-95, 358 S.E.2d at 13 (quoting *Johnson*, 298 N.C. at 369, 259 S.E.2d at 761).

Defendant takes exception to the prosecutor's argument that, he contends, was clearly intended to evoke sympathy for the victim and her family, as illustrated by the following:

> This was a living breathing woman, you know, who I suggest to you had the same desires to live that each of you have, you know, that April of last year; certainly looked forward to the spring, flowers, warm weather, and living a productive life.
>
> Folks, she didn't deserve to die like that. . . . You know, maybe in an automobile accident, cancer, heart disease, but I mean, to be gunned down in her own back yard, no warning, no chance. As I say, shot down like a dog. And for what reason? . . . Money, greed. That's the value that this defendant placed on the life of Dorothy Mae Smith. I suggest to you in deciding what the appropriate punishment to recommend for this defendant, for you speak as the conscience of Pitt County.
>
> What benefits did society enjoy because Dorothy Mae Smith was alive for forty-four years? Her husband, or son? . . . What has society lost because she was killed and taken from us . . . ?
>
> . . . .
>
> . . . I don't care how close you are to someone, time passes; and if that person is not still there to generate events that cause memories, then memories fade. . . . That's what David Ward took from these people.

The argument, if improper, was not so grossly so as to require the trial court to intervene *ex mero motu*.

**[20]** Defendant also takes exception to the argument:

> This is a man with a short fuse. I suggest to you this is a man that can kill again. . . .
>
> . . . .

> I don't know that executing David Ward will ever make anyone think twice about committing murder. It may or may not deter a murder. That's not the issue here today. But it would doggone sure deter David Ward. I can guarantee you that he will never commit another murder. Now are you willing to say he won't if you give him life?

Defendant contends the prosecutor appealed to the jury to recommend the death penalty as a deterrent to his killing again, thus improperly appealing to the jurors' passions, prejudices and fears. We disagree. We have held such specific deterrence arguments proper. *Syriani*, 333 N.C. at 397, 428 S.E.2d at 144 (specific deterrence argument, "He's killed now. The only way to insure he won't kill again is the death penalty," not improper); *State v. Zuniga*, 320 N.C. 233, 268-69, 357 S.E.2d 898, 920-21 (1987) (specific deterrence argument, "Justice is making sure that [defendant] is not ever going to do this again," not improper), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), *denial of post-conviction relief reversed*, 336 N.C. 508, 444 S.E.2d 443 (1994). The argument in this case likewise was not improper. This assignment of error is overruled.

**[21]** Defendant next contends the trial court erred by admitting testimony about his prior convictions. Defendant offered evidence that he had been a good son, sibling, and father. He had worked to earn money for the family since the age of eight; he had always helped his brother, his blind grandmother, and his uncle; he had a good relationship with his daughter; and he had supported his family financially. The State cross-examined his mother about his prior convictions, specifically, about his breaking into a local restaurant and his stealing of guns, microphones, jewelry, liquor, and other property; breaking into a local car dealership and stealing an automobile; breaking into a local restaurant and stealing gloves, keys and other items; forging checks on a local lumber company's account; and stabbing his sister's boyfriend. Defendant contends the State may only rebut his evidence with specific character evidence that he was not a loving and responsible son, sibling, or father. We disagree.

> Our capital sentencing statute not only permits but requires juries to determine the sentence guided "by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson*, 298 N.C. at 63, 257 S.E.2d at 610. This statute, however, limits the state in its case in chief to proving only those aggravat-

> ing circumstances listed in section (e). Bad reputation or bad character is not listed as an aggravating circumstance. Therefore the state may not in its case in chief offer evidence of defendant's bad character. A defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in section (f) of the statute. *State v. Johnson*, 298 N.C. at 72-74, 257 S.E.2d at 616-17. Often this may be evidence of his good character. The state should be able to, and we hold it may, offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence, including defendant's good character.

*State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981) (footnote omitted). As in *Silhan*, defendant proffered evidence of his good character "tending to show [him] to be, generally, a good person by those most intimately acquainted with him." *Id.* The State was entitled to rebut this good character evidence with evidence of specific instances of other crimes, wrongs or acts by the defendant. "Both the state and defendant are entitled to a fair sentencing hearing, and the jury is entitled to have as full a picture of a defendant's character as our capital sentencing statute and constitutional limitation will permit." *Id.*

In the alternative, defendant contends that only the record evidence of prior crimes, and not the circumstances of those crimes, should have been admitted. We disagree. "Consistent with prior decisions of this Court, the State is entitled to present witnesses in the penalty phase of the trial to prove the circumstances of prior convictions and is not limited to the introduction of evidence of the record or conviction." *Roper*, 328 N.C. at 365, 402 S.E.2d at 616. "[E]vidence of the circumstances of prior crimes is admissible to aid the sentencer." *Id.* at 364, 402 S.E.2d at 615-16. This assignment of error is overruled.

**[22]** By his final assignment of error, defendant contends the trial court erred by denying his motion for a mistrial after his profane outburst during the State's cross-examination of his mother about his prior convictions. Defendant stood, and the following exchange occurred:

DEFENDANT: This is my mother f——— life you are talking about.

> COURT: Mr. Evans and Mr. Duke, you need to caution your client about any further outburst in this courtroom. They will not be tolerated, sir.
>
> [DEFENSE COUNSEL]: Yes, sir, we will. In fact, excuse me.
>
> COURT: Ladies and gentlemen of the jury, you may be excused for one second if you will.
>
> (All members of the jury retired to the juryroom . . . .)
>
> COURT: Mr. Ward, these proceedings are going to continue, sir, with or without your presence in here. I want you to understand that.
>
> DEFENDANT: Well, if you want to know my whole record, why don't you tell me what it is? Why not put me on the witness stand and let me tell it?
>
> COURT: These are not questions, sir. This is a statement to you. Now either you are going to sit here and be quiet or I'll have you removed.
>
> DEFENDANT: Why don't you ask me, mother f——? If he wants to know about my mother f—— record, let him put me on the stand and I'll tell him about it. Why don't you let me, mother f-----?

Defendant was removed from the courtroom, and the court recessed for fifteen minutes. Defendant was brought back to the courtroom handcuffed and shackled for security purposes. The jury had not yet returned. The trial court ordered that, for the duration of the proceedings, defendant be brought in prior to the jury and remain seated until after the jury had been discharged, so that the jury would not see the handcuffs and shackles.

Counsel for defendant then made a motion for mistrial on the ground that the questions asked of Mrs. Ward about defendant's prior convictions were improper. The trial court denied the motion. Defendant contends the outburst instilled fear of him in the jury, and draws our attention to the prosecutor's argument, "This is a man with a short fuse. I suggest to you this is a man that can kill again."

> 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. Ordinarily, denial of a motion

for mistrial will not be disturbed on appeal absent a showing of abuse of the trial court's discretion.

*Laws*, 325 N.C. at 105, 381 S.E.2d at 623 (citations omitted). We conclude that the trial court did not abuse its discretion by denying defendant's motion for mistrial. As we concluded above, the questions asked of Mrs. Ward about defendant's prior convictions were proper to rebut defendant's good character evidence offered in mitigation. If defendant was prejudiced, it was because of his own misconduct at trial, and he cannot now be heard to complain. Further, after defendant's outburst, the court acted promptly and decisively to restore order by excusing the jury and allowing a short recess to dispel emotions. *Cf. State v. Bonney*, 329 N.C. 61, 75-76, 405 S.E.2d 145, 153 (1991) (trial court did not abuse its discretion by denying motions for mistrial on grounds of improper questions which provoked defendant, and subsequent outburst by defendant, even though trial court deemed questions improper). This assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises five additional issues which he concedes this Court has decided against his position: (1) the trial court erred by limiting defendant's access to pretrial discovery, thereby violating his due process rights; (2) the North Carolina death penalty statute is unconstitutional, is applied in a discriminatory manner, and allows unconstitutionally impermissible discretion; (3) the short-form indictment under N.C.G.S. § 15-144 violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, §§ 19, 22, and 23 of the North Carolina Constitution, and N.C.G.S. § 15A-924(a)(5); (4) the trial court erred by denying defendant's motion for the State to disclose those aggravating circumstances upon which it would rely during the capital sentencing proceeding; and (5) the process of "death qualifying" the jury violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, § 19 of the North Carolina Constitution.

We have considered defendant's arguments on these issues, and we find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

**[23]** Having found no error in the guilt and sentencing phases, we are required by statute to review the record and determine (1) whether

the record supports the jury's finding of the aggravating circumstance upon which the sentencing court based its sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

We conclude that the record supports the jury's finding of the aggravating circumstance submitted to it: that the murder was committed for pecuniary gain. N.C.G.S. § 15A-2000(e)(6) (1988). 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 and determine "whether the [death] sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both 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 by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). It is our purpose in proportionality review "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury," *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988), and to serve as "a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980).

> [W]e use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

*State v. Bacon*, 337 N.C. 66, 104, 446 S.E.2d 542, 562 (1994) (quoting *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983)). We consider only those cases "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).

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence is excessive or disproportionate.

*Id.*

This case involves a particularly cold, calculated, unprovoked and passionless killing committed to obtain the meager proceeds from the small convenience store the victim owned. Defendant determined some time prior to the killing that he was going to rob and perhaps kill Dorothy Mae Smith, spent the day of the killing riding around with his co-participant, and when night came, armed himself with a semi-automatic rifle equipped with a telescope for better sighting and hid in the bush outside the backdoor of the victim's house. When Dorothy Mae Smith got out of her truck, defendant did not demand her possessions, but simply started shooting. Dorothy Mae Smith suffered at least three non-fatal wounds before she was rendered unconscious by a fatal wound to the head, severing the brain stem, from a shot fired from the semi-automatic rifle. Harris picked up the plastic bag containing the money box and ran with defendant to their waiting car, discarding the few personal items belonging to the victim along the driveway.

The jury returned a verdict finding defendant guilty of first-degree murder upon the theories of lying in wait, premeditation and deliberation, and felony murder. It found the only aggravating circumstance submitted—that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6)—and only three mitigating circumstances—that defendant aided in the apprehension of another capital felon, that defendant confessed guilt to, and cooperated with, law enforcement officers the day following the crime, and that it was never proven as to which firearm defendant fired on 3 April 1991. It refused, however, to find, *inter alia*, that the plot to commit crimes against the victim was not raised or planned by defendant; that after the arrest of defendant, he freely and voluntarily waived his rights to remain silent, have an attorney present at any questioning and have

an attorney appointed to represent him during any questioning by law enforcement officials; that he has a history of addiction to drugs and/or alcohol; that he used cocaine on the date of the crime; that he has less than average intelligence; and that he was in special education in school.

Defendant contends that this case more closely resembles those in which this Court has found the death sentence disproportionate than those involving remorseless, torturous killings in which this Court has allowed death sentences to stand. As in his case, three were robbery-murders and involved the "pecuniary gain" aggravating circumstance: *Benson*, 323 N.C. 318, 372 S.E.2d 517; *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Two involved the especially "heinous, atrocious, or cruel" aggravating circumstance: *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). None are sufficiently similar to the present case to merit a finding of disproportionality here.

In *Benson* the defendant confronted the victim and demanded his money. When the victim hesitated, the defendant fired his gun, striking the victim in the upper portion of both legs. The victim died later in the hospital of cardiac arrest resulting from loss of blood. *Benson*, 323 N.C. at 321, 372 S.E.2d at 518. This Court found the death sentence disproportionate because, in contrast to the present case, the defendant was convicted solely on the theory of felony murder, and the evidence that he fired at the victim's legs tended to show that the defendant intended only to rob the victim. Further, also in contrast to the present case, the jury found as mitigating circumstances that the defendant was under the influence of mental or emotional disturbance and had no significant history of prior criminal activity. *Id.* at 328, 372 S.E.2d at 522. Further still, the defendant not only confessed and cooperated upon arrest, as in the present case, but he pled guilty during the trial and acknowledged his wrongdoing before the jury. *Id.* at 328, 372 S.E.2d at 523.

In *Young* the defendant, who had been drinking heavily all day, suggested to two co-participants that they rob and kill the victim so they could buy more liquor. *Young*, 312 N.C. at 672, 325 S.E.2d at 184. The three began walking to the victim's house and gained entry. Then they stabbed the victim and left the house with money, a coin collection, and other valuables which they divided. *Id.* at 673, 325 S.E.2d at 184. The murder was not as coldly planned and executed as that in

the present case, and defendant in the present case was not heavily intoxicated by drugs or alcohol, as was the defendant there.

In *Jackson* the defendant, who had been drinking, recognized the victim on the road, told his companions that the victim might have some money on his person, got out his gun, and ordered his companions to follow the victim's car. Finding the car, the defendant and his companions faked a breakdown, waved the victim down, and asked the victim for jumper cables. The victim was found shot twice in the head at close range with his wallet gone and some change scattered on the ground near his car. *Jackson*, 309 N.C. at 29-30, 305 S.E.2d at 707-08. This murder, like that in *Young*, had an element of relative spontaneity that is absent here. It was not as coldly planned and executed as that in the present case.

In *Bondurant* the defendant pointed the gun at the victim, taunted him for at least two minutes, and then shot him. *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. "[I]mmediately after he shot the victim, he exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. Defendant entered the hospital to secure medical assistance for his victim and spoke there with police, confessing that he had shot the victim. *Id.* Here, by contrast, defendant (or his co-participant) grabbed the money and ran, returned to his mother's house, picked up some clothes, and took a cab to his girlfriend's house. Only when arrested the next day on an outstanding warrant for unrelated charges did defendant confess to the killing, and he never expressed remorse for his actions.

In *Stokes* the defendant and two companions planned to rob the victim's business. During the robbery the assailants severely beat and killed the victim. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. In contrast to the present case, there was evidence there "that [the defendant] suffered from impaired capacity to appreciate the criminality of his conduct, and that he was under the influence of a mental or emotional disturbance at the time of the murder." *Id.* at 21, 352 S.E.2d at 664. The Court also considered it important that the defendant was only seventeen; defendant here is twenty-nine.

*Stokes* involved a robbery-murder, as here, but the defendant was convicted only on the theory of felony murder; there was "little, if any," evidence of premeditation and deliberation. *Id.* at 24, 352 S.E.2d at 666. Here, defendant was convicted upon the theories of premeditation and deliberation, and lying in wait, and there was substantial

evidence of premeditation and deliberation. The Court also found no evidence in *Stokes* showing that defendant deserved a death sentence any more than did his co-participant who received a life sentence. *Id.* at 21, 352 S.E.2d at 663.

Defendant contends that one other case in which the jury recommended a life sentence is most similar to the present case, that of his co-participant, Wesley Thomas Harris. *See State v. Harris*, 338 N.C. 211, 449 S.E.2d 462 (1994). Defendant contends it was Harris who raised the idea of robbing, and possibly killing, Dorothy Mae Smith; drove him to Smith's home; retrieved the money box; drove him from the crime scene; stored the firearms at his apartment; and was found in possession of the stolen money. Defendant contends that, under the authority of *Stokes*, 319 N.C. 1, 352 S.E.2d 653, his death sentence was excessive; as to the crime committed, his co-participant was more culpable or at most they were equally culpable because "[b]oth committed the same crime in the same manner." *Id.* at 21, 352 S.E.2d at 663.

Pursuant to N.C.G.S. § 8C-201 (1992) (Judicial Notice), we take judicial notice of the record in that case—*see Swain v. Creasman*, 260 N.C. 163, 164, 132 S.E.2d 304, 305 (1963)—as well as the opinion, to address defendant's contentions and distinguish that case from this one. The *Harris* jury found Harris guilty of first-degree murder only on the theories of lying in wait and felony murder; it did not find him guilty on the theory of premeditation and deliberation. *See Harris*, 338 N.C. at 216, 224, 449 S.E.2d at 464, 468. Here, by contrast, the jury found defendant guilty on the theory of premeditation and deliberation. Harris had presented expert evidence at the guilt-innocence phase that he could not form the specific intent to kill because of his chronic and acute alcohol, cocaine and marijuana dependencies. *See id.* at 219, 449 S.E.2d at 465-66. Further, while the *Harris* jury found that the murder was committed for pecuniary gain, it also found mitigating circumstances dealing with Harris' substance abuse and mental condition: that the murder was committed while the defendant was under the influence of mental or emotional disturbance, that the defendant acted under the domination of another person, that 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, that Harris' personality disorders and/or drug addiction and/or emotional problems are subject to successful treatment on a long-term basis, and that Harris has adjusted well to incarceration and has been a good inmate. Here, by contrast, there

was insufficient evidence to support either the mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, or that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Further, the jury here refused to find any of the nonstatutory mitigating circumstances dealing with defendant's alleged drug addiction or mental condition. These facts significantly distinguish the character of the co-participants and the nature of their involvement in the offense, thus justifying their disparate sentences.

The most singular feature of this case is that it is a murder perpetrated by lying in wait. One other case in the pool is most similar to this one for purposes of proportionality review—*State v. Brown*, 320 N.C. 179, 358 S.E.2d 1. The Court in *Brown* emphasized that the crime of first-degree murder by lying in wait at the victim's residence "shocks the conscience, not only because a life was senselessly taken, but because it was taken by the surreptitious invasion of an especially private place, one in which a person has a right to feel secure." *Id.* at 231, 358 S.E.2d at 34. "The victim, unaware of the threat, had no opportunity to defend [her]self. Unlike the victim felled in a face-to-face confrontation, this victim had no chance to fight for [her] life." *Id.* at 232, 358 S.E.2d at 34 (citation omitted).

In *Brown* "[t]he murder was committed after defendant had lain in wait under the victim's window and paused for the victim to position himself in the most opportune place for annihilation." *Id.* at 231-32, 358 S.E.2d at 34. As in the present case, "[t]he crime was as calculated and deliberate as a murder can be. In the lengthy, purposeful plotting, and in the execution of [the] crime, the defendant displayed a cold callousness and obliviousness to the value of human life." *Id.* at 232, 358 S.E.2d at 34. As in the present case, "defendant displayed absolutely no remorse or contrition for his act." *Id.* In addition, there was evidence in the record in *Brown* that the victim had mistreated the defendant and that the defendant had been drinking, but the jury refused to find the corresponding mitigating circumstances. *Id.* at 232, 358 S.E.2d at 35. Here, the jury likewise refused to find any of the mitigating circumstances dealing with defendant's alleged drug abuse and drug intoxication on the night of the murder.

The jury here did find it mitigating that the defendant had aided in the apprehension of his co-participant, confessed guilt to and cooperated with law enforcement officers the day following the crime, and

that it was never proven as to which firearm the defendant fired. Nevertheless, as in *Brown*, "[v]iewed in light of the evidence regarding the nature of the crime and the character of the defendant, we find the evidence diminishing culpability minuscule and insufficient to warrant a holding of disproportionality." *Id.*

We conclude that the circumstances of the numerous cases cited by defendant in which the jury returned a life sentence, or in which this Court held a death sentence disproportionate, distinguish those cases from the present case; *Brown* is the case in the pool most comparable to the present case. In light of *Brown*, and of the especially cold, calculated, and unprovoked nature of the offense here, we cannot say that the death sentence was excessive or disproportionate, considering both the nature of the crime—a premeditated and deliberated, lying in wait killing—and the character of the defendant.

We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive.

NO ERROR.

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STATE OF NORTH CAROLINA v. BOBBY LEE HARRIS

No. 345A92

(Filed 3 November 1994)

**1. Evidence and Witnesses § 1255 (NCI4th)— assertion of right to counsel—further communication initiated by defendant—subsequent confession admissible**

Defendant initiated further communication with the sheriff after he had earlier asserted his right to counsel, and his confession to the sheriff was admissible in this capital trial, where the sheriff allowed defendant's brother to visit defendant in jail; defendant's brother then went to the sheriff's office and told the sheriff that defendant wanted to talk with him; the sheriff had defendant brought to his office; the sheriff began the conference by asking defendant whether he wanted to talk with him in regard

to what had happened; and defendant answered that he wanted to do so.

**Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 749 et seq.**

**Duty to advise accused as to right to assistance of counsel. 3 ALR2d 1003.**

**What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.**

2. **Evidence and Witnesses § 1248 (NCI4th)— Miranda warnings—assertion of right to counsel—further communication initiated by defendant—additional warnings unnecessary**

Where defendant had been properly advised of his *Miranda* rights and had asserted his right to counsel approximately twelve hours before he initiated communications with the sheriff, the sheriff was not required to again advise defendant of his *Miranda* rights before interrogating him, and defendant's subsequent confession to the sheriff was not inadmissible because the sheriff failed to advise defendant that if he decided to answer questions he could stop at any time and failed to ask defendant if he wanted a lawyer at that time.

**Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 749 et seq.**

**Duty to advise accused as to right to assistance of counsel. 3 ALR2d 1003.**

**What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.**

3. **Criminal Law § 434 (NCI4th)— closing argument—prosecutor's statement about defendant's probation—supporting evidence**

The district attorney's jury argument in a robbery-murder case that defendant was already on probation for another crime, that he knew what he was doing, and that "[w]e don't have a person who [has] never been in trouble" was supported by substantive evidence and was not improper where defendant stated in his recorded confession, which was played for the jury, that he was afraid that his probation would be revoked and he needed money

to leave town, and this evidence showed defendant's motive to rob and murder the victim.

**Am Jur 2d, Trial § 626.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**4. Criminal Law § 951 (NCI4th)— ineffective assistance of counsel—motion for appropriate relief—determination without hearing**

The trial judge did not err by failing to conduct a hearing on defendant's motion for appropriate relief at the end of the guilt phase of a capital trial on the ground that he had ineffective assistance of counsel where the motion contained a general allegation that, because counsel had bone marrow cancer and was in pain, he did not conduct meaningful meetings with defendant or his co-counsel and that the case went to trial without adequate preparation; the only specific allegations as to ineffective assistance of counsel because of this lack of preparation concerned counsel's motion to suppress a part of defendant's confession and his delivery of a psychologist's report to the district attorney; the trial judge was able to determine the effect of these two matters without an evidentiary hearing; and the trial judge found (1) that a part of defendant's confession was irrelevant to the guilt phase of the trial and defendant was not prejudiced by its exclusion, and (2) that there was no evidence that the district attorney used the report in any way and defendant was not prejudiced by the delivery of the report to him.

**Am Jur 2d, Coram Nobis and Allied Statutory Remedies § 59.**

**Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.**

**Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 ALR4th 180.**

**5. Criminal Law § 1315 (NCI4th)— capital sentencing—question about defendant's refusal to work—favorable answer—defendant not prejudiced**

The trial court in a capital sentencing hearing did not err by permitting the State to ask defendant's brother on cross-examination, "Your brother just won't work, will he?" where the witness answered that he would say defendant is sick, this testimony was not unfavorable to defendant, and the question added little to testimony already elicited as to defendant's character.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**6. Criminal Law § 370 (NCI4th)— capital sentencing—court's inquiries about relevancy of evidence—no expression of opinion**

The trial court did not intimate to the jury that the testimony of defendant's mother was not relevant in a capital sentencing hearing when he twice interrupted during her extensive testimony to inquire about the relevancy of her testimony concerning the day she decided to leave her first husband and testimony concerning birth defects of a daughter born during her second marriage where the court, upon being assured by defense counsel that the evidence had relevance, permitted those lines of testimony to continue without further comment. N.C.G.S. § 8C-1, Rule 611(a)(2).

**Am Jur 2d, Trial §§ 276 et seq.**

**7. Criminal Law § 439 (NCI4th)— capital sentencing—opinion on credibility of witness—no gross impropriety**

The prosecutor stated his opinion as to the credibility of a witness in violation of N.C.G.S. § 15A-1230 when he argued to the jury in a capital sentencing hearing that "I'm sure [defendant's mother] has tried to color this as best she can in the light that is most favorable to [defendant]" and that "I'm not certain that all of these things she has testified about happened exactly the way she said they did." However, the prosecutor could properly argue that it is a matter of common knowledge that a mother will likely shade her testimony favorably for her son, and the error of stating this argument in the form of an opinion was *de minimis* and did not require the trial court to intervene *ex mero motu*.

**Am Jur 2d, Trial §§ 692 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**8. Criminal Law § 452 (NCI4th)— capital sentencing—jury argument—failure to offer certain mitigating evidence**

The prosecutor's jury argument in a capital sentencing hearing that defendant had not offered any evidence from previous employers or former teachers which would show that he was a good worker or a good student did not involve facts not in evidence but was a proper comment on the failure of defendant to offer evidence which might have mitigated his punishment. The prosecutor's comment on the fact that defendant was not mentally retarded was also a proper comment on a lack of evidence which might have mitigated defendant's punishment.

**Am Jur 2d, Trial §§ 590 et seq.**

**Adverse presumption or inference based on party's failure to produce or examine witness with employment relationship to party—modern cases. 80 ALR4th 405.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**9. Criminal Law § 454 (NCI4th)— capital sentencing—jury argument—life sentence like slap on wrist**

It was not error for the prosecutor to argue in a capital sentencing hearing that a life sentence was like a "slap on the wrist" or a "pat on the back," since the effect of the argument was that life imprisonment was not a severe enough punishment for the crime defendant had committed.

**Am Jur 2d, Trial §§ 572 et seq.**

**Supreme Court's views as to what courtoom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**10. Criminal Law § 452 (NCI4th)— capital sentencing—jury argument—mitigating circumstances limited only by imagination—no gross impropriety**

While the prosecutor may have overstepped the bounds of what defendant could prove for mitigating circumstances in a capital sentencing hearing when he argued that he was limited in the circumstances he could submit justifying imposition of the death penalty but that there was no limit except that of their own imagination as to what defendant's attorneys could submit in mitigation of his punishment, this argument was not so grossly improper as to violate due process.

**Am Jur 2d, Trial §§ 554 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**11. Criminal Law § 441 (NCI4th)— capital sentencing—jury argument—basis for expert opinion—inaccurate comment—no gross impropriety**

The prosecutor's jury argument in a capital sentencing hearing that all a forensic psychiatrist who was an expert in addiction medicine knew about defendant was what defendant had told him, although not completely accurate as to the basis of the psychiatrist's diagnosis, was not so grossly improper as to require a new trial.

**Am Jur 2d, Trial § 695.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**12. Criminal Law § 1337 (NCI4th)— capital sentencing—aggravating circumstance—conviction of felony involving violence—ambiguous instruction—no plain error**

The trial court's instruction in a capital sentencing hearing that the jury should find the aggravating circumstance that defendant had previously been convicted for a felony involving violence if it found beyond a reasonable doubt "that on or about

the alleged date the defendant had been convicted of robbery and that the defendant killed the victim after he committed robbery" did not permit the jury to find this aggravating circumstance based on the robbery that occurred in conjunction with the murder for which defendant was on trial and was not plain error in light of the court's instruction in the previous sentence that defendant's conviction must have been based on conduct that occurred before the events out of which the murder arose.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

**13. Criminal Law § 1361 (NCI4th)— impaired capacity mitigating circumstance—instructions requiring finding of alcoholism and intoxication**

The trial court did not err by requiring the jury to find both that defendant was suffering from the disease of alcoholism and that he was intoxicated in order to find the impaired capacity mitigating circumstance since (1) defendant's attorney agreed at the charge conference that the court would so charge, and any error in the charge was invited error, and (2) defendant's expert witness testified that a "clear history of alcoholism and active drinking right up to the period of the offense in question" caused defendant to act as he did, and there was no evidence that either the disease or defendant's intoxication alone would support the finding of this circumstance.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**14. Criminal Law § 1323 (NCI4th)— capital sentencing—nonstatutory mitigating circumstances—instructions—finding of mitigating value**

The trial court did not err by instructing the jury in a capital sentencing proceeding that it could consider nonstatutory mitigating circumstances which it found to have mitigating value.

**Am Jur 2d, Trial §§ 1441 et seq.**

**15. Criminal Law § 1325 (NCI4th)— capital sentencing—weighing aggravating and mitigating circumstances—use of "may" in instruction**

The trial court did not err by instructing the jury in a capital sentencing hearing that, in weighing the aggravating circumstances against the mitigating circumstances, each juror "may" consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence.

**Am Jur 2d, Trial §§ 1441 et seq.**

**16. Criminal Law § 1373 (NCI4th)— first-degree murder—death penalty not disproportionate**

A sentence of death imposed upon defendant for first-degree murder was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, where defendant was convicted on the basis of both premeditation and deliberation and felony murder, the underlying felony being armed robbery; the jury found as aggravating circumstances that defendant had previously been convicted of a felony involving the use or threat of violence to the person and that the capital felony was committed for pecuniary gain; the jury found only one statutory and seven nonstatutory mitigating circumstances; and the evidence at trial tended to show: defendant and his accomplice worked for the victim as shrimpers; they planned to rob the victim to obtain funds and a vehicle to flee the state and avoid the consequences of other criminal activities; the victim, while on his boat, was stabbed by defendant three times in the back, robbed, and thrown overboard near the shore while he was still alive; the victim lay on a pile of oyster shells for several hours before he was found; the victim died on the operating table from loss of blood some five hours after being rescued; the wounds suffered by the victim need not have been fatal if he had received earlier treatment; and defendant failed to seek help for the victim afer leaving him in the water even though he had several chances to do so.

**Am Jur 2d, Criminal Law § 628.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed con-**

**tinuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like—post-*Gregg* cases. 66 ALR4th 417.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.**

Chief Justice EXUM concurring in part and dissenting in part.

*Justice* FRYE *joins in this concurring and dissenting opinion.*

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Britt (Joe F.), J., at the 13 July 1992 Criminal Session of Superior Court, Onslow County, upon a jury verdict of guilty of first-degree murder, robbery with a dangerous weapon, second-degree burglary, larceny of a truck, and larceny of a firearm, during the 27 April 1992 Criminal Session of Superior Court, Onslow County, Strickland, J., presiding. The defendant's motion to bypass the Court of Appeals as to the non-capital cases was allowed 27 May 1993. Heard in the Supreme Court 15 March 1994.

The evidence at trial tended to show that the defendant, Bobby Lee Harris, and Joe Simpson were employed by the victim, John Redd, in his fishing business. For several days, the defendant and Simpson discussed the possibility of stealing the victim's truck and driving to Georgia. On the night of 20 August 1991, the three men went fishing around 11:00 p.m. According to the defendant's confession, the plan was for the defendant to restrain Redd while Simpson bound him. They were then going to rob him and leave him on the shore. The defendant, Simpson, and Redd had been drinking during the evening and for whatever reason (the defendant blamed Redd's "griping"), the defendant stabbed Redd with Redd's knife rather than merely restraining him. Redd was robbed of his wallet containing approximately $80.00 and of his keys, then was either thrown from the boat or placed on a pile of oyster shells. Shortly after dumping Redd, and as the defendant and Simpson were returning to the dock around 2:30 a.m., they were stopped by a game warden and cited for

traveling without running lights. After returning the boat to its dock, the defendant and Simpson took the victim's truck, drove to the victim's house, used the victim's keys and entered the house. They searched for and found the victim's .12-gauge shotgun and a .22 pistol, both of which they took. Taking some beer from the house, the two men left the house and drove to Georgia. The defendant and Simpson surrendered to Georgia authorities on 23 August 1991 after learning of Redd's death.

The victim was stabbed three times in the back. He was found on a pile of oyster shells along Bear's Inlet around 6:15 a.m. He was transported to the Naval Hospital at Camp Lejeune and died on the operating table around noon, but not before identifying the defendant and Simpson as his assailants. The cause of death was exsanguination, bleeding to death. The victim's blood alcohol level was the equivalent of .263 on the breathalyzer test.

*Michael F. Easley, Attorney General, by William B. Crumpler, Associate Attorney General, for the State.*

*Charles H. Henry and Charles K. Medlin, Jr., for defendant-appellant.*

WEBB, Justice.

**[1]** The defendant's first two assignments of error deal with the admissibility of a statement the defendant made to Sheriff Ed Brown. The defendant made a motion to suppress this statement and a hearing was held on this motion.

The evidence at this hearing showed that the defendant and Joe Simpson surrendered to the sheriff's department of Haralson County, Georgia. Lt. Mack Whitney of the Onslow County Sheriff's Department and three other law enforcement officers went to Haralson County, Georgia, to return the two men to North Carolina. On the morning of 27 August 1991, Lt. Whitney met the defendant at the Haralson County Jail. Lt. Whitney fully advised the defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The defendant said he wanted an attorney and no interrogation of the defendant was had at that time. The defendant signed a form acknowledging that he had been fully advised of and understood his rights. The defendant volunteered the information that Mr. Redd's shotgun was at the home of Joe Simpson's grandmother with whom

the two men had been staying while they were in Georgia. Lt. Whitney retrieved the shotgun and returned it to North Carolina.

Lt. Whitney and an SBI agent brought the defendant and Joe Simpson back to Jacksonville and put them in the Onslow County Jail on the evening of 27 August 1991. During the evening, Sheriff Brown allowed the defendant's brother to visit the defendant. The defendant's brother then came to the sheriff's office and told the sheriff that the defendant wanted to talk to him.

The sheriff had the defendant brought to his office at approximately 11:20 p.m. on 27 August 1991. Those present in the office with the sheriff and the defendant were Lt. Whitney, the defendant's brother and his brother's wife. A cassette tape was used to record the conference. The sheriff began the conference by asking the defendant whether he wanted to come and talk to him in regard to what had happened and the defendant answered that he wanted to do so. The defendant started to make a statement and Sheriff Brown then interrupted him and again advised him of his rights under *Miranda* except he did not advise him that he could stop answering questions at any time. The sheriff also did not ask the defendant, "[d]o you want a lawyer now?" The defendant then made an incriminating statement.

The court made findings of fact consistent with the above evidence including a finding that Sheriff Brown did not encourage the defendant to speak to him. The court concluded that the defendant freely, understandingly, voluntarily, knowingly, and intelligently waived his *Miranda* rights and agreed to speak with Sheriff Brown without the presence of an attorney. The defendant's motion was overruled.

In *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981), the United States Supreme Court held that once a defendant has requested counsel, law enforcement officers may not again interrogate him until he is provided with counsel unless he initiates further communication with the officers. The defendant says the evidence showed Sheriff Brown plainly initiated a custodial interrogation of him in violation of *Edwards*. He says that the totality of circumstances, including the involvement of a family member as well as removing him from the jail to the friendlier confines of the sheriff's office, coupled with the incomplete recital of the defendant's constitutional rights, could not overcome his earlier assertion of the right to counsel. We disagree. The evidence clearly showed and the court found that the defendant initiated further communication with the sheriff. The fact

that the defendant's brother carried the message to Sheriff Brown, that the defendant wanted to talk to him, does not mean the sheriff initiated the conversation. The answers the defendant gave to the sheriff as their conference began clearly show it was the defendant and not Sheriff Brown who initiated the conversation.

This assignment of error is overruled.

**[2]** In his second assignment of error, the defendant contends he was not adequately warned under *Miranda* because Sheriff Brown did not tell him that if he decided to answer any questions he could stop at any time and ask for a lawyer and the sheriff did not ask him if he wanted a lawyer at that time. The defendant acknowledges that approximately twelve hours earlier, Lt. Whitney had properly warned him of his *Miranda* rights in Haralson County, Georgia.

In *State v. McZorn*, 288 N.C. 417, 219 S.E.2d 201 (1975), *sentence vacated on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976), we discussed the need to give an additional *Miranda* warning after a proper warning has been given. Chief Justice Sharp, writing for the Court, said,

> The consensus is that although *Miranda* warnings, once given, are not to be accorded "unlimited efficacy or perpetuity," where no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning, repetition of the warnings is not required.

*Id.* at 433, 219 S.E.2d at 212. The ultimate question is whether the defendant, with full knowledge of his legal rights, knowingly and intentionally relinquished them.

There is no reason to believe the defendant, having been fully and properly advised of his *Miranda* rights approximately twelve hours before his interview with Sheriff Brown, had forgotten them. Certainly he should have known of his right to an attorney before he could be interrogated by the officers for he had exercised his right on that day. It was not necessary for Sheriff Brown to advise the defendant again of his rights under *Miranda*.

This assignment of error is overruled.

**[3]** The defendant next assigns error to certain portions of the district attorney's argument to the jury, made over the objection of the

defendant. The district attorney argued that the defendant was already on probation for another crime, that he knew what he was doing and, "[w]e don't have a person who [has] never been in any trouble." The defendant did not take the stand in this case and did not offer any evidence as to his own reputation and character.

The defendant, relying on *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986) and *State v. Miller*, 271 N.C. 646, 157 S.E.2d 335 (1967), says allowing the district attorney to argue as he did was error requiring a new trial. In *Tucker*, we ordered a new trial because the district attorney argued that testimony of former crimes, elicited only to impeach the defendant as a witness, should be considered substantive evidence for conviction. In *Miller*, we held it was prejudicial error in a trial for breaking or entering to imply that the defendants were habitual storebreakers when there was no evidence to support such an implication. The defendant says that by allowing the district attorney to make the argument he made in this case, the jury was inflamed to convict him for crimes for which he was not being tried.

The distinction between this case and *Tucker* and *Miller* is that in this case there was substantive evidence which supports the district attorney's argument. In his recorded statement to Sheriff Brown, which was played for the jury, the defendant said he was afraid his probation would be revoked and he needed money to leave town. This was evidence that the defendant had a motive to rob and murder Mr. Redd. The district attorney's argument was proper.

This assignment of error is overruled.

The defendant's next two assignments of error involve a motion for appropriate relief made by the defendant after the guilt phase of the trial, but before the sentencing hearing. Timothy E. Merritt and Charles K. Medlin were appointed to represent the defendant. While the jury was being selected, Mr. Medlin became aware that Mr. Merritt was ill and in pain. Mr. Medlin offered to take on more in-court responsibilities but Mr. Merritt declined, saying that the jury *voir dire* "kept his mind off the pain." During the seven days of jury selection, the court's schedule was interrupted three times to accommodate Mr. Merritt's need for medical treatment.

After the jury was seated, the trial proceeded without interruption. However, after the guilt phase was completed the sentencing phase was continued for eleven days because of the hospitalization of Mr. Merritt. The diagnosis at this time was bone marrow cancer and

the prognosis was terminal.[1] Mr. Merritt was relieved as counsel for the defendant and Charles H. Henry was appointed to replace him for the sentencing hearing, which was continued.

The defendant made a motion for appropriate relief prior to the sentencing hearing, contending that he had ineffective assistance of counsel because of the illness of Mr. Merritt. In the motion, which was sworn to by Mr. Medlin, Mr. Medlin said he believed the sickness and pain Mr. Merritt was suffering adversely affected his ability to conduct the trial. He said that on occasion, "Sunday sessions" were scheduled to discuss strategy and Mr. Merritt was late for them so that little strategy was discussed. Mr. Medlin said in the motion that Mr. Merritt, against his advice, made a motion *in limine* to suppress a part of the defendant's confession, which led the State to move to suppress other parts of the confession. Both motions were allowed, which excluded evidence of second-degree murder which might have led to a conviction of second-degree rather than first-degree murder.

Mr. Medlin also said in the motion that Mr. Merritt had procured a psychologist to evaluate the defendant. The psychologist's report referred to medical opinions which he was not qualified to give. Mr. Merritt gave a copy of the report to the district attorney without discussing the matter with Mr. Medlin. Mr. Medlin said the psychologist should not have been considered as a witness for the defendant and the report should not have been delivered to the district attorney.

Judge James R. Strickland, who presided at the guilt phase of the trial, denied the motion for appropriate relief. As to the allegation that Mr. Merritt should not have moved to suppress part of the defendant's confession, Judge Strickland found that the part of the confession that was suppressed would have been highly prejudicial to the defendant at the guilt phase of the trial. A part of the confession was irrelevant to the guilt phase of the trial and the defendant was not prejudiced by its exclusion. As to the giving of the psychologist's report to the district attorney, Judge Strickland found that there was no evidence that the district attorney used the report in any way and no prejudice to the defendant was shown by the delivery of the report to the district attorney.

Judge Strickland ruled that there was not a showing that Mr. Merritt's representation was deficient, or if it was that the defendant

1. Mr. Merritt died approximately nine months later as a result of the illness.

was prejudiced by it. He concluded that an evidentiary hearing was not necessary and denied the defendant's motion.

**[4]** The defendant first says it was error for the court not to conduct a hearing on his motion, particularly his allegations that Mr. Merritt failed to conduct meaningful meetings with co-counsel and the defendant to discuss trial preparation and that the case went to trial without adequate preparation.

The defendant made the motion for appropriate relief pursuant to N.C.G.S. § 15A-1414(b). In regard to a motion made under this section, N.C.G.S. § 15A-1420(c) provides:

> (1) Any party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit. The court must determine, on the basis of these materials and the requirements of this subsection, whether an evidentiary hearing is required to resolve questions of fact.
>
> (2) An evidentiary hearing is not required when the motion is made in the trial court pursuant to G.S. § 15A-1414, but the court may hold an evidentiary hearing if it is appropriate to resolve questions of fact.

We cannot hold that the court committed error by not holding an evidentiary hearing. The motion contained a general allegation that because of his illness, Mr. Merritt did not conduct meaningful meetings with the defendant or his co-counsel and that the case went to trial without adequate preparation. The only specific allegations as to ineffective assistance of counsel because of this lack of preparation dealt with the motion to suppress a part of the defendant's confession and the delivery of the psychologist's report to the district attorney. Judge Strickland had conducted the trial and was able to determine the effect of these two matters without an evidentiary hearing. There were no specific contentions that required an evidentiary hearing to resolve questions of fact.

This assignment of error is overruled.

The defendant next assigns error to the court's failure to find he had ineffective assistance of counsel. He concedes there is no evidence in the record which would support such a finding because, he says, the court did not conduct an evidentiary hearing. He says he

made this assignment of error to preserve the issue. Although we overrule this assignment of error, we note that the defendant may make a motion for appropriate relief under N.C.G.S. § 15A-1415 and present any additional evidence he may have as to ineffective assistance of counsel.

**[5]** The defendant next assigns error to the overruling of his objection to a question asked his brother by the State on cross-examination during the sentencing hearing. The defendant's brother testified as to the defendant's criminal history, which was largely inter-related with his own. The defendant's brother testified further as to the defendant's addiction to crack cocaine, noting that on one occasion upon the release of the defendant from one treatment program, he returned to the brother's home and the brother's television set and other valuable possessions were soon missing. On cross-examination, the State elicited testimony, without objection, that the defendant had been fired from several jobs. The following colloquy then occurred:

> [MR. ANDREWS:] In other words, he's just not going to work, is he, Mr. Harris? Your brother just won't work, will he?
>
> . . . .
>
> MR. HENRY: Objection, Your Honor.
>
> THE COURT: Well, overruled if he knows. Do you know the answer to that, sir?
>
> . . . .
>
> [MR. HARRIS:] I would say he is sick. He needs a doctor.

The defendant contends that the only purpose of this question was to make the jury think the defendant is a shiftless person. Being a shiftless, lazy person, says the defendant, is not an aggravating circumstance under N.C.G.S. § 15A-2000, and it was error to let the State create such a circumstance by asking this question. *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).

The testimony elicited was certainly not unfavorable to the defendant. The witness in effect denied his brother was shiftless and lazy but said he was sick. The question added very little to the testimony that had been elicited as to the defendant's character.

This assignment of error is overruled.

**[6]** The defendant next assigns error to two instances in which the court interrupted the defendant's counsel while he was examining a witness during the penalty hearing. He says these interruptions intimated to the jury that the testimony of the witness was not relevant, but because this is a capital case the jury would have to listen to it. The defendant says this is error. *See State v. Holden*, 280 N.C. 426, 185 S.E.2d 889 (1972); *State v. Woolard*, 227 N.C. 645, 44 S.E.2d 29 (1947).

The defendant called his mother, Mrs. Mode, as a witness at the sentencing hearing. The defendant's attorney opened his questioning by inquiring extensively about her first marriage. Other than referring to "the boys' " comprehension of problems in the marriage, the first eight transcript pages of Mrs. Mode's testimony fail to mention the defendant. The court's first intervention occurred after the following sequence of questions and answers:

Q. Do you recall the day that you finally decided to leave David Harris, your husband, your first husband?

A. Yes, I do.

Q. What happened on that day?

A. Well, he had—we had been arguing. He had been slapping me around that day. And on this particular occasion, I had gone to sit down on the living room couch and he had progressed with his meanness over the years and it had gotten worse and worse. But on this particular day, I had walked away from him and had wanted to sit down on the couch; and I had a television to my right and a full-length coffee table in front of me. And I was—

THE COURT: Mr. Medlin, I don't want to interrupt, but how is this relevant to the issues involved in this lawsuit[?]

MR. MEDLIN: Your Honor, I'll tie that up in just a second, if you will permit me.

THE COURT: All right, go ahead.

Counsel continued to ask questions permitting the witness to conclude the story of the break-up of the marriage and progressed on to the witness' second marriage. This marriage resulted in the birth of a handicapped daughter. The mother next testified extensively about the medical problems this child suffered. The second intervention by the court occurred as follows:

Q. What, if anything—tell me about Jennifer being born? What, if any, complications was she born with?

A. She is a multiple handicapped child. She has several birth defects.

Q. What are they?

A. She has a neurologic problem. It is called arachnoidea. It is the covering on the brain. Her brain is like chocolate on a cake and in some places for her it doesn't exist. And it has a lot of sensory nerves into it and it affected her memory, her balance, her ability to do anything.

Q. Any other birth defects she was born with?

A. Yes, she was born deaf.

Q. Completely deaf?

A. She has maybe 20, 25 percent hearing in her left ear, but it is not usable to her.

Q. Does she have some assistance with the hearing?

A. Yes, she does. She wears a hearing aid.

Q. What, if anything, was she born with?

A. She has a heart problem. She has a growth problem. She has a vision defect.

THE COURT: Again, Mr. Medlin, I assume this has some relevancy to the issues here?

MR. MEDLIN: Yes, sir, it has complete relevance to the issues here and it will become apparent in just a little while.

THE COURT: All right.

We note that in over fifty transcript pages of direct examination, these two brief questions were the only times the court spoke except in response to infrequent objections. In comparing the events to the controlling statute, we note that the trial court is charged with "exercis[ing] reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time . . . ." N.C.G.S. § 8C-1, Rule 611(a)(2) (1992). Judge Britt did no more in either situation than ensure that defense counsel was not consuming the court's time with irrelevant material. Once assured

by counsel that the evidence had relevance, the court permitted the questioning to continue without further comment and expressed no opinion on the evidence. The court in no way abused its discretion nor approached the level of interference which would be error.

This assignment of error is overruled.

**[7]** The defendant next assigns error to several parts of the district attorney's argument to the jury. No objection was made to them at trial, but the defendant says the court should have intervened *ex mero motu* and stopped them with instructions to the jury to disregard those parts of the argument. If no objection is made, we will not order a new trial based on an improper jury argument unless it constitutes a gross impropriety which "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993), *cert. denied*, ___ U.S. ___, 129 L. Ed. 2d 895, 62 U.S.L.W. 3871 (30 June 1994) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986)).

The defendant's mother and brother testified to the very bad conditions under which the defendant was reared. In his argument to the jury, the district attorney in an effort to counteract the mother's testimony said:

> I'm sure that she has tried to color this as best she can in the light that is most favorable to Bobby Harris[.] I mean, a mother would do that.
>
> I'm not certain that all of these things she has testified about happened exactly the way she said they did.

At a later time in his argument, the court *ex mero motu* corrected the district attorney when he expressed his opinion in his argument, but did not instruct the jury to disregard the argument.

We agree with the defendant that by stating his opinion as to the credibility of a witness, the district attorney violated N.C.G.S. § 15A-1230. *See State v. Riddle*, 311 N.C. 734, 319 S.E.2d 250 (1984). We cannot hold, however, that this argument was so grossly improper that it "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *State v. McCollum*, 334 N.C. 208, 224, 433 S.E.2d 144, 152 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157). It is a matter of common knowledge that a mother will likely shade her testimony favorably for her son.

The district attorney could argue this to the jury and the error of stating it in the form of his opinion was *de minimis*. *State v. McHone*, 334 N.C. 627, 640, 435 S.E.2d 296, 304 (1993), *cert. denied*, ___ U.S. ___, 128 L. Ed. 2d 220 (1994).

**[8]** The defendant next contends under this assignment of error that the district attorney argued matters that were not in evidence. *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975); *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). The district attorney argued that the defendant had not offered any evidence from previous employers which would have shown he was a good worker, or from former teachers which would have shown he was a good student. The defendant says this was an attempt by the State to create a nonstatutory aggravating circumstance, the lack of an exemplary work and educational background. This argument by the district attorney did not involve facts that were not in evidence. It was a comment on the failure of the defendant to offer evidence which might have mitigated his punishment. This argument was proper. *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993). Nor can we hold that it was error, as argued by the defendant, for the district attorney to comment on the fact that defendant was not mentally retarded. This again was a comment on a lack of evidence which might have mitigated the defendant's punishment.

**[9]** The defendant also contends it was error for the district attorney to argue that a life sentence was like a "slap on the wrist" or a "pat on the back." We note that the defendant's attorney argued the severe punishment involved in serving a life sentence. Both arguments were proper. The district attorney could argue that life in prison was not a severe enough punishment for the crime defendant had committed and this in effect was what he was arguing.

**[10]** The defendant next contends it was error for the district attorney to argue that he was limited in the circumstances which he could submit justifying the imposition of the death penalty, while there was no limit except that of their own imagination as to what the defendant's attorneys could submit in mitigation of his punishment. The defendant says only circumstances which may have mitigating value may be submitted to the jury and not any circumstances that may be the product of the defendant's imagination. *See State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446 (1981).

The district attorney may have overstepped the bounds of what the defendant could prove for mitigating circumstances, but the argu-

ment was not so grossly improper that the conviction was a denial of due process.

**[11]** The defendant argues further, under this assignment of error, that the district attorney misstated the evidence in arguing about the testimony of Dr. Thomas W. Brown, a forensic psychiatrist and an expert in the field of addiction medicine. Dr. Brown testified about the defendant's disease of alcoholism and how it affected his mental functioning at the time of the killing. The doctor had interviewed the defendant and had examined his medical records from the Onslow County Mental Health Center and Walter B. Jones Alcohol and Drug Treatment Center. In his argument to the jury, the district attorney said that all the doctor knew about the defendant was what the defendant had told him. The district attorney's argument, although not completely accurate as to the basis of Dr. Brown's diagnosis, was not so grossly improper as to require a new trial.

This assignment of error is overruled.

**[12]** The defendant next assigns error to the following part of the charge during the sentencing hearing:

> Members of the jury, robbery is by definition a felony involving the use or threat of violence to the person. A person has been previously convicted, if he has been convicted and not merely charged and if his conviction is based on conduct which occurred before the events out of which this murder arose.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had been convicted of robbery and that the defendant killed the victim after he committed robbery, you would find this aggravating circumstance . . . .

The defendant says that this instruction is erroneous because the first sentence of the second paragraph allowed the jury to find the aggravating circumstance that the defendant had previously been convicted of a felony involving the use or threat of violence to the person, based on the robbery that occurred in conjunction with the murder. The defendant did not object to the charge at the time it was given and he did not request additional instructions. We must review this assignment of error under the plain error rule. *State v. Gibbs*, 335 N.C. 1, 49, 436 S.E.2d 321, 349 (1993), *cert. denied*, ___ U.S. ___, 129 L. Ed. 2d ___, 62 U.S.L.W. 3861 (27 June 1994).

We note that the State and the defendant offered evidence of the defendant's conviction of robbery in Oklahoma prior to any of the events in this case. The district attorney argued the prior conviction to the jury as the basis for finding the aggravating circumstance. We do not believe the ambiguous language to which the defendant assigns error rises to the level of plain error, particularly in light of the instruction in the previous sentence that the defendant's conviction must have been based on conduct that occurred before the events out of which the murder for which he was being tried arose.

This assignment of error is overruled.

**[13]** The defendant next assigns error to a part of the charge in which the court said, "[y]ou would find this mitigating circumstance if you find that the defendant was suffering from the disease of alcoholism and was intoxicated at the time of this offense, and that this impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." The defendant says it was error to require him to prove both the disease of alcoholism and that the defendant was intoxicated at the time of the crime in order to have the jury find this mitigating circumstance.

The first difficulty with this argument by the defendant is that the defendant, through his attorney, agreed at the charge conference that the court would charge on this feature of the case as it did. If there was error in the charge, it was invited error and we shall not review it. *State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993).

We note that there was no error in this part of the charge. Dr. Brown, the witness upon whom the defendant relied to establish this mitigating circumstance, testified that it was a "clear history of alcoholism and active drinking right up to the period of the offense in question," which caused the defendant to act as he did. We cannot find any evidence in the record that either the disease or the defendant's intoxication alone would support the finding of this mitigating circumstance. The court thus properly did not so charge the jury.

This assignment of error is overruled.

**[14]** The defendant next assigns error to a part of the charge in which the court instructed the jury that it could consider nonstatutory mitigating circumstances which it found to have mitigating value. He contends that when the court submits a mitigating circumstance to the jury, it must consider it. The defendant candidly admits that we have determined this issue contrary to his position in *State v. Hill*, 331 N.C.

387, 417, 417 S.E.2d 765, 780, *cert. denied*, ___ U.S. ___, 122 L. Ed. 2d 684, *reh'g denied*, ___ U.S. ___, 123 L. Ed. 2d 503 (1993); *State v. Huff*, 325 N.C. 1, 59, 381 S.E.2d 635, 669 (1989), *judgment vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777, *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1990); and *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). He requests that we reconsider this question. We decline to do so. This assignment of error is overruled.

**[15]** The defendant next contends there is error in the following portion of the charge:

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. When deciding this issue, each juror may consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence in issue two.

The defendant says that by the use of the word "may" in instructing the jury how to consider mitigating circumstances, the court told the jury that it did not have to consider the mitigating circumstances, which is error. We answered this question contrary to the defendant's position in *State v. Jones*, 336 N.C. 229, 443 S.E.2d 48 (1994) and *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547 (1994). This assignment of error is overruled.

PROPORTIONALITY REVIEW

**[16]** In reviewing the sentence, as we are required to do by N.C.G.S. § 15A-2000(d), *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1; *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983), we have conducted a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, and we conclude that the jury's finding of each aggravating circumstance was supported by the evidence. We further conclude that nothing in the record suggests that the jury sentenced the defendant to death while under the influence of passion, prejudice, or any other arbitrary factor.

Our final task is to determine whether the sentence was excessive or disproportionate to the penalties imposed in other first-degree murder cases. As we have noted in the past, there are cases where the "nature of the crime and the character of the defendant in every

instance distinguish [the] case in some way from others in the pool." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34. We find this to be one of those cases. As noted below, this defendant and this crime are clearly distinguishable from those cases in the pool which resulted in life sentences based either upon a jury recommendation of life or upon a finding by this Court that the death sentence imposed was disproportionate. The facts and circumstances in "death affirmed" cases are similarly distinguishable. In a discussion of cases such as this and of appellate courts' duties to conduct thorough proportionality reviews, the United States Supreme Court stated:

> The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime. In scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the "twin objectives" of "measured consistent application and fairness to the accused." . . . It is a routine task of appellate courts to decide whether the evidence supports a jury verdict and in capital cases in "weighing" States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed. . . . [A] similar process of weighing aggravating and mitigating evidence is involved in an appellate court's proportionality review. Furthermore, this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency. It is also important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes.

*Clemons v. Mississippi*, 494 U.S. 738, 748-749, 108 L. Ed. 2d 725, 738-39 (1990) (citations omitted).

In determining proportionality, we are impressed with the callousness exhibited by the defendant in this case. The defendant acknowledged that his purpose in carrying out the crime was to obtain the wherewithal to flee other legal problems. The defendant and his companion planned the robbery well in advance and the defendant acknowledged that he carried a knife, though he indicated that the plan did not entail his using the knife. The defendant evidenced a degree of cowardice in attacking the victim without warning and from behind, stabbing him three times in rapid succession. *See State v. Greene*, 324 N.C. 1, 376 S.E.2d 430 (1989), *judgment*

*vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603, *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1990). According to the defendant, he was aware that the victim was seriously wounded and he took steps to make the victim more comfortable before the defendant was placed on the shore. However, this testimony was contradicted by the victim's rescuer who testified that the victim indicated he had been "rolled out of the boat." This witness, as well as rescue and medical personnel, testified that the victim was cold and wet when found. The defendant himself noted that after stabbing the victim and then "help[ing]" him, the defendant and his companion went through the victim's pockets and took his wallet and keys. The defendant further confessed that he told the victim that help would be sent, but the defendant never took steps to fulfill this promise. The evidence indicated the defendant could have told the wildlife officer, who stopped the defendant's boat moments after the victim had been unloaded, about the victim. The defendant stated, however, "I didn't think about telling [the officer] what happened unless he would of—if he had detained me, yea I would have told him what happened, but I was hoping that he would let me go." The defendant went on to indicate that both he and his accomplice intended to call for help, but neither availed himself of the myriad of opportunities their movements furnished. The defendant could have telephoned "911" anonymously from a pay phone they passed along the road or from telephones in his accomplice's house or in the victim's house. Instead, the defendant left the victim to suffer for some ten hours before he was rescued. *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) (defendant saw her victim suffering and took no action to save him); *cf.*, *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983) (defendant immediately sought help after shooting victim). The duration of the victim's suffering has been found to be significant. *E.g.*, *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991); *see 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), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988). With the victim marooned, the defendant and his accomplice proceeded to the victim's home, used his keys to enter, stole two guns and some beer, then headed for Georgia. While the defendant surrendered himself to the authorities and cooperated fully, he did so a week after the murder, and only after being informed that the victim, prior to his death, had identified the defendant by name and that police were looking for

him. Evidence at trial indicated that the wounds suffered by the victim need not have been fatal. The victim died some fifteen hours after the attack and roughly five hours after his rescue as the result of blood loss. Though the defendant indicated in his confession that he regretted his action, it is noteworthy that no member of the jury found mitigating value in the defendant's purported remorse. The evidence introduced at trial indicated the defendant had an extensive record of past criminal activity including an armed robbery on a military installation at Fort Sill, Oklahoma in 1986 for which the defendant was sentenced to five years in a Federal Correctional Institution. As noted previously, the defendant confessed that the instant robbery was planned in order to obtain funds and a vehicle in order to flee the state and to avoid the consequences of other criminal activities.

The jury found as aggravating circumstances that: (1) the defendant had been previously convicted of a felony involving the use or threat of violence to the person; and (2) the capital felony was committed for pecuniary gain.

Twenty-three mitigating circumstances were submitted to the jury, but jurors found only eight. The eight found by one or more jurors were: (1) that 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, N.C.G.S. § 15A-2000(f)(6); (2) the defendant has acknowledged his guilt to law enforcement officers; (3) the defendant took responsibility for the killing and did not try to minimize his culpability in the murder in his confession; (4) the defendant's confession was consistent with the evidence uncovered by the sheriff's department in the course of their investigation; (5) after the arrest, the defendant, freely and knowingly waived his constitutional right to remain silent and to have an attorney; (6) the defendant is a product of a dysfunctional home environment; (7) the defendant experienced repeated violence in the form of verbal abuse, physical abuse and emotional abuse during childhood; (8) the defendant suffered from continual alcohol and drug abuse from an early age. The defendant offered extensive evidence regarding his childhood and upbringing, in part asserting that frequent moves and a lack of love and nurturing mitigated his actions in this case. We would note that while there was evidence of abuse and neglect, there was also ample evidence to indicate the defendant's mother, brother and other relatives made every effort to provide loving guidance and to help him overcome his drug and alcohol problems. In response to his brother's effort to give the defendant a fresh start after undergoing

drug rehabilitation, the defendant waited until his brother and sister-in-law left for work, then according to the brother, "[m]y TV, VCR, rent money, albums, the tapes, and everything was gone out of my apartment." The defendant was found in the apartment "cracked out" and holding a crack pipe. Evidence showed that the frequent moves were the result of the defendant's stepfather's military commitment and the number and frequency of the moves does not appear excessive. We find there was sufficient evidence for the jury to conclude the nonstatutory mitigating circumstances not found lacked mitigating value.

The defendant offered a proportionality review in his brief. In this review, the defendant sets forth twelve cases for comparison. He contends these cases, which resulted in life sentences, are substantially similar to the instant case and therefore, this Court should find the death penalty in the instant case disproportionate and impose a sentence of life imprisonment.

The first three cases cited by the defendant are cases in which the death penalty was found disproportionate. In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant, age nineteen, was one of three men who decided, after an evening of drinking, to go to the victim's house to buy more liquor. The defendant suggested that they rob and kill the man instead. Following the plan, the three men gained entrance by indicating they were there to purchase liquor. Once inside the house, the defendant pulled a knife and stabbed the victim twice in the chest. When the victim managed to remove the knife, another of the attackers stabbed the victim five or six times in the back. The defendant and his cohorts then searched the house and stole numerous valuables. Medical evidence indicated the victim died shortly after being stabbed as a result of one wound which pierced the heart. Two key factors distinguish the instant case. In *Young*, the aggravating circumstances were limited to those involving the crime at hand—that is, the defendant committed the murder for pecuniary gain and while engaged in the commission of armed robbery. In the case at bar, the jury did not find the mitigating circumstance of the defendant's age and found the aggravating circumstance that the defendant had previously committed a violent felony.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the victim was robbed, then shot twice in the head at close range. This Court indicated that there was no evidence of the events after the defendant and victim were seen leaving together. The sole aggravating cir-

cumstance was that the murder was committed for pecuniary gain. The jury found in mitigation that the defendant had no significant history of prior criminal activity and the statutory catch-all. The aggravating circumstance of the present defendant's having committed a prior violent felony distinguishes this case from the case at bar.

The defendant next cites *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), in which this Court found the death sentence to be disproportionate. In *Stokes*, the defendant and others decided to rob the owner of a warehouse. The owner, age 70, was attacked as he left his business. The defendant was one of two assailants who actually administered blows to the victim with sticks they had carried for that purpose. They robbed the victim and left him lying on the ramp where the assault occurred. He died some fourteen hours after the assault as a result of head injuries including a fractured skull. The co-assailant, Murray, received a life sentence for his role in the assault (*see State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988)). Stokes was found guilty under the felony murder theory. The sentencing jury found the aggravating circumstance that the crime was especially heinous, atrocious, or cruel. The jury also found the presence of mitigating circumstances without specifying what they were. In *State v. Lawson*, we held that, "[s]ince the jury did not specify which mitigating circumstances it found and specified that it found 'one or more,' we must assume for purposes of proportionality review that the jury found both mitigating circumstances submitted. . . ." *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). We reaffirmed that holding in *Stokes*, where twelve mitigating circumstances were submitted. In distinguishing *Stokes* from the instant case, we note that Stokes was only seventeen-years-old at the time he committed the murder, that he had no significant history of criminal activity, and that he committed the crime while under the influence of mental or emotional disorder. Further, he was not convicted under the theory of premeditation and deliberation. As the Court in *Stokes* noted, the aforementioned combination of circumstances found in robbery cases have generally resulted in life sentences.

In *State v. Holland*, 318 N.C. 602, 350 S.E.2d 56 (1986), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987), the victim was found nude, lying on the floor in the bedroom of his house. He had been stabbed numerous times in his chest. Valuables and the victim's car were missing from the house. The defend-

ant had been involved in a homosexual relationship with the victim. At trial, the defendant was found guilty under the theory of premeditation and deliberation. The jury did not find the defendant guilty of felony murder. Two aggravating circumstances were found, that the murder was committed while the defendant was engaged in committing robbery with a dangerous weapon and that the murder was committed for pecuniary gain. However, this Court subsequently vacated the underlying conviction for robbery with a dangerous weapon. The jury also found two mitigating circumstances, that the defendant did not resist arrest and that he had been abused by his father. The absence of a prior conviction of a violent felony is a significant distinguishing factor between *Holland* and the case at bar.

*State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984), is the next case upon which the defendant relies. The evidence in that case showed that the defendant was dropped off at the victim's residence so that he could inquire about possible employment. When picked up approximately thirty minutes later, the defendant was armed with a .22-caliber pistol and in possession of money and jewelry. He stated that he had killed "old man Teel." The victim, Mr. Teel, was found dead in his home. He had one gunshot wound in the head and four in the chest and upper abdomen. He died as a result of multiple gunshot wounds. Both premeditation and deliberation and felony murder were submitted to the jury, but they returned a verdict based solely upon felony murder and specifically rejected premeditation and deliberation. In reaching a decision on sentencing, the jury found the same two aggravating circumstances as were found in the instant case: (1) that the defendant had previously been convicted of a felony involving the use of violence to the person; and (2) that the murder was for pecuniary gain. The jury also found two statutory and seven nonstatutory mitigating circumstances. In answer to whether the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, the jury answered "no." A sentence of life imprisonment was then imposed. In distinguishing *Wilson* from the instant case, we would note the jury in this case found the defendant guilty on both theories of murder and also that the jury found only one statutory mitigating circumstance and found that the aggravating circumstances outweighed those in mitigation.

In *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983), the defendant was convicted in the first-degree murder of a 79-year-old man and his 66-year-old female housekeeper. Each victim was found to have died from a single gunshot wound to the back of the head. The

jury found the defendant guilty of first-degree murder based on both premeditation and deliberation and felony murder. The jury was unable to reach a unanimous verdict regarding sentencing, so as required by N.C.G.S. § 15A-2000(b) (1988), the court imposed a life sentence.

*State v. Hunt*, 305 N.C. 238, 287 S.E.2d 818 (1982), upon which the defendant relies, involves the death of Walter Ray, a man known to run an illegal whiskey house and to keep large sums of cash. The defendant had been to Ray's trailer before and had expressed an intent to "rip off" Ray. In an effort to get cash, the defendant, wearing gloves, entered Ray's trailer and grabbed him from behind. He forced Ray into a bedroom where the defendant pocketed approximately $400 in cash and a pistol. He then threatened Ray with the pistol. After Ray pleaded for the defendant not to kill him that way, the defendant permitted the victim to drink alcohol and take some pills. Once the victim became sluggish, the defendant used a knife to inflict wounds on the victim's forearms in the vicinity of his wrist. He later deepened the wounds and waited while the victim bled to death. Investigating officers first believed the wounds were self-inflicted. Later, the defendant spoke with a friend and gave a detailed recounting of the murder. Several months later, the friend informed authorities who arrested the defendant based on this information. As the State notes, the details of this crime are very similar to the case at bar, the jury found three aggravating circumstances including: (1) the defendant had been previously convicted of a felony involving the use of violence to the person; (2) the murder was committed for the purpose of avoiding a lawful arrest; and (3) the murder was committed while the defendant was engaged in the commission of a dangerous felony, to wit, robbery with a dangerous weapon. The jury did not reach the issue of mitigating circumstances, because it was determined by the jury that they could not unanimously find beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

In *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523, the companion case to *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653, the defendant received a life sentence upon a jury finding that he was guilty of murder under the felony murder theory. While the jury found the same aggravating circumstances as were found in the instant case, the absence of premeditation and deliberation is of importance in comparing the two cases.

The defendant next argues *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983), is a comparable case. In *Bare*, the victim was thrown down a mine shaft two different times and the second time rocks were thrown in after him to ensure that he fell all the way to the bottom. The motive in *Bare* was revenge. The defendant was found guilty of first-degree murder on the basis of premeditation and deliberation. The jury found three aggravating circumstances: (1) that the defendant had previously been convicted of a felony involving the use of violence to the person; (2) that the capital felony was committed while the defendant was engaged in the commission of a kidnapping; and (3) that the murder was especially heinous, atrocious, or cruel. A life sentence resulted from the jury's inability to unanimously find beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

In *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986), the victim, age 61, suffocated after being bound by the defendant. The victim was discovered in her home. She was nude and her ankles, knees, wrists, and mouth were bound by various materials. The medical examiner concluded that the victim most likely died as a result of suffocation caused by the gag tied around her mouth. Indications were that the victim was suffering from a sinus infection which made it impossible for her to breathe through her nose. Complications related to the sinus infection caused the cloth gag to form a virtually air tight seal on her mouth. Death most likely occurred within thirty minutes of the gag's being placed across the victim's mouth. The defendant met the victim while he was in prison through the victim's involvement with the Yoke Fellows, a religious organization which conducted Bible studies and held devotionals with inmates. The defendant was found guilty of first-degree murder on the basis of premeditation and deliberation as well as the felony murder rule. The jury found two of the three aggravating circumstances which were submitted: (1) the defendant had been previously convicted of a felony involving the use or threat of violence to the person; and (2) the murder was committed while the defendant was engaged in the commission of kidnapping. The jury found none of the ten mitigating circumstances submitted, but unanimously recommended the defendant be sentenced to life imprisonment.

The defendant also relies on *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985), in which the defendant was convicted of first-degree murder based on felony murder. The victim was the manager of the Bishop Motel in Belmont. He was stabbed once in the chest, a

wound which punctured his heart resulting in his bleeding to death. The jury determined that the defendant was present and participated in the killing with others, but did not find that he delivered the fatal blow; intended that the victim be killed; or contemplated that deadly force might be used in the course of the robbery with a dangerous weapon. Five mitigating circumstances were found to exist including: (1) that the defendant is the father of two minor children and is obligated to support them to the best of his abilities; (2) that the defendant, based upon his level of education and work experience, is capable of rehabilitation; (3) that the defendant has members of his family who are willing to assist in his rehabilitation; (4) that the defendant has manifested his concern for his fellow man in providing unsolicited assistance to Donald Isley, who was in need right after a tragedy altered Mr. Isley's life; and (5) that while the defendant has been convicted of a prior felony involving the use of violence, his involvement contained an element of self-defense. While the jury determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, it also found that the aggravating circumstances were not sufficiently substantial to call for the imposition of the death penalty.

The final case brought forward by the defendant is *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986). In *Williams*, the defendant was the boyfriend of the victim's daughter. The victim and her daughter had a history of violent physical confrontations. During the period preceding the murder, the defendant and his girlfriend had discussed "getting rid" of the victim. After a violent argument, the daughter called and spoke with the defendant and expressed the sentiment that she just wished he would "do it." The victim's house evidenced a struggle. She died as the result of ligature strangulation and an acute head injury. The defendant admitted his guilt to his girlfriend, but at trial presented evidence suggesting the victim's daughter was the murderer. The defendant was convicted of first-degree murder. The jury determined that the defendant had previously been convicted of a felony involving the use or threat of violence to the person, and that the murder was committed for pecuniary gain. The jury was presented with four mitigating circumstances and determined that one or more had mitigating value. In the absence of specifically denoted mitigating circumstances, we must find that the jury determined all four had mitigating value. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. The jury ultimately determined that, while the aggravating circumstances were not outweighed by the mitigating circumstances, they were not sufficiently substantial to call for the imposition of the death penalty.

We held recently:

> [T]he fact that in one or more cases factually similar to the one under review a jury or juries have recommended life imprisonment is not determinative, standing alone, on the issue of whether the death penalty is disproportionate in the case under review. Early in the process of developing our methods for proportionality review, we indicated that similarity of cases, no matter how many factors are compared, will not be allowed to "become the last word on the subject of proportionality rather than serving as an initial point of inquiry." [*State v. Williams*, 308 N.C. 47, 80-81, 301 S.E.2d 335, 356 (1983).] Instead, we stated plainly that the constitutional requirement of "individualized consideration" as to proportionality could only be served if the issue of whether the death penalty was disproportionate in a particular case ultimately rested upon the "experienced judgments" of the members of this Court, rather than upon mere numerical comparisons of aggravators, mitigators and other circumstances. Further, the fact that one, two, or several juries have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have "consistently" returned life sentences . . . .

*State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 46-47 (1994).

We have noted in the past that conviction upon both premeditation and deliberation and felony murder theories is significant. *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). In particular, a finding of premeditation and deliberation indicates "a more calculated and cold-blooded crime." *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, ___ U.S. ___, 130 L. Ed. 2d 162, 63 U.S.L.W. 3264 (3 October 1994) (*citing Artis*, 325 N.C. 278, 384 S.E.2d 470). The State notes in its brief that the jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate. *See e.g.*, *Artis*, 325 N.C. 278, 384 S.E.2d 470; *State v. Brown*, 320 N.C. at 214, 358 S.E.2d at 24. We agree. Recently, in *State v. Rose*, 335 N.C. 301, 351, 439 S.E.2d 518, 546, *cert. denied*, ___ U.S. ___, 129 L. Ed. 2d 883, 62 U.S.L.W. 3861 (27 June 1994), we determined that none of the cases in which the death sentence was determined by this Court to be disproportionate have included this aggravating circumstance.

We have not been able to find a case on "all fours" with this case. In examining the cases in the proportionality pool, we believe that if a murder is committed in a particularly egregious manner the jury is likely to return a recommendation that the death penalty be imposed. If on occasion a jury does not do so, that does not mean jurors are not regularly recommending the death penalty in cases which are similar in their cruelty.

The murder in this case was especially callous and cruel. The victim was stabbed, robbed, and thrown overboard while still alive. He was able to reach a pile of oyster shells where he stayed for several hours before he was found. The defendant might have been able to save the victim if he had availed himself of any one of the chances he had to do so after he had left him in the water. Not to do so was particularly cruel. When the nature of the murder is considered in combination with the defendant's past record, we cannot hold that the death sentence was disproportionate.

NO ERROR.

Chief Justice EXUM concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case. However, given the manner in which the crime was committed, defendant's subsequent conduct, our precedents holding that death sentences under similar circumstances are disproportionate, the compelling mitigating circumstances found by the jury and that juries in this State have consistently returned life sentences under similar circumstances, I conclude the death penalty here as a matter of law is disproportionate.

N.C.G.S. § 15A-2000(d)(2) mandates that we consider whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This requires a comparison of "the case at bar with other cases in the [proportionality] pool[1] 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 the defendant's character, background, and physical and mental condition." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S.

1. For a definition of those cases in the proportionality pool, *see State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994).

1120, 86 L. Ed. 2d 267 (1985). A comparison of this case to other capitally tried cases in our proportionality pool in which both crimes and defendants are similar to the crime and defendant in the instant case compels the conclusion that the sentence of death here is disproportionate.

The State offered in evidence defendant's out-of-court confession to investigators. It offered an edited version during the guilt proceeding and an unedited version during the sentencing proceeding. According to the unedited version of defendant's confession, defendant and Joe Simpson, his accomplice, both worked for the deceased, John Redd, a shrimper. For about a week they had been talking about stealing Redd's truck so they could go to Georgia. On the day of the murder, defendant and Simpson had been drinking. They planned to rob Redd while the three of them were shrimping. While shrimping, defendant and Simpson "dropped the net wrong. . . . It was tangled up. John [Redd] . . . got upset about it and he kept yelling at us. . . . Then he started hounding Joe, saying you are just a piece of shit, I'd rather have Ida working for me. . . . [W]e never did plan to kill him. We did plan to rob him. What happened I don't know. I guess I got tired of his griping and I stabbed the man. I thought I only stabbed him twice, but after I stabbed him, we made him lay down in the boat. He laid down in the boat and he asked me did he have his liquor, so I gave him his liquor and I lit him a cigarette." Defendant and Simpson decided to take the deceased to a beach; "but we got stuck, the boat motor stuck in the sand and we had to drag that out, but when we got there, Joe helped the man off the boat. I told the man that I would call somebody and try to send somebody to him to help him. . . . We weren't going to throw him overboard. We was going to tie him up and put him on the bank. Then take his truck. . . . When I put him down in the boat . . . I asked him, are you all right. He said boys I am hurting, don't stick me again, don't kill me. I said John I am not going to kill you, I am going to get you some help. John, I reckon he thought we was taking him to the dock, because when we pulled up to the bank, I said O.K. John we're here. He looked up, put his hand on the side of the boat, and said we are at the dock? He looked up and he goes oh no don't do that. That's when Joe helped him out of the boat and put him on the bank. . . . I kept telling Joe I think I killed the man. Joe kept saying we need to call somebody and tell them where he was at. We never called anybody. Joe never called anybody. I never called anybody." Defendant, when asked how he felt "inside," replied, "Bad."

This incident occurred shortly before 2:00 a.m. on 21 August 1991. Norwood Mercer, a fisherman, discovered Redd alive at about 6:00 a.m. apparently on or near the bank where defendant and Simpson had left him. Redd told Mercer that he had been robbed and stabbed and had been there "the biggest part of the night." Redd was sitting on a pile of oyster shells at the edge of the water.

Mercer got back to Shell Rock Landing with Redd at approximately 6:30 a.m. and the rescue squad arrived fifteen to twenty minutes later. A paramedic noticed that Redd was pale, cold and wet. He saw two stab wounds on Redd's back. The ambulance arrived at Naval Hospital at Camp Lejeune at 7:22 a.m. Detective Lee Stevens arrived at 7:45 a.m. and spoke to Redd. Redd told Stevens that two persons whom he had hired two weeks ago had accosted him and that defendant had stabbed him and robbed him. Redd said that his assailants had planned it but that the knife with which he was stabbed belonged to him. He said defendant stabbed him twice and that "they threw me overboard." Redd stated that defendant said he would not kill him.

Redd was taken to the operating room at about 10:20 a.m. Dr. David Geiger, a surgeon, was called in and observed three stab wounds in Redd's back. Redd died at 12:46 p.m. on 21 August 1991 because of blood loss from the stab wounds.

Although defendant was convicted on the basis of both premeditation and deliberation and felony murder, the underlying felony being armed robbery, there is barely enough evidence in the guilt phase to carry the question of premeditation and deliberation to the jury. The fatal stabbing was not planned but took place on the spur of the moment. While there is evidence that defendant intended to kill Redd when he stabbed him, the evidence also shows that, after the stabbing occurred, defendant and Simpson took measures which they thought might save Redd's life. They assisted Redd after the stabbing and left him alive in a place where he might be rescued. Redd was, in fact, rescued alive, and he lived for almost twenty-four hours after defendant stabbed him.

Defendant voluntarily surrendered himself and gave a full confession to law enforcement authorities. His confession was the principal evidence against him at trial. Defendant showed some remorse in his confession; although the jury did not find this to be a mitigating circumstance.

At sentencing, the jury found two aggravating circumstances—that defendant had been previously convicted of a felony involving the use or threat of violence to the person and that the capital felony was committed for pecuniary gain. It also found the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. The jury found seven nonstatutory mitigating circumstances: Defendant has acknowledged his guilt to law enforcement officers; defendant took responsibility for the killing and did not try to minimize his culpability; defendant's confession was consistent with the evidence uncovered by the sheriff's department in the course of its investigation; after the arrest, defendant freely and knowingly waived his constitutional right to remain silent and to have an attorney; defendant is a product of a dysfunctional home environment; defendant experienced repeated violence in the form of verbal abuse, physical abuse and emotional abuse during childhood; and defendant suffered from continual alcohol and drug abuse from an early age.

These circumstances, of course, do not justify defendant's having inflicted the fatal wounds; and defendant should be severely punished by being imprisoned for life for the murder he committed. They do, I believe, show that this murder does not rise to the level of egregiousness present in those cases in which juries have returned, and we have affirmed, death sentences. Considering both the crime and the defendant, this case is more like murder cases in which life imprisonment has been imposed.

There are several cases in the proportionality pool, similar to the one before us, in which this Court concluded the death penalty was disproportionate:

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two companions went to the victim's home to both rob and murder him. Because the victim knew the defendant and his companions, they were allowed into the home under the guise that they were going to buy some liquor. The defendant surprised the victim and stabbed him twice. A companion "finish[ed] him" by stabbing him five or six more times. After the killing, the defendant along with the others stole valuables from the victim. They then searched his house and stole his coin collection. The jury in *Young* found two aggravating circumstances, that the murder was committed while defendant

was engaged in the commission of an armed robbery and that it was committed for pecuniary gain.

The robbery and murder in *Young* are similar to the robbery and murder in this case in that in both cases alcohol was a factor, defendants took advantage of their familiarity with the victims, and stabbing was the means by which the killings were committed. Indeed, the killing in *Young* was more aggravated because it was planned in advance and some of the wounds were inflicted after the victim was rendered helpless. Here defendant only planned to rob the victim. It was only after an argument and the consumption of alcohol that the robbery escalated into murder. Defendant also made some attempt to assist the victim after the stabbing.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), another similar robbery murder case, three men conspired to rob an elderly man. The defendant tricked the victim into giving him a ride and then shot him twice in the head during the course of the robbery. The jury found as an aggravating circumstance that the killing was committed for pecuniary gain. The Court found the death sentence imposed on Jackson was disproportionate.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the victim died of a cardiac arrest after being robbed and shot in the legs by the defendant. The jury found the aggravating circumstance that the crime was committed for pecuniary gain. In determining that the death sentence was disproportionate, the Court noted that it appeared defendant was simply attempting to rob the victim. Defendant pleaded guilty during the trial and acknowledged his wrongdoing before the jury. Likewise in this case, I believe the evidence shows that defendant only planned to rob the victim. He turned himself in to the authorities and took responsibility for his actions.

There are several robbery murder cases in which juries, after finding the same two aggravating circumstances as those found here, have recommended life imprisonment. *State v. Howard*, 334 N.C. 602, 433 S.E.2d 742 (1993); *State v. Erlewine*, 328 N.C. 626, 403 S.E.2d 280 (1991); *State v. Darden*, 323 N.C. 356, 372 S.E.2d 539 (1988); *State v. Clark*, 319 N.C. 215, 353 S.E.2d 205 (1987); *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986); *State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984); and *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988).

In *State v. Holland*, 318 N.C. 602, 350 S.E.2d 56 (1986), *overruled on other grounds by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987), defendant stabbed the victim to death, and the jury found two aggravating circumstances: the murder was committed while the defendant was engaged in committing robbery with a dangerous weapon and the murder was committed for pecuniary gain. The jury recommended life imprisonment.

It thus appears that in cases where both the crime and the defendant are similar to the crime and the defendant here either this Court has declared the death penalty to be disproportionate or juries have returned sentences of life imprisonment. The majority has not cited a similar case in which the death penalty was imposed at trial and affirmed on appeal, and my research has not revealed one.

In *State v. Lawson*, 310 N.C. at 648, 314 S.E.2d at 503, we said that if, after making the comparisons with similar cases, considering both the crimes committed and the defendants who committed them,

> we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

This Court has consistently and recently made these kinds of comparisons in conducting its proportionality reviews in death sentence cases. *See State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994); *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994); *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118 (1993), *cert. denied*, 126 L. Ed. 2d 341, 62 USLW 3319 (U.S.N.C., Nov. 1, 1993) (No. 93-5077), *reh'g denied*, 126 L. Ed. 2d 707, 62 USLW 3453 (U.S.N.C., Jan. 10, 1994) (No. 93-5077); *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, 122 L. Ed. 2d 684, 61 USLW 3582 (U.S.N.C., Feb. 22, 1993) (No. 92-6594), *reh'g denied*, 123 L. Ed. 2d 503, 61 USLW 3715 (U.S.N.C., Apr. 19, 1993) (No. 92-6594); and *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (1991), *cert. denied*, 116 L. Ed. 2d 232, 60 USLW 3266 (U.S.N.C., Oct. 7, 1991) (No. 91-5252).

Considering both the crime and defendant, as we are required to do by N.C.G.S. § 15A-2000(d)(2), and the other cases in our propor-

tionality pool in which both the crime and defendant are similar to the crime and the defendant here, I conclude the sentence of death imposed in this case is disproportionate. I vote to remand the case to the superior court for the imposition of a sentence of life imprisonment.

Justice Frye joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA v. HENRY WATSON

No. 359A91

(Filed 3 November 1994)

**1. Homicide § 257 (NCI4th)— first-degree murder—premeditation and deliberation—quarrel with victim**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss for lack of evidence showing premeditation and deliberation where defendant argued that all of the evidence showed that his intent to kill the victim was formed under the influence of the provocation of the quarrel with the victim. However, there was evidence tending to show preparedness on the part of defendant to kill the victim before the argument between them ensued in that defendant procured a gun and placed it by his side in the truck where he was seated before the argument and evidence that after the argument had ended and the victim had withdrawn there was time for defendant's blood to have cooled before the shooting occurred. Defendant's mere anger at the victim is not alone sufficient to negate deliberation. Moreover, there was other evidence sufficient to support the jury's finding of both deliberation and premeditation.

**Am Jur 2d, Homicide §§ 437 et seq.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

**2. Homicide § 384 (NCI4th)— first-degree murder—self-defense—fear of death or great bodily harm**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss on the ground that the State failed to prove that defendant did not act in self-defense where there was evidence from which the jury could find beyond a reasonable doubt that defendant's belief in the need to kill was unreasonable.

**Am Jur 2d, Homicide § 448.**

**Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.**

**Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.**

**3. Homicide § 615 (NCI4th)— first-degree murder—self-defense—instructions—honest but unreasonable belief in need to kill**

There was no plain error in a noncapital first-degree murder prosecution in which self-defense was an issue where the trial court charged the jury in terms of defendant's belief in a need to kill, rather than in terms of his belief in a need to use deadly force. Although defendant argued that an honest but unreasonable belief in the need to kill is tantamount to the use of excessive force and should result in a verdict of voluntary manslaughter on the theory of imperfect self-defense, and although as a general proposition instructing a jury in terms of the need "to use deadly force" rather than "to kill" could be appropriate if the evidence supported such an instruction, the evidence in this case showed an intent to kill rather than an intent to use deadly force.

**Am Jur 2d, Homicide §§ 519 et seq.**

**4. Homicide § 493 (NCI4th)— first-degree murder—instructions—premeditation and deliberation—lack of provocation**

There was no plain error in a noncapital prosecution for first-degree murder by instructing the jury that premeditation and deliberation could be inferred from certain circumstances, including the victim's lack of provocation. Although defendant

argued that there was no evidence showing a lack of provocation by the victim, there was some evidence to show that defendant acted independently of any provocation, which is the legal equivalent of acting in the absence of provocation. Moreover, the pattern jury instruction which the court gave could not have been misunderstood to mean that the State had proven the circumstances mentioned.

**Am Jur 2d, Homicide § 501.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

**5. Evidence and Witnesses §§ 1070, 1066 (NCI4th)— flight— instructions—evidence sufficient—not an expression of opinion**

The trial court did not err in a noncapital first-degree murder prosecution by instructing the jury on flight as evidence of guilt where there was evidence that defendant immediately sped away in his truck after shooting the victim five times and, although aware that police officers had visited his house in search of him, did not contact the police or return home for two weeks following the shooting. The court appropriately instructed the jury that it was to determine the weight to be given the evidence and that it was the contention of the State rather than the court that defendant had fled. Defendant did not request that another explanation for defendant's unavailability be suggested in the court's instructions.

**Am Jur 2d, Evidence §§ 532 et seq.**

**6. Homicide § 635 (NCI4th)— first-degree murder—self-defense—duty to retreat**

The trial court did not err in a noncapital first-degree murder prosecution by failing to instruct *ex mero motu* that a person who is without fault and who reasonably believes that an attack is being made with felonious intent has no duty to retreat where the evidence was that the victim quit the argument and returned to his vehicle, defendant left his vehicle, walked to the victim's car and began shooting, and the evidence revealed no attack or attempted attack by the victim.

**Am Jur 2d, Homicide § 520.**

**Homicide: extent of premises which may be defended without retreat under right of self-defense. 52 ALR2d 1458.**

7. **Evidence and Witnesses § 284 (NCI4th)— first-degree murder—self-defense—cross-examination—character of victim**

The trial court did not err in a noncapital first-degree murder prosecution by sustaining the State's objection to cross-examination of a prosecution witness concerning the character of the deceased where there was no showing that defendant had knowledge of the witness's opinion of the victim's dangerousness and, although it was error not to permit the jury to hear evidence regarding the victim's violent character because the jury was instructed on self-defense and was required to determine the aggressor, the error was harmless because the trial court gave defendant wide latitude in cross-examining the witness and defendant was able to elicit extensive testimony concerning the victim's reputation for violence. Moreover, there was no offer of proof and the significance of the evidence sought to be elicited could not be assessed.

**Am Jur 2d, Evidence §§ 363 et seq.**

8. **Evidence and Witnesses § 2170 (NCI4th)— first-degree murder—gunshot residue analysis—basis for expert opinion**

There was no error in a noncapital first-degree murder prosecution where defendant contended that an SBI agent's expert testimony on gunshot residue analysis amounted to an opinion based on an assumed fact unsupported by evidence, but his opinion was that his findings were consistent with the victim raising his hand in response to the attack and was not based on any assumed fact. N.C.G.S. § 8C-1, Rule 702.

**Am Jur 2d, Witnesses § 427.**

9. **Constitutional Law § 342 (NCI4th)— first-degree murder—jury question—ex parte communication**

There was no error in a noncapital first-degree murder prosecution where the jury knocked on the door and indicated that they had a question, the judge instructed the bailiff to give them a yellow pad, stand at the door, and tell them to write out the question, the question had not been produced within fifteen minutes, and the judge sent the defendant to lock-up and worked on

other matters. Although defendant contended that this was an unconstitutional *ex parte* communication, the bailiff was instructed only to retrieve a question from the jury and bring it to the court. No objection was raised by defendant and, nothing else appearing, it may be assumed that the bailiff followed the court's instructions. Moreover, as to the court's failure to determine whether the jury had a question, the jurors were free to inform the court that their question remained unanswered and the defendant was free to object and request that the court confirm that the jury no longer had a question.

**Am Jur 2d, Criminal Law §§ 695, 696, 910 et seq.**

**Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal—post-Parker cases. 35 ALR4th 890.**

**Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR4th 410.**

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Read, J., at the 10 September 1990 Criminal Session of Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 15 January 1993.

*Michael F. Easley, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.*

EXUM, Chief Justice.

Defendant Henry Watson was tried noncapitally for first-degree murder of Ronald Bilbrey on the theory of premeditation and deliberation. He was found guilty and sentenced to life imprisonment. Defendant now brings forth eight assignments of error. We conclude defendant's trial was free from prejudicial error.

I.

The State's evidence tended to show the following: Around 9:00 p.m. on 16 June 1989 Lisa Marlene Harrell was watching television with her husband in their mobile home at Countryside Trailer Park in

Raleigh when she heard a loud argument outside. Looking through the window of her mobile home, she observed a truck and a car resembling a station wagon facing each other. Harrell then returned to her chair and continued watching television.

The argument continued for about thirty minutes before Harrell heard a gunshot, which, after a brief pause, was followed by three additional consecutive shots. Upon hearing the shots, Harrell stepped outside onto her porch and witnessed a blue and white Ford pickup truck driving past her mobile home and leaving the mobile home park at a high rate of speed. Directing her attention toward the area where the car and truck had been parked, Harrell heard someone crying for help. She walked toward the station wagon and observed a woman, Sherry Ann Green, kneeling on the seat, screaming "Ron," and "Help me," and a man, Ronald Bilbrey, in the driver's seat slumped over toward the passenger side. Green was Bilbrey's girlfriend at the time of the shooting. The two had been living together with Ira Diggs, Green's fourteen year-old son, in a mobile home in the same mobile home park. Harrell checked Bilbrey's pulse and found he had none. Harrell recognized the smell of alcohol within the station wagon, but she saw no evidence of any weapon in the vehicle or on either Bilbrey or Green.

Earlier on the same date, Diggs, defendant's nephew, saw defendant leaving Green's mobile home. Defendant had come to inquire about ten dollars that Bilbrey owed him. At that time, Green, defendant and Bilbrey were all intoxicated. Bilbrey paid defendant the money and ordered defendant to leave. After telling Green that he was tired of defendant being around Green's mobile home, Bilbrey left the mobile home, saying that he was going to talk to defendant and get it straight.

When Diggs entered the mobile home, Green told him that she, defendant and Bilbrey had argued and she was afraid to spend the night in the mobile home because she felt some problem might arise between Bilbrey and her. Green requested Diggs to find defendant and ask whether she and Diggs could stay at defendant's house.

Diggs stopped defendant as he was leaving the mobile home park and asked whether he and Green could stay with defendant that night. While Diggs and defendant were talking, Bilbrey drove up in his car and stopped within five feet of defendant's truck. At the same time, defendant removed a .22-caliber revolver from a bag and placed it next to his leg.

Bilbrey began to argue with defendant. During the argument, Bilbrey instructed Diggs to find Green. When Diggs returned with Green, the two men were still arguing. Bilbrey, who appeared intoxicated, was standing next to the door of defendant's truck, and defendant was seated in his vehicle. When Bilbrey accused defendant of making advances towards Green, defendant told Bilbrey he did not want to discuss the matter in public. He then told Bilbrey "he was acting like an ass." Bilbrey responded, "I'll show you how an ass acts," and then jumped into his own car and leaned over as if to insert the keys in the ignition. At that moment defendant got out of his truck and walked to the side of Bilbrey's car, grabbed the door and began shooting. Green tried to grab defendant's arm, but he pushed her away and knocked her down. He then continued firing at Bilbrey. Bilbrey attempted to drive away, but lost control of the car and hit a mobile home. Without speaking, defendant returned to his truck and left the area quickly.

The police arrived shortly thereafter. An investigation conducted by field agents of the City-County Bureau of Investigation uncovered no weapons on or near Bilbrey's body. An autopsy revealed Bilbrey received four gunshot wounds to the left side of the body. One bullet, which passed through the lung, heart and esophagus was thought to be the key fatal wound, resulting in death within fifteen minutes.

Defendant did not report the shooting to the police. Police began a search for defendant and visited his residence every other day. He was arrested two weeks after the shooting.

Defendant testified in his own behalf. He stated Green had warned him that Bilbrey had guns and had threatened to "get" him. Defendant had seen Bilbrey armed previously and Bilbrey had told defendant that he, Bilbrey, had killed someone in a prior dispute.

Before the shooting, defendant had been fishing with a friend. Because the place where they intended to fish was known for snakes, defendant took his gun with him. After the fishing trip, defendant went to the mobile home park to collect ten dollars which Bilbrey owed him. As defendant was leaving the mobile home park in his truck, Diggs approached him and asked if he and Green could spend the night with defendant. Diggs said Green was afraid that Bilbrey would beat her. About that time, Bilbrey drove up rapidly in his car. An argument between defendant and Bilbrey ensued in which Bilbrey accused defendant of making passes at Green. Bilbrey told Diggs to summon Green. When Green arrived, Bilbrey asked her if she previously informed him that defendant had made passes at her. When

Green denied any knowledge of the matter, Bilbrey called her a "damn lie." He then hit her and attempted to choke her. Defendant attempted to leave the scene but had difficulty starting his truck. Bilbrey released Green and continued to argue with defendant. After telling defendant he was going to show him how an ass acts, he returned to his car. As Bilbrey reached around in his car, defendant believed he was looking for a gun. Defendant testified he panicked and shot Bilbrey. He was unaware of how many times he fired or whether Bilbrey attempted to start his car.

After the shooting, defendant started his truck and drove away. He discarded the gun in a creek near the road. Despite his wife's request to do so, defendant was too afraid to report the incident to the police.

Additional facts will be presented in the discussions of the legal issues to which they are pertinent.

II.

Defendant first contends the trial court erred by denying his motion to dismiss at the close of all the evidence on the ground the evidence was insufficient to support a verdict of guilty. Defendant contends the evidence falls short of satisfying the State's burden of proof for two reasons: 1) the State's evidence was insufficient to prove premeditation and deliberation; and 2) the State's evidence was insufficient to prove defendant did not act in self-defense.

A.

**[1]** Defendant argues that all the evidence shows his intent to kill the victim was formed under the influence of the provocation of the quarrel with the victim; therefore, there was no premeditation and deliberation. We disagree.

The State's proof is sufficient if a rational juror could have found the element of premeditation and deliberation beyond a reasonable doubt. *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986). Upon defendant's motion to dismiss, "the trial court must determine whether there is substantial evidence of each element of the offense charged, or any lesser offense, and that defendant is the perpetrator." *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992).

> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). 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).

*Id.* "[A]ll evidence must be considered in a light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced from the evidence." *State v. Leroux*, 326 N.C. 368, 375, 390 S.E.2d 314, 320, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990). If substantial evidence of each element of the offense charged exists, the trial court must deny the motion to dismiss and submit the charge to the jury. *McAvoy*, 331 N.C. at 589, 417 S.E.2d at 493.

The degrees of homicide may be defined as follows: Murder in the first degree is the unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (1986); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Murder in the second degree is the unlawful killing of another human being with malice but without premeditation and deliberation. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under the influence of some passion or heat of blood produced by adequate provocation. *State v. Tidwell*, 323 N.C. 668, 673, 374 S.E.2d 577, 580 (1989).

"A killing is 'premeditated' if 'the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing.' " *State v. Morston*, 336 N.C. 381, 402, 445 S.E.2d 1, 12 (1994) (quoting *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154). A killing is with deliberation if the intent to kill is formed in a cool state of blood and not under the influence of passion aroused by sufficient provocation. *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 272 (1994); *McAvoy*, 331 N.C. at 589, 417 S.E.2d at 494.

There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. *State v. Montague*, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979); *State v. Ward*, 286 N.C. 304, 313, 210 S.E.2d 407, 413-14 (1974), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). Mere words, however abusive or insulting are not sufficient provocation to negate malice and reduce the homicide to manslaughter. *State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985). Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetra-

tor. *State v. Rogers*, 323 N.C. 658, 667, 374 S.E.2d 852, 858 (1989); *State v. Williams*, 296 N.C. 693, 252 S.E.2d 739 (1979).

The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or threatened assault, may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree. *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981); *State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 795-96 (1981); *State v. Thomas*, 118 N.C. 1113, 1124, 24 S.E. 431, 434-35 (1896).

Here defendant, relying on *Corn*, contends the State did not prove the elements of premeditation and deliberation. Essentially defendant's argument is that all the evidence shows defendant acted under the provocation arising from his quarrel with the victim which negated deliberation. In *Corn*, all the evidence showed the victim entered defendant's house while intoxicated, began arguing with defendant and accused defendant of being a homosexual, whereupon defendant shot and killed the victim. The Court concluded that the State failed to show premeditation and deliberation because the evidence revealed the shooting was a sudden event brought on by sufficient provocation from the victim. The Court said:

> There is no evidence that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his actions. Defendant did not threaten [the deceased] before the incident or exhibit any conduct which would indicate that he formed any intention to kill him prior to the incident in question. There was no significant history of arguments or ill will between the parties. Although defendant shot deceased several times, there is no evidence that any shots were fired after he fell or that defendant dealt any blows to the body once the shooting ended.

*Id.* at 298, 278 S.E.2d at 224.

Unlike the circumstances in *Corn*, all the evidence in the present case did not show defendant was provoked into shooting the victim. Rather, there was evidence tending to show preparedness on the part of defendant to kill the victim before the argument between them ensued. Before their argument defendant procured a gun and placed it by his side in the truck where he was seated. Further, there was evi-

dence that after the argument had ended, and the victim had withdrawn, there was time for defendant's blood to have cooled before the shooting occurred. The evidence showed that after the argument between the victim and defendant had ceased and the victim had returned to his car, defendant got out of his vehicle, walked over to the victim and began to shoot the victim several times. Unlike *Corn*, in which the victim's verbal assault immediately provoked defendant's shooting, there was evidence here that any provocation resulting from the argument between defendant and the victim had had time to dissipate before defendant shot and killed the victim.

Defendant's mere anger at the victim is not alone sufficient to negate deliberation. " '[C]ool state of blood' does not mean the perpetrator was devoid of passion or emotion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595-96 (1992). " 'A perpetrator may deliberate, premeditate, and may intend to kill after premeditation and deliberation, although prompted to a large extent and controlled by passion at the time.' " *Id.* (quoting *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991)).What is required to negate deliberation, as we have shown above, is a sudden arousal of passion, brought on by sufficient provocation during which the killing immediately takes place.

Aside from the evidence of the quarrel, which, we have concluded, is not enough to negate deliberation as a matter of law, there was other evidence sufficient to support the jury's finding of both deliberation and premeditation. Premeditation and deliberation ordinarily are not susceptible to proof by direct evidence; therefore, they generally must be proved by circumstantial evidence, such as,

> "(1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner."

*State v. Woodard*, 324 N.C. 227, 230-31, 376 S.E.2d 753, 755 (1989) (quoting *State v. Calloway*, 305 N.C. 747, 751, 291 S.E.2d 622, 625-26 (1982)).

Here evidence tended to show ill will between defendant and the victim. Sometime prior to the fatal shooting, defendant had been informed that the victim was jealous of defendant and had threatened to harm him. To this, defendant responded that he would "get him

back." Before the victim's fatal encounter with defendant, defendant was sitting in his truck talking to Diggs. As the victim approached, Diggs observed defendant remove a gun from a bag and place it beside his leg. At the time of the shooting, defendant left his truck, walked over to the victim's car and shot the victim several times while pushing Green aside.

The jury's findings were also supported by evidence regarding the nature of the shooting. Under the "felled victim theory" of premeditation and deliberation, "when numerous wounds are inflicted, the defendant has the opportunity to premeditate from one shot to the next." *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987). Even where the gun is capable of being fired rapidly, "some amount of time, however brief, for thought and deliberation must elapse between each pull of the trigger." *Id.*; *see also State v. Brogden*, 329 N.C. 534, 543, 407 S.E.2d 158, 164 (1991) (felled victim theory supported by testimony of defendant's wife that there was a "pause" between shots). Here, Harrell testified that at the time of the shooting, she heard four shots: "first a 'pow' and just a little hesitation and then three more consecutive from there." Agent Creasy, assigned to the Trace Evidence Section of the SBI Crime Laboratory, testified that one explanation for the concentration of gunshot residue on the victim's left hand is that the victim had raised his left hand to fend off an attack.

We conclude the trial court did not err in denying defendant's motion to dismiss for lack of evidence showing premeditation and deliberation.

B.

**[2]** Nor did the trial court err in denying defendant's motion to dismiss on the ground that the State failed to prove defendant did not act in self-defense. The principles regarding the law of self-defense have been set out by this Court in *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489. The elements which constitute perfect self-defense are:

> 1) It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> 2) Defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

3) Defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

4) Defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

*Id.* at 595, 417 S.E.2d at 497 (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)); *accord State v. Maynor*, 331 N.C. 695, 699, 417 S.E.2d 453, 455 (1992).

Whenever there is evidence that a defendant charged with a homicide killed in self-defense, the State has the burden of proving beyond a reasonable doubt that he did not. *State v. Potter*, 295 N.C. 126, 143, 244 S.E.2d 397, 408 (1978).

This Court has recognized two categories of self-defense, perfect self-defense, which is a complete defense, and imperfect self-defense, which is a partial defense resulting in defendant's guilt of voluntary manslaughter. *Maynor*, 331 N.C. at 699, 417 S.E.2d at 455-56. Perfect self-defense exists where there is evidence of all four elements of self-defense and the State fails to prove beyond a reasonable doubt the non-existence of any of the four elements. *McAvoy*, 331 N.C. at 595-96, 417 S.E.2d at 497. Imperfect self-defense exists where there is evidence of the first two elements of self-defense and the State fails to prove beyond a reasonable doubt the non-existence of either element but does prove beyond a reasonable doubt that defendant either used excessive force or was the aggressor in bringing on the affray. *Id.*

To negate the defense of self-defense altogether, the State need only prove beyond a reasonable doubt the non-existence of either the first or second element, i.e., either defendant had no belief that it was necessary to kill to save himself from death or great bodily harm, or that defendant's belief, if he had one, was unreasonable because the circumstances as they appeared to defendant were not sufficient to create such a belief in the mind of a person of ordinary firmness. *State v. Reid*, 335 N.C. 647, 670, 440 S.E.2d 776, 789 (1994).

The question before us is whether there is some evidence from which the jury could find beyond a reasonable doubt that defendant's belief in the need to kill was unreasonable. We conclude there is. While there was evidence from which the jury could have found that

defendant's belief was reasonable, there was also evidence from which the jury could have found that it was not. For example, Green testified that when the victim got into his car, he made no motions or movement "other than just shutting the door and trying to start the car." From this testimony the jury could have found that the victim did nothing to create a reasonable fear of imminent danger in the mind of a person of ordinary firmness. Corroborating Green's testimony was the testimony of various other witnesses that the victim did not have a gun. Additionally, no gun was found on the victim or at the scene of the shooting. Further evidence of the unreasonableness of defendant's belief in the need to kill included that tending to show his hasty departure from the scene and subsequent false statements to the police, from which the jury could have inferred that defendant harbored a sense of guilt inconsistent with a killing justified on the basis of self-defense. Defendant's own statement that "[i]t happened so quick and fast and I just panicked and shot him" could have been interpreted by the jury as an admission that the shooting was an overreaction. Considering this evidence in the light most favorable to the State, we hold the trial court was correct in concluding that a rational jury could find beyond a reasonable doubt that defendant's belief in the need to kill was unreasonable.

III.

**[3]** Defendant next contends the trial court erred by failing to instruct the jury that it could return a verdict of voluntary manslaughter if the State failed to prove defendant did not believe it necessary to kill, even if it proved this belief was unreasonable. Defendant's argument is that an honest, but unreasonable, belief in the need to kill, is tantamount to the use of excessive force, and should result in a verdict of voluntary manslaughter on the theory of imperfect self-defense. While acknowledging that the instructions given were correct under *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489, defendant asks this Court to reconsider its analysis in *McAvoy* and hold that defendant's belief in the need to kill need not be reasonable for the jury to find he acted in self-defense.

We note that defendant properly has informed the Court that he made no objection at trial to the trial court's instructions on this ground. Our review of this matter therefore is for plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). However, "[a] prerequisite to our engaging in a 'plain error' analysis is the determination that the instruction complained of constitutes 'error' at all." *State v. Torain*,

316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied,* 479 U.S. 836, 93 L. Ed. 2d 71 (1986). Here we find no error in the trial court's instructions.

In *McAvoy,* this Court considered the same issue that defendant now argues. The *McAvoy* Court resolved two inconsistent lines of authority on the law of self-defense and concluded an unreasonable though honest belief in the need to kill was insufficient to justify a killing on the ground of self-defense. The Court concluded that an honest but unreasonable belief in the need to kill is not equivalent to the use of excessive force and that there is no inconsistency in a verdict of voluntary manslaughter on the basis of imperfect self-defense based on the use of excessive force and a verdict of first-degree murder resulting from defendant's unreasonable belief in the need to kill. *Id.*

In *State v. Maynor*, the Court reached the same conclusion, holding that

> a trial court is not required to instruct on either perfect or imperfect self-defense with regard to a charge of murder "unless evidence was introduced tending to show that at the time of the killing, the defendant *reasonably* believed" it necessary to kill the victim in order to save himself from imminent death or great bodily harm. *State v. Norman*, 324 N.C. 253, 260, 378 S.E.2d 8, 12 (1989).

*Maynor*, 331 N.C. at 700, 417 S.E.2d at 456 (emphasis original). We conclude *McAvoy* and *Maynor* were correctly decided, and we decline to reconsider or disturb their holdings. Based on these prior decisions, we conclude the trial court did not commit error by refusing to instruct the jury as suggested by defendant.

Defendant next contends that even under the law announced in *McAvoy and Maynor*, self-defense should require a reasonable belief only in the need "to use deadly force" rather than the need "to kill" so that juries can better assess the propriety of the degree of deadly force used by defendant. Defendant contends had the jury been instructed in this manner, it "could well have decided that some form of deadly force—such as firing one shot at a nonvital part of the body—would have been appropriate, but that firing four shots, including one into the heart, was excessive."

We think that, as a general proposition, instructing a jury in terms of the need "to use deadly force," rather than "to kill," could be appro-

priate if the evidence supported such an instruction. How to phrase these instructions depends on the nature of the evidence in the case. If the evidence is that defendant intended to use deadly force, to disable the victim but not to kill him, it would be appropriate to instruct in terms of the need to use deadly force, rather than the need to kill, and in terms of whether the amount of deadly force used was excessive under the circumstances.

Where the evidence shows, as it does here, an intent to kill rather than an intent to use deadly force, the trial court should instruct the jury, as it did, in terms of the need to kill. Here, defendant testified that he approached the victim as the victim was entering his car, "panicked and shot him." Other witnesses testified that defendant shot the victim several times while holding the gun "inches" from his head. An autopsy revealed four gunshot wounds to the victim's body, one of which penetrated the victim's lung, heart and esophagus. Expert testimony indicated that gunshot residue on the victim's hands could have been the result of the victim raising his hand to fend off the attack by defendant. All the evidence shows that defendant intended to kill the victim. None showed that he intended merely to use deadly force to disable but not to kill the victim. In light of all the evidence concerning defendant's intent, we conclude the trial court properly charged the jury in terms of defendant's belief in a need to kill, rather than in terms of his belief in a need to use deadly force.

IV.

**[4]** Defendant next contends that the trial court committed plain error by instructing the jury that premeditation and deliberation could be inferred from certain circumstances, including the victim's lack of provocation. Defendant argues there was no evidence showing a lack of provocation by the victim. Again, we disagree.

The trial court, over defendant's objection, gave the jury the following pattern jury instruction on premeditation and deliberation:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by 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, threats and declarations of the defendant, use of grossly excessive force, infliction of lethal wounds after the victim is felled, brutal or vicious circumstances of the killing or manner in which or means by which the killing was done.

As we have already discussed in Section II of this opinion, all the evidence before the jury did not show defendant acted under provocation. There was some evidence to show that defendant acted independently of any provocation, which is the legal equivalent of acting in the absence of provocation.

Defendant contends the trial court's instruction on the circumstances from which premeditation and deliberation might be inferred could have been misunderstood by the jury to mean that the State had proven the circumstances mentioned, leaving the jury to decide only whether the facts showed premeditation and deliberation. This argument is rejected on the authority of *State v. Stevenson*, 327 N.C. 259, 393 S.E.2d 527 (1990). In that case, the defendant assigned error to an instruction on premeditation and deliberation identical to the present instruction and argued that "the instruction could be understood by the jury as an opinion . . . of the court that the absence of provocation had been proven." *Id.* at 264, 393 S.E.2d at 529. The Court dismissed this argument holding that "the trial court's mere recital of such examples cannot be construed as an expression of an opinion that any of them have been proven." *Id.*

V.

**[5]** Defendant next contends the trial court erred by instructing the jury on flight as evidence of guilt. Pursuant to North Carolina Pattern Instructions, N.C.P.I.-Crim. 104-35 and 104-36, the trial court instructed the jury as follows:

> The State contends that the defendant fled. Evidence of flight may be considered by you, together with all the facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

Defendant contends this instruction was error for two reasons: First, it was not supported by the evidence presented; and second, the instruction, as given, failed to apply fully and fairly the law to the facts of the case and constituted an impermissible expression of opinion by the trial court about the case.

We find no merit in these arguments. In *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805 (1991) this Court said:

> "[F]light from a crime shortly after its commission is admissible as evidence of guilt." *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972), and a trial court may properly instruct on flight "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged," *State v. Greene*, 321 N.C. 594, 607, 365 S.E.2d 587, 595, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988) (quoting *State v. Irick*, 291 N.C. [480,] 494, 231 S.E.2d [833,] 842 [(1977)]).

*Id.* at 722, 407 S.E.2d at 813. The Court held in *Tucker* that the trial court's instruction on flight, which was identical to the instruction given in the instant case, was proper when the jury heard evidence "that defendant shaved off a beard and mustache within two days of the murder, that police began looking for him two months later, and that he was not found until three years after the murder—in Texas." *Id.*

We find here evidence supporting the flight instruction. There was evidence that defendant immediately sped away in his truck after shooting the victim five times. Although aware that police officers had visited his house in search of him, defendant did not contact the police or return home for two weeks following the shooting.

We further reject defendant's contention that he was prejudiced by the trial court's instruction. As stated in *Tucker*, "it was for the jury to decide whether these facts taken together with other facts and circumstances, supported the State's contention that defendant had fled." *Id.* at 723, 407 S.E.2d at 813. Here, prior to giving the instruction, the trial court appropriately instructed the jury as follows:

> You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

The trial court also accurately informed the jury that it was the contention of the State, not the trial court, that defendant fled. While there might have been explanation for defendant's unavailability other than flight from arrest and prosecution, these are best left to argument of counsel. Had defendant wanted such an explanation to be suggested in the court's instructions to the jury, he should have expressly requested such an instruction. No such request was made.

We conclude the instruction on flight was supported by the evidence and was not an expression of opinion from the bench. *Id.* at 723, 407 S.E.2d at 814.

VI.

**[6]** Defendant next contends the trial court committed plain error by failing to instruct, *ex mero motu*, that a person who is without fault and who reasonably believes that an attack is being made with felonious intent has no duty to retreat. We find no error.

A person attacked with deadly force and who is free from fault in bringing on the attack, has no duty to retreat, "but may stand his ground and kill his adversary, if need be." *State v. Pearson*, 288 N.C. 34, 39-40, 215 S.E.2d 598, 603 (1975). Here, however, there was nothing in the evidence giving rise to defendant's lack of duty to retreat. Defendant, not the victim, was the aggressor. The evidence is that after the victim quit the argument and returned to his vehicle, defendant left his vehicle, walked over to the victim's car and began shooting. The evidence reveals no attack or attempted attack launched by the victim. The trial court, therefore, did not commit error, much less plain error, in failing to give an instruction on defendant's having no duty to retreat.

VII.

**[7]** Defendant next contends the trial court erred by sustaining the State's objection to cross-examination of a prosecution witness concerning the character of the deceased. During cross-examination of State witness Diggs, the following transpired:

BY MR. GASKINS:

Q. Have you seen [the victim] when he was intoxicated before?

A. Yes.

Q. Did you consider him to be particularly dangerous when he was intoxicated?

MR. HAISLIP: Objection.

COURT: Sustained.

Defendant contends the trial court's ruling amounted to prejudicial error because it prevented defense counsel from investigating an important aspect of the victim's character. According to defendant, the "central question" was whether defendant "reasonably believed he had to shoot [the victim] in order to defend himself, and "[a]ssessing the threat posed by [the victim's] violent character was a crucial part of that inquiry. . . . Testimony about the impact of intoxication on

[the victim's] generally violent character would have given the jury valuable information for evaluation [sic] the reasonableness of appellant's belief that [the victim] was about to shoot him."

As a general rule, evidence of a victim's character is not admissible. N.C.G.S. § 8C-1, Rule 404(a) (1992). The rule, however, has exceptions. An accused, for example, may introduce "[e]vidence of a pertinent trait of character of the victim" that is relevant to an issue in the case. *State v. Squire*, 321 N.C. 541, 364 S.E.2d 354 (1988). Where an accused argues that he acted under self-defense, the victim's character may be admissible for two reasons: to show defendant's fear or apprehension was reasonable or to show the victim was the aggressor. *State v. Winfrey*, 298 N.C. 260, 258 S.E.2d 346 (1979).

Defendant may admit evidence of the victim's character to prove defendant's fear or apprehension was reasonable and, as a result, his belief in the need to kill to prevent death or imminent bodily harm was also reasonable. *Id.* Such evidence may be proved by opinion testimony. N.C.G.S. § 8C-1, Rule 405(a) (1992). Rule 404(a)(2), however, does not govern its admission. 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 90, p. 275 (4th ed. 1993). "The purpose of such evidence is not to prove conduct by the victim, but to prove defendant's state of mind." *Id.*; Rule 404 cmt. Such an opinion is relevant on the issue of defendant's state of mind only to the extent that defendant has knowledge of this opinion. *State v. Johnson*, 270 N.C. 215, 218-19, 154 S.E.2d 48, 51 (1967). When defendant knows of the violent character of the victim, such evidence is relevant and admissible to show to the jury that defendant's apprehension of death and bodily harm was reasonable. *Id.* at 219-20, 154 S.E.2d at 52. "[A] jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *Id.*

Here the evidence concerned State's witness Diggs's opinion of the victim's dangerousness. Because there is no showing that defendant had knowledge of Diggs' opinion of the victim's dangerousness, the evidence was irrelevant on the issue of whether defendant's belief in the need to kill the victim was reasonable.

Evidence of the victim's character may also be admissible "because it tends to shed some light upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man." *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 348. Defendant, to

prove that the victim was the aggressor, may present evidence of the victim's violent character, "whether known or unknown to the defendant at the time of the crime." Broun, § 90, p. 273; *State v. Barbour*, 295 N.C. 66, 243 S.E.2d 380 (1978). "The relevancy of such evidence stems from the fact that in order to sustain a plea of self-defense, it must be made to appear to the jury that the accused was not the aggressor. *See State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135 (1971)." *Winfrey*, 298 N.C. at 262, 258 S.E.2d at 348.

Because the jury was instructed on self-defense and was required to determine who was the aggressor in the affray, it was error for the trial court not to permit the jury to hear evidence regarding the victim's violent character. Such error, however, was harmless. First, the trial court gave defendant wide latitude in cross-examining Diggs. As a result, defendant was able to elicit extensive testimony concerning the victim's reputation for violence. Additionally Diggs testified he saw the victim, while intoxicated, strike Green. This evidence being before the jury, we conclude defendant was not prejudiced by the exclusion of Diggs's opinion. Second, defendant did not make an offer of proof so as to place Diggs's response to the question in the record. "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Hester*, 330 N.C. 547, 555, 411 S.E.2d 610, 615 (1992) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)); *see also* N.C.G.S. § 8C-1, Rule 103(a)(2) (1992); N.C.G.S. § 15A-1446(a) (1988). Since we have no way of knowing what Diggs's response would have been, we cannot assess the significance of the evidence sought to be elicited.

Defendant's assignment of error is overruled.

VIII.

**[8]** Defendant next contends the trial court erred by overruling defendant's objection to questions posed by the State to its expert witness S.B.I. Agent Creasy regarding his gunshot residue analysis. Defendant argues that while an expert may base an opinion upon facts in the record, Creasy's testimony amounted to an opinion based on an assumed fact unsupported by evidence—that the victim raised his hand to fend off an attack or blast from a gun.

Creasy was examined directly as follows:

Q. If, if the facts or circumstances as described to you ruled out the possibility of suicide, then with what other circumstances would findings that you made be consistent?

A. It could be consistent with the muzzle blast of a firearm; in other words, the hand being in close proximity to the muzzle when the firearm is discharged.

. . . .

Q. Would the findings you observed on the left hand, the findings you observed in the wipings and from the left hand of [the victim], would they be consistent with for example [the victim] raising his hand somewhat to fend off an attack or blast from a gun?

MR. GASKINS: Objection. The evidence is directly opposed to that.

COURT: Repeat the question please. I didn't get the last part of it. Say it again.

BY MR. HAISLIP:

Q. Would the findings you observed in the handwipings taken from [the victim]'s left hand or from the hand of the victim, would those wipings, the findings you made be consistent with [the victim] having raised that hand to fend off an attack or blast from the muzzle of a gun?

MR. GASKINS: Objection.

MR. O'DONNELL: Objection.

COURT: Overruled. You may answer.

A. Yes, sir, that would be one explanation for those concentrations on his left hand.

Rule 702 of the North Carolina Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702 (1992). Here, Creasy qualified as an expert in the analysis of gunshot residue and trace evidence. He did not base his opinion on any assumed fact. Rather, he gave his findings and expressed his opinion that these findings were consistent with the victim having raised his hand in response to an attack. Creasy's

opinion thus became evidence that supported the State's theory that the victim raised his hand to fend off defendant's attack. The testimony was admissible as it assisted the jury in understanding the reach and import of Creasy's gunshot residue findings. *State v. Benjamin*, 83 N.C. App. 318, 319-20, 349 S.E.2d 878, 879 (1986) (opinion by Judge (now Justice) Webb); *State v. Crawford*, 329 N.C. 466, 477, 406 S.E.2d 579, 585 (1991). Defendant's assignment of error to this testimony is overruled.

IX.

**[9]** In his final assignment of error, defendant contends the trial court erred by failing to determine in open court whether the jury wanted to ask a question during its deliberation. The portion of the trial transcript material to this issue reveals the following:

> COURT: The defendant is in the courtroom with counsel, the Assistant District Attorney. Let the record show that the jurors knocked on the door. One of the jurors said they had a question. The Court instructed the Sheriff to give them a yellow pad, stand at the door and tell them to write the question out. We're awaiting the question.
>
> Knock on the door and ask if they have the question prepared.
>
> BAILIFF: They don't have it yet.
>
> COURT: All right.
>
> Sheriff, it's been fifteen minutes since the jury said they had a question. Take the defendant back to lock-up so we can work on some other matters here.
>
> JURY CONTINUES TO DELIBERATE.

Defendant contends the trial court's handling of the jury's communication to the bailiff amounted to an unconstitutional *ex parte* communication with the jury. We disagree.

Article I, section 23 of the North Carolina Constitution provides:

> In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

N.C. Const. art. I, § 23. Similar protection is afforded defendant by the Sixth Amendment of the federal constitution. "This protection guarantees an accused the right to be present in person at every stage of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 613 (1987); *State v. Pittman*, 332 N.C. 244, 253, 420 S.E.2d 437, 442 (1992).

For a defendant tried noncapitally, "this right [is] a personal right which [can] be waived, either expressly, or by his failure to assert it." *Pittman*, 332 N.C. at 253, 420 S.E.2d at 442; *State v. Braswell*, 312 N.C. 553, 559, 324 S.E.2d 241, 246 (1985). In the instant case defendant, having failed to object at trial, waived his right and cannot assign as error the trial court's denial of the right.

Even if defendant had not waived his right to be present, we would find no error in the trial court's actions. It is error for the trial court to issue substantive instructions, either personally or through its bailiff, to the jury outside the presence of the defendant. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612. However, a defendant's right to be present is not violated where a trial court merely instructs the jury on procedural matters through its bailiff, as the court did in the instant case. *State v. Gay*, 334 N.C. 467, 434 S.E.2d 840 (1993). In *Gay*, the defendant assigned as error the trial court's instructions to the bailiff to inform the jury "to take or extend a recess during evidentiary hearings or discussions of legal issues" and to continue to abide by the trial court's earlier instructions while on break. *Id.* at 482, 434 S.E.2d at 848. The transcript revealed that the defendant neither objected to the instruction nor requested to be heard on the matter. *Id.* This Court held that while "shorthand procedures, such as the one instituted by the trial court in this case, may run the risk of violating defendant's right to be present, [there was no] reversible error on these facts." *Id.* at 482-83, 434 S.E.2d at 848. In so holding, the Court stated,

> We observe initially that it would be unreasonable to hold that bailiffs may have no contact with the jury. In carrying out their custodial duties bailiffs must necessarily engage in some contact with the jury or prospective jurors. While a bailiff certainly may not attempt to instruct jurors as to the law, a simple reminder by the bailiff to the jurors that they are to abide by the court's earlier instructions should not be considered an instruction as to the law.

*Id.* at 482, 434 S.E.2d at 848.

Similarly in *State v. May*, 334 N.C. 609, 615, 434 S.E.2d 180, 183 (1993), *cert. denied*, ___ U.S. ___, 127 L. Ed. 2d 661 (1994), this Court found no violation of the right of confrontation where the trial court, without objection from defendant, instructed the bailiff to tell the jurors to take a fifteen-minute break. Upon concluding there was no constitutional violation, the Court stated,

> It was not error for the court to send this message by the bailiff to the jury. It would impose a heavy burden on our courts if a court reporter were required to accompany a bailiff every time he is with a jury in order to make a record of what was said.

*Id.*

In the present case the bailiff was instructed only to retrieve a question from the jury and bring it to the trial court. No objection was raised by defendant or his counsel. So long as the record shows nothing to the contrary, we assume the bailiff followed the court's instructions. *Id.* As stated in *Gay*: "Communications such as these do not relate to defendant's guilt or innocence. Nor would defendant's presence have been useful to his defense." *Gay*, 334 N.C. at 482, 434 S.E.2d at 848. We find no violation of defendant's constitutional rights.

As for the trial court's failure to determine in fact whether the jury wanted to ask a question, we find no error. After being informed off the record that the jury may have a question, the trial court, in defendant's presence, instructed the sheriff to request that the jury write its question on a legal pad. He further instructed the sheriff to wait outside the jury room until the jury produced the question, at which time the sheriff was to bring it to the court. No objection was made by defendant. The sheriff waited approximately fifteen minutes during which time the jury never produced its question for the court. Apparently considering the jury's request to submit a question abandoned, the trial court announced its intention to move on to other matters and to reincarcerate defendant for the remainder of the jury's deliberation. At no time during subsequent deliberation did the jury resurrect its request to ask a question.

Thus, the record shows that while the jurors may have had a question at one time during deliberation, they were able to resolve the query among themselves. The jurors were free to inform the trial court, either directly while in the courtroom before recessing for the day or through the bailiff, that their question remained unanswered.

Furthermore, defendant was free to object and request the trial court conduct the jurors into the courtroom to confirm that they no longer had a question. Neither was done. Defendant's assignment of error is overruled.

For the foregoing reasons, we conclude defendant received a fair trial free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. RALPH EDWIN HAMILTON

No. 217A93

(Filed 3 November 1994)

**1. Criminal Law § 776 (NCI4th)— first-degree murder— insanity and voluntary intoxication—instructions**

There was no error in a first-degree murder prosecution in which defendant was sentenced to life imprisonment where the jury was originally instructed on intoxication and diminished capacity; the jurors returned to the courtroom with questions on intent, premeditation and deliberation, the role of alcohol and the effect of reduction in judgment; the court's reinstruction included an instruction on sanity; defendant was not given an opportunity to object until after the jury retired; defendant then objected on the ground that he had not raised the insanity defense; and defendant contended on appeal that, because the jury was instructed on insanity, for which defendant bears both the burden of production and persuasion, the jury may have also believed defendant bore the burden of persuasion for voluntary intoxication and diminished capacity. The court erred by giving an insanity instruction where there was no evidence of insanity; however this instruction did not relieve the State of its burden of proving every element of the crime charged in that the court repeatedly instructed the jury on the State's burden to prove each element of first-degree murder; the court properly instructed the jury twice on voluntary intoxication and diminished capacity; the instruction on insanity did not inform the jury that defendant had the burden of proof regarding insanity and did not negate the accu-

rate instructions on voluntary intoxication and diminished capacity; and the evidence before the jury supported its verdict.

**Am Jur 2d, Trial §§ 1279, 1280.**

2. **Appeal and Error § 155 (NCI4th)— first-degree murder—instructions—intent to kill—diminished capacity and intoxication—no timely objection**

Defendant waived appellate review of instructions concerning intent to kill and diminished capacity and intoxication where the court asked whether the prosecution or defendant had any requests for additions or modifications to the instructions after the jury retired, defendant did not then object to the instruction at issue, and defendant brought the instruction to the attention of the court when the jury returned for further instruction approximately one and one-half hours later. Defendant did not properly preserve this assignment of error because he did not timely object when the trial court inquired as to whether any party had any objections, and he waived any appellate review because he did not specifically and distinctly allege that the court's instruction amounted to plain error.

**Am Jur 2d, Appeal and Error §§ 562 et seq.**

3. **Homicide § 490 (NCI4th)— first-degree murder—instructions—premeditation—specific intent to kill—deliberation**

The trial court did not err in a first-degree murder prosecution by instructing the jury on premeditation, intent to kill, and deliberation conjointly, rather than separately, when charging with regard to voluntary intoxication and diminished mental capacity. Specific intent to kill, premeditation and deliberation are interdependent rather than independent elements and must be considered collectively rather than in isolation.

**Am Jur 2d, Homicide §§ 482 et seq.**

4. **Homicide § 470 (NCI4th)— first-degree murder—instructions—burden of proof and reasonable doubt**

The trial court did not err in a first-degree murder prosecution by not giving the proffered pattern jury instruction on the burden of proof and reasonable doubt where the trial court charged the jury numerous times throughout its instructions on first-degree murder and second-degree murder that the State bore the burden of proof on each element.

**Am Jur 2d, Homicide §§ 482 et seq.**

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Small, J., at the 5 October 1992 Criminal Session of Superior Court, Orange County, upon a jury verdict finding defendant guilty of first-degree murder and a jury recommendation that defendant be sentenced to life imprisonment. Heard in the Supreme Court 6 December 1993.

*Michael F. Easley, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.*

*J. Kirk Osborn for defendant-appellant.*

MEYER, Justice.

Upon a proper indictment, defendant Ralph Edwin Hamilton was tried capitally, convicted of first-degree murder of his wife, Marva Hamilton, and sentenced to life imprisonment. On appeal defendant brings forth three assignments of error: that the trial court committed reversible error in instructing on sanity and soundness of mind, that the trial court committed reversible error in instructing that intent may be inferred from diminished mental capacity and intoxication, and that the trial court erroneously denied defendant's requested jury charge on the burden of proof. We conclude that defendant's trial was free of prejudicial error and therefore affirm his conviction of first-degree murder.

At trial, the State's evidence tended to show the following:

Around 4:00 p.m. on 2 July 1991, Eric Cherry, a second-shift employee at UNC Hospitals in Chapel Hill, North Carolina, left work and walked toward Parking Lot F at the Dean E. Smith Center. Cherry entered his vehicle and began backing out of the parking space when he heard a popping noise. Believing that one of his tires had burst, Cherry drove forward to see if he could determine which tire had malfunctioned. At the same time he heard another popping noise. Convinced that nothing was wrong with his car, he proceeded to drive around the parking lot to determine whose car had malfunctioned. He noticed a man, later identified by Cherry as defendant, standing over a woman, later identified as the victim Marva Hamilton, who was lying face down on the ground. Cherry stopped his car and witnessed defendant raise a gun and fire at the victim's head from a distance of about one foot. Cherry noticed that a grey station wagon was parked directly behind a white truck. The driver's doors of both vehicles

were open. As Cherry watched, defendant shot the victim three more times. At some point during the shooting defendant stared directly at Cherry. As defendant walked toward the station wagon, Cherry copied down the car's license plate number, then drove away. When he looked back to see where defendant was, Cherry saw him return to the victim's body and shoot her again. Defendant then entered the station wagon and sped out of the parking lot.

Cherry proceeded straight to the police station where he talked with an officer and followed him back to the crime scene. Cherry had seen the victim before and knew that the white truck was the vehicle she usually drove.

Denise Johnson, who was employed by UNC Hospitals on 2 July 1991 in the same department as the victim, was returning to her car in Parking Lot F around 4:00 p.m. Upon reaching the parking lot, she saw somebody struggling and then heard a noise similar to a car backfiring. She looked around and saw people diving for cover on the steps leading down to the parking lot. Upon hearing more shots, she hid beneath a car. Looking under the cars, she could see someone's feet in a position indicating a body was prone on the ground. Johnson heard someone drive away and then return, followed by additional gunfire. After the car drove away a second time, Johnson approached the feet and found the victim on the ground, with a pool of blood behind her head. The victim had a weak pulse and her eyes were dilated. Her car keys were at her side. Johnson immediately yelled for help.

Deborah Ware, a UNC Hospitals employee, was entering the parking lot at the time of the shooting. She heard a shot and witnessed a man standing over a person and pointing a gun at the person's head. Ruthanne Wheeler, a registered nurse at the hospital, was also returning to the parking lot at the time of the shooting. Upon entering the lot, she heard someone yell for a doctor or nurse. Wheeler went to the victim and attempted to perform mouth-to-mouth resuscitation. There was a considerable amount of blood and an apparent wound to the victim's head. Elizabeth Nicotra, a registered nurse who was accompanying Wheeler, assisted in rendering first aid. During a search for some identification, Nicotra found the victim's purse in the truck. She also discovered that the truck's right rear tire was flat.

Rodney Carter, criminal investigator with the UNC Department of Public Safety, arrived at the crime scene at 4:37 p.m. He found the driver's door of the victim's truck open. Inside the truck were book-

bags, keys and a hospital pager. The truck's right rear wheel was flat. The wheel was later checked for punctures and found to have none. Carter recovered two bullets from the asphalt beneath the victim's body. He also recovered bullet fragments from the hospital following the victim's autopsy. During a subsequent search of defendant's car, he recovered one unfired .22-caliber bullet and three .22-caliber casings. Subsequent examination of these items at the SBI laboratory revealed that all of the recovered casings were fired from the same .22-caliber gun. Furthermore, a projectile recovered from the victim's brain was identified as a .22-caliber bullet.

An autopsy of the victim revealed two gunshot wounds to the head, either of which was potentially fatal, as well as bruises and abrasions on the head. The autopsy further revealed gunshot wounds to the victim's hands, which according to forensic pathology expert Deborah L. Radisch, M.D., appeared defensive in nature.

At the time of the shooting, Hildegarde ("Peggy") Slade lived at Tar Heel Manor, an apartment complex in Carrboro. She was familiar with defendant because he had been living in the same complex with the victim and their daughter. Several days before the shooting, Peggy saw the victim at the apartment complex retrieving clothes for the children.

After the victim and defendant separated, defendant visited Peggy's apartment daily. Peggy noticed defendant had a drinking problem and had persuaded defendant to attend Alcoholics Anonymous.

On 2 July 1991, defendant called Peggy to inform her he was coming to town from Greensboro. He arrived at her apartment around 9:00 a.m. with a twelve-pack of beer. While at the apartment, defendant consumed eight beers. Defendant began speaking of the victim and of how he wanted her to return. As the morning progressed, Peggy noticed defendant becoming angry. Defendant indicated that he thought the victim was having a relationship with a man named George. At Peggy's suggestion, defendant went to his own apartment around noon. Around 3:00 p.m. on the same day, Peggy saw defendant putting clothes into his grey station wagon. Defendant informed her that he was going to Greensboro and that she would not see him again.

Thomas Slade was a fishing companion of defendant. Around 4:45 p.m. on 2 July 1991, Thomas returned home from work. At about 5:10

p.m. he received a collect telephone call from defendant in Greensboro. Defendant informed Thomas that he had just shot his wife four or five times and that he needed Thomas to call the hospital to determine her condition. Defendant gave him a number to call in Greensboro and said that he was planning to go to Georgia.

Upon telephoning the hospital, Thomas was given no information about the victim's condition but was asked to contact the victim's family as quickly as possible. Thomas was able to reach one of the victim's brothers; however, there was no answer at the number given to him by defendant. On the same evening, defendant telephoned William Mack in Greensboro and informed him he had shot his wife. At defendant's direction, Mack called the hospital and discovered the victim was in critical condition. Mack asked defendant to come to his house and defendant complied. When defendant arrived, Mack said that he appeared "out of it" and was crying. Defendant told Mack that he went to the parking lot to talk to the victim. When he approached the victim, she reached into the truck and defendant thought she was retrieving a gun. In reaction, defendant started shooting. Mack called the 911 emergency number in Guilford County to divulge defendant's location. When defendant said that he was not going to wait for the police to arrive, Mack called 911 a second time. Shortly thereafter, police officers arrived at Mack's home and took defendant to the Greensboro Police Department.

Detective Clay Williams of the UNC police took defendant into custody at the Greensboro Police Department and transported him to Chapel Hill. At the time of arrest, defendant smelled strongly of alcohol. When Williams attempted to read the arrest warrant to defendant, defendant passed out. Williams determined that defendant's condition rendered him incapable of understanding his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Upon arrival in Chapel Hill, Williams discovered that the victim had died. When Williams informed defendant of the victim's death, defendant fainted.

Evelyn Hamilton, defendant's sister, testified that defendant called her around 10:00 p.m. on 1 July 1991. Defendant informed Evelyn Hamilton that he needed the gun he had recently given her because he was scared that his wife's brothers were going to do something to him. Evelyn Hamilton informed defendant that she no longer had the gun.

Defendant presented the following evidence:

Billy Williamson Royal, M.D., a forensic psychiatrist accepted as an expert in his field, testified that he conducted three interviews with defendant in September 1992 and October 1992. He also had examined various documents pertaining to defendant's school record, his treatment at Dorothea Dix Hospital and records of his attorney's interviews with members of his family. Based on his examination, Royal made several diagnoses with regard to defendant's mental state on 2 July 1991. Royal diagnosed defendant's condition as one of acute alcohol intoxication, alcohol dependency, depression, personality disorder not otherwise specified, identity disorder and a provisional diagnosis of cocaine use. In Royal's opinion, defendant did not have the capacity in terms of a normal person to form the intent to murder his wife at the time of the shooting. Royal also was of the opinion that on 2 July 1991 defendant was unable to carry out plans in terms of a normal, reasonable person.

Jacqueline Bradsher, a jail matron at the Orange County Sheriff's Department, testified that she had seen defendant at the jail on 2 July and on 3 July 1991. Bradsher testified she heard defendant call out to his wife during the night. She also heard him ask other jailers whether he could use the telephone to call his wife so that she could post bond for him.

On rebuttal, the State called James Groce, M.D., who was accepted as an expert in the field of forensic psychiatry. Groce had examined defendant twice, on 5 July and 6 July 1991, after his admission to Dorothea Dix Hospital on 5 July 1991. Groce also conducted interviews of defendant on 8 July, 10 July, 14 July and 17 July. He diagnosed defendant as suffering from an adjustment disorder with depressed mood and alcohol dependence. Groce further noted the possibility of alcohol withdrawal. In Groce's opinion, defendant, on 2 July 1991, would have been able to understand the situation, evaluate what was happening, make plans for future behavior and form the intent to carry out actions. Groce was of the opinion that defendant would have been able to understand what was going on and, based on this understanding, make plans for new behavior. Groce again examined defendant on 17 September 1991 during a subsequent admission to Dorothea Dix Hospital and diagnosed defendant as suffering from adjustment disorder with depressed mood, a condition which typically lasts for three months but probably was prolonged in part because of the impending trial and death of his wife.

I.

**[1]** Defendant first contends the trial court committed reversible error by instructing the jury that "sanity or soundness of mind is the natural and normal condition of people." Defendant contends that by instructing the jury on insanity, for which defendant bears both the burden of production and persuasion, the jury may have also erroneously believed defendant bore the burden of persuasion for the defenses of voluntary intoxication and diminished capacity. We disagree.

The record indicates that in its original charge, the trial court instructed the jury as follows:

> And fifth, the State must prove the defendant acted with deliberation, which means that he acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect. In determining this, you will consider the defendant's intoxication and diminished mental capacity, if any, as I will explain to you later.
>
> . . . .
>
> You may find that there is evidence which tends to show that the defendant was intoxicated or was impaired by a mental or emotional disorder at the time of the shooting.
>
> . . . If the defendant was intoxicated or his mental capacity was diminished as a result of mental or emotional impairment, you should consider whether or not any one of these or all of these conditions affected his ability to formulate the specific intent which is required for a conviction of first degree murder.
>
> . . . .
>
> . . . If as a result of intoxication or diminished mental capacity by reason of mental or emotional impairment, the defendant did not have the specific intent to kill formed after premeditation and deliberation, he is not guilty of first degree murder.
>
> Therefore, I instruct you, if you have a reasonable doubt as to whether or not the defendant formulated the specific intent to kill

after premeditation and deliberation, considering the evidence with respect to defendant's intoxication and diminished mental capacity as a result of mental or emotional impairment, you will not return a verdict of guilty of first degree murder.

After being so instructed, the jury retired to the jury room for deliberation. Within one and one-half hours, the jury returned to the courtroom with questions on several matters for the trial court, including the instructions on "intent," "premeditation" and "deliberation." The jury was "particularly concerned about what role judgment would play in the ability to deliberate or to plan or to premeditate, and whether alcohol and some reduction in judgment in that faculty would mean that an individual is unable to premeditate or deliberate." The trial court then consulted with the prosecution and defense counsel, at which time defense counsel expressed concern with the trial court's original instruction on intent, describing it as "somewhat confusing." The trial court stated that it would "endeavor to clarify" the matter and then reinstructed the jury on the elements of first-degree murder as follows:

> The third thing the State must prove is that the defendant intended to kill the victim. . . .
>
> In your consideration of whether or not the defendant had this intent to kill, I would instruct you that you should consider the defendant's condition as a result of intoxication, if any, and any diminished mental capacity he may have had as a result of a mental defect or emotional disturbance.
>
> I'll go into that a little bit further later on. But I am varying this instruction and the following instructions from what I gave you this morning.
>
> Fourth, the State must prove the defendant acted with premeditation. . . .
>
> In your consideration of this element, I would instruct you that you should consider the degree of defendant's intoxication, if any, and any diminished mental capacity as a result of emotional or mental disturbance or defect. And I'll explain that, as I said, further later.
>
> And fifth, the State must prove the defendant acted with deliberation. . . .
>
> In determining whether or not the defendant acted with deliberation, again you would consider in your determination of this

element the defendant's degree of intoxication, if any, and any diminished mental capacity as a result of mental defect or emotion.

You may find that there is evidence which tends to show that the defendant had been drinking and was intoxicated, or that he was impaired by a mental or emotional disorder at the time of the shooting. In this connection I would instruct you—I just want to check one thing.

(Pause in the proceedings.)

THE COURT: Excuse me. *I would instruct you that sanity or soundness of mind is the natural and normal condition of people. Therefore, everyone is presumed to be sane until the contrary is made to appear. And so I would instruct you that a person is presumed to have normal mental capacity and emotions until the contrary is shown.*

Also, I would instruct you that generally, voluntary intoxication is not a legal excuse for a crime.

In this case, there was evidence of intoxication or of some degree of intoxication, and there was evidence of some mental impairment as a result of emotion or mental disorder. Therefore, you must determine the effect either one or the combination of those conditions had upon the defendant's ability to premeditate, deliberate, and to have the active—the actual, specific intent to kill.

. . . .

It is not a fact that I can relate to you as to what effect the alcohol would have on his judgment, or what role alcohol or his emotional or mental state would have on his premeditation or deliberation or on his intent to kill. That is a fact the jury must determine from the evidence.

If the defendant was intoxicated or his mental capacity was diminished as a result of mental or emotional impairment, you should consider whether or not any one of these or a combination of these conditions affected his ability to formulate the specific intent which is required for a conviction of first degree murder.

. . . .

> If as a result of intoxication or diminished mental capacity by reason of mental or emotional impairment, the defendant did not have the specific intent to kill formed after premeditation and deliberation, he is not guilty of first degree murder.
>
> Therefore, I instruct you, if you have a reasonable doubt as to whether or not the defendant formulated the specific intent to kill after premeditation and deliberation, considering the evidence with respect to the defendant's intoxication and diminished mental capacity as a result of mental or emotional impairment, you will not return a verdict of first degree—guilty of first degree murder.

(Emphasis added.)

Having been so instructed, the jury once again retired to the jury room to resume deliberation. Defendant subsequently objected to the instruction relating to sanity or soundness of mind on the ground that defendant had not raised the insanity defense.

We conclude, and the State concedes, that because an instruction on insanity given by the trial court is inapplicable where there is no evidence of insanity, it was error for the trial court to give such an instruction. *State v. Jones*, 293 N.C. 413, 426, 238 S.E.2d 482, 490 (1977); *see also State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). This erroneous instruction, however, does not require reversal.

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

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

N.C. R. App. P. 10(b)(2). While defendant did object to the instruction on insanity, no objection was made until after the jury had retired for deliberation. However, a review of the transcript shows that defense counsel was not given, as required by Rule 10(b)(2), an opportunity to make an objection regarding the trial court's instruction on sanity and soundness of mind until after the jury had retired to resume deliberation. Therefore, we will treat this assignment of error as if it

had been properly preserved for appellate review and will review it for error.

Defendant has the burden of both production and persuasion when pleading the defense of insanity. *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991). However, when pleading the defense of voluntary intoxication or diminished mental capacity, defendant has only the burden of production. *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988) (voluntary intoxication); *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988) (diminished mental capacity). Defendant contends the trial court's erroneous instruction on insanity or soundness of mind had the effect of shifting the burden of persuasion to defendant on the defenses of voluntary intoxication and diminished mental capacity and, therefore, was unconstitutional. Defendant fails to articulate which of his constitutional rights were violated; however, we presume his contention is that the erroneous instruction had the effect of relieving the State of its burden of proof, thereby violating due process. *Sandstrom v. Montana*, 442 U.S. 510, 61 L. Ed. 2d 39 (1979). Because the error allegedly was of constitutional dimension, defendant contends that the burden is on the State, pursuant to N.C.G.S. § 15A-1443(b), to prove that the trial court's error was harmless beyond a reasonable doubt.

We conclude that the trial court's instruction on sanity or soundness of mind did not relieve the State of its burden of proving, beyond a reasonable doubt, every element of the crime charged. For this reason, the trial court's instruction did not violate defendant's due process rights, *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970), and "the harmless error standard of N.C.G.S. § 15A-1443(a) applies," *State v. Hood*, 332 N.C. 611, 617, 422 S.E.2d 679, 682 (1992), *cert. denied*, ___ U.S. ___, 123 L. Ed. 2d 659 (1993). Under N.C.G.S. § 15A-1443(a), defendant "bears the burden of showing a reasonable possibility that, absent the error, a different result would have been reached at trial." *Id.* We hold that defendant has not met this burden.

The record indicates that the trial court not only repeatedly instructed the jury on the State's burden to prove each element of first-degree murder, it also properly instructed the jury twice on voluntary intoxication and diminished capacity. The trial court charged the jury not to return a verdict of guilty of first-degree murder if it had a reasonable doubt as to whether defendant was able to formulate the specific intent to kill after premeditation and deliberation in light of the evidence of defendant's intoxication and diminished mental

capacity. Nothing in these instructions placed any burden on defendant to prove intoxication or diminished capacity beyond a reasonable doubt. Rather, the jury was properly charged to consider whether there was sufficient evidence of either voluntary intoxication or diminished capacity so as to raise a reasonable doubt as to the existence of the intent required for a conviction of first-degree murder.

As to the trial court's isolated instruction on sanity or soundness of mind, this instruction, while erroneous, did not inform the jury that defendant had the burden of proof regarding insanity. Nor did it negate the trial court's repeated, accurate instructions on voluntary intoxication and diminished capacity. "We presume 'that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.' " *State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208 (quoting *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985)) (alteration in original), *cert. denied*, — U.S. —, 126 L. Ed. 2d 602 (1993).

We further conclude that the evidence before the jury supported its verdict. At trial, defense counsel conceded that defendant killed the victim, stating: "Sometime around 4 o'clock or a little later that evening, [defendant] did shoot and kill his wife in the parking lot at UNC. We don't dispute that." The only question before the jury, therefore, was whether defendant was guilty of first- or second-degree murder, the resolution of which hinged largely on how the jury considered evidence of defendant's intoxication and diminished capacity. We conclude there was substantial evidence from which the jury could have found beyond a reasonable doubt that defendant did not act while voluntarily intoxicated or while under a diminished capacity. With regard to voluntary intoxication, there was some evidence in the record that defendant had been intoxicated in the past. However, there was no evidence that defendant had consumed any alcoholic beverages between midday and approximately 4:00 p.m., the time at which the murder was committed. Following the murder, defendant successfully drove his vehicle from Chapel Hill to Greensboro. Although he was intoxicated at the time of arrest, approximately three hours had elapsed since the time of the shooting.

As for the defense of diminished capacity, defendant offered psychiatric testimony of Dr. Royal, a forensic psychiatrist. Dr. Royal based his opinion on examinations made approximately one year after the murder. Dr. Royal had no knowledge of defendant's dimin-

ished capacity at the time of the victim's death. Conversely, State's witness Dr. Groce, a forensic psychiatrist who treated defendant upon his admission to Dorothea Dix Hospital three days after the murder, testified that while defendant was suffering from an adjustment disorder with depressed mood and alcohol dependence, he was of the opinion that at the time of the murder, defendant could have made plans and would have been able to form the intent to carry out plans.

Furthermore, an examination of the record reveals plenary evidence of premeditation and deliberation. For purposes of proving the elements of first-degree murder,

> [a] killing is "premeditated" if "the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing." A killing is "deliberate" if the defendant acted "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."

*State v. Morston*, 336 N.C. 381, 402, 445 S.E.2d 1, 13 (1994) (quoting *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991)). Premeditation and deliberation ordinarily are not susceptible to proof by direct evidence; therefore, they generally must be proved by circumstantial evidence, such as,

> "(1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner."

*State v. Woodard*, 324 N.C. 227, 231, 376 S.E.2d 753, 755 (1989) (quoting *State v. Calloway*, 305 N.C. 747, 751, 291 S.E.2d 622, 625-26 (1982)).

Here the evidence shows that prior to the murder, defendant was angry with the victim and informed Peggy Slade that he believed the victim was seeing another man. On the day before the murder, defendant attempted to retrieve a gun from his sister under the pretext that he was scared of the victim's brothers and needed protection. He also informed a co-worker that he was moving to Greensboro and would not be returning to work. On the day of the murder, defendant packed his car and informed a neighbor that he was leav-

ing town permanently. Defendant went to the parking lot where the victim parked her car while working and shot the victim multiple times as she attempted to leave work. After the shooting, the victim was lying face down on the ground. Defendant began to walk away, but returned to the victim and, while standing over her body, fired an additional shot at her head from close range. Defendant then left the parking lot quickly in his car and proceeded to leave town.

This assignment of error is overruled.

II.

**[2]** By his next assignment of error, defendant contends the trial court erred by instructing the jury that intent to kill may be inferred from diminished mental capacity and intoxication. During its initial charge to the jury on the elements of first-degree murder, the trial court instructed the jury as follows:

> Third, the State must prove the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances, including intoxication and the defendant's mental—excuse me—and the defendant's diminished mental capacity, if any, as I will explain to you later.

After the jury retired to the jury room, the trial court asked whether the prosecution or defendant had any requests for additions or modifications to the instructions. At that time, defendant did not object to the instruction at issue. It was not until approximately one and one-half hours later, when the jury returned from deliberation for further instruction, that defendant brought the instruction to the attention of the trial court. At that point, defendant stated that the instruction was "somewhat confusing," and the trial court advised that it would "endeavor to clarify" the matter. The trial court then reinstructed the jury that with regard to the elements of first-degree murder, "[a]n intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." With regard to each element of first-degree murder, the trial court instructed the jury that it should "consider the defendant's condition as a result of intoxication, if any, and any diminished mental capacity he may have had as a result of a

mental defect or emotional disturbance." The trial court further charged that defendant could not be found guilty of first-degree murder "[i]f as a result of intoxication or diminished mental capacity by reason of mental or emotional impairment, the defendant did not have the specific intent to kill formed after premeditation and deliberation."

Because defendant did not timely object to the trial court's instructions when the trial court, outside the presence of the jury, inquired as to whether either party had any objections with regard to the jury charge, defendant did not properly preserve this assignment of error for appellate review under Rule 10(b)(2) of the Rules of Appellate Procedure. Rule 10(c)(4) provides:

> *Assigning Plain Error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error *where the judicial action questioned is specifically and distinctly contended to amount to plain error.*

N.C. R. App. P. 10(c)(4) (emphasis added). Because defendant has failed to specifically and distinctly allege that the trial court's instruction amounted to plain error, defendant has waived any appellate review.

This assignment of error is overruled.

III.

**[3]** By another assignment of error, defendant contends that the trial court erred by not charging the jury as defendant requested with regard to premeditation, specific intent to kill and deliberation. Defendant made a timely written request for separate instructions as to the impact of voluntary intoxication and diminished capacity upon premeditation, deliberation and intent to kill. Defendant requested that the trial court instruct the jury in three separate instructions on how voluntary intoxication or diminished mental capacity may have affected defendant's ability to act with intent to kill, premeditation or deliberation. Concerned that defendant's proffered instruction would result in confusion for the jury, the trial court denied defendant's request. The trial court instead combined the elements of first-degree murder when instructing the jury on voluntary intoxication and diminished capacity and gave the following charge: "If as a result of intoxication or diminished mental capacity by reason of mental or

emotional impairment, the defendant did not have the specific intent to kill formed after premeditation and deliberation, he is not guilty of first degree murder."

Defendant contends that had the trial court instructed the jury separately regarding the impact of voluntary intoxication and diminished capacity on premeditation and on deliberation, a different result would have been reached. We do not agree.

This Court addressed a similar issue in *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992). There, the defendant requested that the trial court instruct the jury on whether his alleged diminished capacity affected his capacity to form the requisite intent for first-degree murder as well as his capacity to premeditate and deliberate. The trial court, upon agreeing to give the requested instruction in substance, charged the jury as follows: "If, as a result of the combined intoxicated, drugged and lacking mental capacity of the defendant, if, as a result of this, the defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, then he is not guilty of first degree murder." *Id.* at 474, 418 S.E.2d at 203. The defendant argued that since intent is an element independent of premeditation and deliberation, he was entitled to have a separate diminished capacity instruction with regard to each element.

Holding to the contrary, this Court noted that "specific intent to kill is a necessary element of first-degree murder," and proof of premeditation and deliberation is also proof of intent to kill. *Id.* Therefore, "specific intent is a constituent of premeditation and deliberation." *Id.* at 475, 418 S.E.2d at 204; *see also State v. Quesinberry*, 319 N.C. 228, 230, 354 S.E.2d 446 448 (1987).

The *Holder* Court based its conclusion on the language attending the substantive elements of first-degree murder, which provides:

> "*Premeditation means that the defendant formed the specific intent to kill* for some length of time, however short, before the actual killing. *Deliberation means that the intent to kill* was executed in a cool state of blood, without legal provocation, and in furtherance of a fixed design for revenge or to accomplish some unlawful purpose. No particular length of time is required for the mental processes of premeditation and deliberation; it is sufficient that the processes occur prior to, and not simultaneously with, the killing."

331 N.C. at 475, 418 S.E.2d at 204 (quoting *State v. Cummings*, 323 N.C. 181, 188, 372 S.E.2d 541, 547 (1988) (citations omitted), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 249, 404 S.E.2d 849 (1991)) (emphasis added). This language demonstrates that a specific intent to kill is a constituent of both premeditation and deliberation. As such, specific intent to kill, premeditation and deliberation are interdependent, rather than independent, elements and must be considered collectively rather than in isolation. Following the lead of *Holder*, we conclude it was not error for the trial court to instruct the jury on these elements conjointly, rather than separately, when charging the jury with regard to voluntary intoxication and diminished mental capacity.

**[4]** Defendant further contends the trial court erred by not giving the proffered pattern jury instruction on the burden of proof and reasonable doubt, which provides:

> The defendant has entered a plea of "not guilty." The fact that he has been [indicted] [charged] is no evidence of guilt. Under our system of justice, when a defendant pleads "not guilty," he is not required to prove his innocence; he is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

N.C.P.I.—Crim. 101.10 (1974). The trial court denied defendant's request and instead instructed the jury as follows:

> Under our system of justice, when a defendant pleads not guilty, he is not required to prove his innocence. The defendant is presumed to be innocent. That presumption goes with him throughout the trial, and until the jury is satisfied of his guilt beyond a reasonable doubt.

Defendant asserts that by failing to give the requested instruction, the trial court failed to explain to the jury that the State bears the burden of proof throughout the trial. We note, and defendant concedes, that the trial court charged the jury numerous times throughout its instructions on first-degree murder and second-degree murder that the State bore the burden of proof on each element. We therefore find no error.

For the foregoing reasons, we hold defendant received a fair trial free of any prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. WESLEY THOMAS HARRIS

No. 435A92

(Filed 3 November 1994)

**1. Evidence and Witnesses § 963 (NCI4th)— hearsay—defendant's statements to psychiatrist—trial preparation—medical diagnosis exception inapplicable**

Defendant's statements to a psychiatrist were made in preparation for his murder trial and were thus not admissible under the medical diagnosis or treatment exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(4) where the psychiatrist saw defendant less than two months before trial and nine months after the killing; defense counsel arranged defendant's interview by the psychiatrist; there was no evidence that the psychiatrist planned or proposed any course of treatment; and the psychiatrist's contact with defendant prior to trial was limited to one occasion while defendant was in jail.

**Am Jur 2d, Evidence § 867.**

**Admissibility of statements made for purposes of medical diagnosis or treatment as hearsay exception under Rule 803(4) of the Federal Rules of Evidence. 55 ALR Fed 789.**

**2. Evidence and Witnesses § 1025 (NCI4th)— defendant's statements to psychiatrist—inadmissibility as statements against penal interest**

Defendant's statements to a psychiatrist were not admissible as statements against penal interest pursuant to N.C.G.S. § 8C-1, Rule 804(b)(3), even if defendant may assert his own unavailability, because they were not so incriminating "that a reasonable man in his position would not have made the statement[s] unless he believed [them] to be true" where the incriminating statements defendant made to the psychiatrist were similar to statements he had already made to the police; the only additional incriminating information in the statements served only to reduce defendant's potential criminal liability; and the bulk of defendant's statements to the psychiatrist were exculpatory.

**Am Jur 2d, Evidence §§ 789 et seq.**

**What constitutes statement against interest admissible under Rule 804(b)(3) of Federal Rules of Evidence. 34 ALR Fed 412.**

**3. Evidence and Witnesses § 2241 (NCI4th)— defendant's statements to psychiatrist—basis for expert opinion—exclusion not prejudicial error**

Assuming, arguendo, that statements defendant made to a psychiatrist should have been admitted in defendant's trial for first-degree murder, armed robbery and conspiracy to murder to show the basis for the psychiatrist's expert opinion regarding defendant's mental disorders, defendant was not prejudiced by the exclusion of those statements where the psychiatrist testified that defendant suffered from chronic and acute abuse of marijuana, cocaine and alcohol which would have impaired his ability to form the specific intent to kill; the jury refused to find defendant guilty of first-degree murder based on premeditation and deliberation but found him guilty based on lying in wait and on the felony of armed robbery; there is no reasonable possibility that defendant's convictions for armed robbery and conspiracy were affected by the exclusion of defendant's statements as support for the psychiatrist's diagnosis since a fair reading of the record reveals that his testimony addressed only the crime of murder; and even if the psychiatrist's testimony were construed to indicate that defendant could not form the intent required for armed robbery and could not agree to commit certain acts, the record indicates that defendant's statements to the psychiatrist were of only minimal significance to the psychiatrist's opinions.

**Am Jur 2d, Expert and Opinion Evidence §§ 228 et seq.**

**4. Evidence and Witnesses § 84 (NCI4th)— murder-robbery—evidence irrelevant to facts in issue**

In this prosecution for first-degree murder and armed robbery, the trial court did not err in sustaining the State's objections to questions concerning whether defendant's father abandoned him, when defendant's drug use began, the nature of the area where the murder-robbery occurred, and the location of the victim's husband, the reasons he was in jail, and his relationship with the codefendant since the evidence sought to be elicited was not material to any issue in the case; the psychiatrist who testified that defendant suffered from chronic and acute intoxication of cocaine, marijuana and alcohol on the day of the crimes did not

state that when defendant began using drugs affected his diagnoses; and defendant was permitted to elicit from another witness that the area was known for drug activity.

**Am Jur 2d, Evidence §§ 307 et seq.**

**5. Evidence and Witnesses § 2302 (NCI4th)— ability to premeditate and deliberate—expert opinion properly excluded**

Opinion testimony by a psychiatrist that defendant could not premeditate and deliberate was properly excluded because it relates to a legal standard.

**Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362, 363.**

**Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.**

**6. Evidence and Witnesses § 1422 (NCI4th)— rifle, ammunition and other items found at defendant's apartment—failure to link to crimes charged—admission as harmless error**

Assuming arguendo that the trial court in a murder-robbery trial erred by admitting walkie-talkies, a crowbar, a Redfield scope, clips, ammunition, and a .22 caliber bolt-action rifle found in a duffel bag in defendant's apartment because these items were not linked to the crimes charged, there is no reasonable possibility that the admission of these items affected the outcome of the trial in light of the State's minimal reference to these items at trial and the State's other evidence, including defendant's inculpatory statement and firearms found in defendant's apartment which were linked to the crimes. N.C.G.S. § 15A-1443(b).

**Am Jur 2d, Evidence §§ 307 et seq.**

**7. Jury § 80 (NCI4th)— excusal of jurors for cause—absence of prejudice to defendant**

Assuming arguendo that the trial court erred by excusing for cause a prospective juror who stated that he had negative feelings toward the district attorney but could apply the law fairly, a juror who indicated that he knew defendant but could give the State and defendant a fair trial, and a juror who stated that he did not want to spend the time necessary for a first-degree murder trial, defendant failed to show that he was prejudiced thereby since a

defendant is not entitled to any particular juror, and defendant evidenced his satisfaction with the empaneled jury by failing to exhaust his peremptory challenges.

**Am Jur 2d, Jury §§ 195 et seq.**

**8. Jury § 223 (NCI4th)— death penalty views—improper excusal—no prejudice to defendant sentenced to life**

Since defendant was not sentenced to death, he was not harmed by any improper exclusion of jurors on the basis of their death penalty views.

**Am Jur 2d, Jury §§ 289, 290.**

**Comment Note.—Beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.**

**9. Jury § 232 (NCI4th)— death qualification of jury—constitutionality**

The practice of death qualifying the jury did not violate defendant's right to a fair trial.

**Am Jur 2d, Jury §§ 289, 290.**

**Comment Note.—Beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.**

**10. Criminal Law § 427 (NCI4th)— closing argument—opening statement facts unsupported by evidence—no comment on defendant's failure to testify**

Where the evidence did not support facts contained in the opening statements of defendant's counsel, the district attorney's closing argument question "What witness said that?" after referring to certain assertions in the opening statements was a fair response to the opening statements and did not constitute an improper comment on defendant's failure to testify. The defendant's erroneous expectations of the admissibility of certain evidence did not deprive the State of the ability to point out that facts alluded to in opening statements were not supported by the evidence introduced at trial.

**Am Jur 2d, Trial §§ 577 et seq.**

**Violation of federal constitutional rule *(Griffin v. California)* prohibiting adverse comment by prosecutor or**

**court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.**

**11. Criminal Law § 433 (NCI4th)— closing argument—references to defendant as "cold-blooded murderer" and "doper"**

It was not improper for the prosecutor to refer to defendant in closing arguments as a "cold-blooded murderer" in a trial for first-degree murder involving a calculated armed robbery and an unprovoked killing. Similarly, where evidence of the State and defendant showed that defendant had a history of drug abuse, the prosecutor's reference to defendant as a "doper," while colloquial, was an accurate term describing the defendant as portrayed by the evidence.

**Am Jur 2d, Trial §§ 681, 682.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.**

**12. Criminal Law § 450 (NCI4th)— closing argument—shooting victim down "just like a dog"**

The prosecutor's statement characterizing defendant's act of killing the victim as "shooting her down just like a dog" did not compare defendant to an animal and was not improper.

**Am Jur 2d, Trial §§ 681, 682.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.**

**13. Criminal Law § 468 (NCI4th)— closing argument—defense strategy as "ingenuity of counsel"**

The prosecutor's reference in his closing argument to defense strategy as "ingenuity of counsel" was not so grossly improper as to require the trial judge to intervene *ex mero motu.*

**Am Jur 2d, Trial §§ 683 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Sumner, J., at the 24 February 1992 Criminal Session of Superior Court, Pitt County, upon a jury verdict of guilty of murder in the first degree. Defendant's motion to bypass the Court of Appeals was allowed 29 December 1992. Heard in the Supreme Court 16 September 1993.

*Michael F. Easley, Attorney General, by William B. Crumpler, Associate Attorney General, for the State.*

*Ernest L. Conner, Jr., for defendant-appellant.*

EXUM, Chief Justice.

Defendant was indicted for the following crimes committed against Dorothy Mae Smith: murder, robbery with a dangerous weapon, conspiracy to commit murder, and conspiracy to commit robbery. On 12 March 1992 he was convicted of first-degree murder on theories of felony murder and lying in wait, armed robbery, conspiracy to commit murder, and conspiracy to commit armed robbery. On 17 March 1992 the jury recommended life imprisonment for the murder conviction. The trial judge sentenced defendant to life imprisonment for murder, forty years for robbery with a dangerous weapon, and thirty years for conspiracy to commit murder; he arrested judgment on the conviction for conspiracy to commit armed robbery. He ordered all sentences to run consecutively.

I.

The State introduced evidence tending to show as follows:

William Brown, brother to Dorothy Mae Smith, worked with Smith on the evening of 3 April 1991 at the convenience store she owned and operated. She closed the store around 10:20 p.m. and left with a money box and a gun, among other items. The box contained checks and about $4000 in cash. She put the box and gun into a white bag and left in her car. Brown followed her to her home which was near the store. After watching Smith pull into her yard, Brown drove off. According to Brown, Smith's husband was in jail at the time.

Lonnie Daniels was a neighbor of Smith. At around 10:30 p.m. on 3 April 1991 he heard five noises that sounded like gunshots. They seemed to come from the direction of Smith's backyard. He went outside his house to look around and noticed Smith's truck in the driveway. With a friend, Daniels went closer to the home and saw Smith

lying on the ground with blood at the back of her head. She was not moving. His friend called the 911 emergency number. He waited until Deputy Sheriff Thomas Wilson arrived.

Deputy Sheriff Thomas Wilson received a call at about 10:41 p.m. on 3 April 1991. He arrived at Smith's residence within seven minutes and saw Daniels and his friend. Daniels led Wilson to the back of Smith's house, where the driveway ends. Wilson observed Smith's body on the ground. Her keys were nearby and there was blood near her head. The rescue squad soon arrived and Smith was declared dead.

Sergeant Billy Tripp arrived at the scene to investigate. He found four .22-caliber fired casings at the edge of the driveway near a bush. Deputy M.H. Kraft arrived at the scene and found a .32-caliber bullet behind an air conditioning unit and a .22-caliber bullet in front of the unit.

On 4 April 1991 police received a tip that David Ward was involved with Smith's death. They arrested and interrogated Ward later that day. Deputy Kraft was present during the interrogation. Ward stated that he and defendant surveilled the store that Smith operated and waited in the bushes behind her house. Smith left her car and approached her home. According to Ward, defendant shot Smith. Smith screamed, and Ward shot her with a .22-caliber rifle. Ward then shot several times in the air, after which he and defendant grabbed the money box and bag and ran. They took the money and put the box and bag in a ditch beside a road.

Around 3:00 p.m. Deputy Kraft was driving with Ward in Kraft's car when Ward pointed out defendant driving in the opposite direction. Kraft turned around and pulled defendant over. Defendant and two others were in the car. Defendant consented to a search of his vehicle, which revealed $1004.50 and marijuana.

After defendant was arrested, he stated that on the night of 3 April 1991 he picked up Ward at Ward's mother's house and they proceeded to Smith's store. They then drove to Smith's house, where they parked on the road across from the house. They went to Smith's house and hid in some bushes next to the driveway. Smith then drove into the driveway and pulled to the back of the house. She got out of her vehicle, removed a white plastic bag from the passenger side and went to the other side of the truck to get the cash box. When she started toward the door of her house, Ward rose and started shooting

with the rifle. Defendant admitted that he had a .32-caliber pistol and that he shot one time. Defendant then got the white bag at Ward's instruction and they left. They divided the money and put the money box and plastic bag in a ditch. Defendant took Ward to Ward's mother's house, and Ward instructed defendant to keep the rifle at his home until later in the week. Before being pulled over by Officer Kraft, defendant jettisoned a large sum of money from the car.

Kraft then went to defendant's apartment with a search warrant. While searching defendant's apartment, officers found a green duffel bag in a closet in the ceiling. The bag contained a Ruger .22-caliber semi-automatic rifle, a .32-caliber semi-automatic pistol and a single-shot, bolt action .22-caliber rifle. It also contained other items such as ammunition clips, ammunition, a holster, a Redfield telescopic scope that fits on a rifle, walkie-talkies, bank bags and a crowbar.

A white plastic bag containing a metal box was later found by a passerby near the place where defendant was arrested. The bag also contained some checks. There was no money in the bag or box. Officers also found in this same general area $2429 and a bank bag.

Dr. M.G.F. Gilliland observed Smith's body that night and later performed an autopsy. In Gilliland's opinion, Smith died of five gunshot wounds to the head, trunk and arm. Gilliland could not determine the type of ammunition that caused the wounds. While examining Smith, Gilliland found a small caliber bullet in Smith's clothing.

Ronald Marrs, a special agent with the State Bureau of Investigation, and an expert on firearms and tool mark identification, testified that the .32-caliber bullet found behind the air conditioner had been fired from the .32-caliber semi-automatic pistol found in defendant's apartment. The four cartridge casings found at the scene were fired by the Ruger semi-automatic .22-caliber rifle. He determined that the .22-caliber single-shot, bolt-action rifle found at defendant's apartment did not fire any bullets or cartridge cases found at the crime scene.

Defendant did not testify, but he offered evidence which tended to show as follows:

Defendant used drugs on 3 April 1993. Larry Perry was with defendant in the late afternoon and early evening of that day and saw defendant consume crack cocaine. Defendant's eyes were glassy, he was edgy, and he looked as though he were in the "twilight zone."

Theresa Godley, engaged to defendant and mother of his child, saw defendant between 8:15 p.m. and 8:30 p.m. He was pacing and shaky; his eyes were red; and he didn't say much. Gail Harris, defendant's cousin, saw defendant around 11:00 p.m. He did not respond to Harris's statements. Harris had seen defendant use alcohol and marijuana earlier in the afternoon. Carolyn Whichard, a friend of defendant, saw him around midnight when he arrived at her house. He appeared "spaced out"; his eyes were blurry, and he looked as though his mind were elsewhere. He stayed there that night.

Dr. Thomas Brown, a psychiatrist, testified that defendant had a passive, dependent personality and was dependent on alcohol, cocaine and marijuana. Dr. Brown interviewed defendant for three hours and reviewed defendant's medical records and school records. In Dr. Brown's opinion, defendant could not form the specific intent to kill because of his chronic and acute alcohol, cocaine and marijuana dependencies.

A private investigator testified that the area near Smith's convenience store has a reputation for drug transactions.

II.

A.

Defendant first argues that the trial court erred in sustaining objections to his questions of Dr. Brown aimed at eliciting statements made by defendant to Dr. Brown during his psychiatric interview.

Dr. Brown interviewed defendant in the Pitt County jail on 4 January 1992. Based on that interview as well as information contained in records and reports, Dr. Brown diagnosed defendant as having a passive dependent personality, which is characterized by an extreme sensitivity to the views of others and results in one's being "pliable" or "spineless." He also diagnosed defendant as suffering from dependency on alcohol, cocaine, and marijuana. Chronic use of these substances causes a "decrease in intellectual ability," or a "change in the sharpness of mental functioning, the ability to understand, plan, and be mentally quick." They "affect the areas of higher brain functioning" and result in a decreased capacity to "get the big picture." Based on defendant's chronic and acute substance abuse, Dr. Brown was of the opinion that defendant could not have formed the specific intent to kill at the time of the killing.

Dr. Brown stated that defendant's statements to him, including those regarding the events of 3 April 1991, were necessary to his diagnoses. The trial court sustained the State's objections to questions regarding what defendant told Dr. Brown during their interview.

Defendant then made an offer of proof in which Dr. Brown revealed that defendant told him the following: Ward proposed that he and defendant break or enter Smith's house to steal cocaine or money that might be there. Defendant believed that there was a large cache of cocaine or a large amount of money in Smith's house. Before the killing defendant consumed more than a pint of wine, possibly as much as a liter, smoked $125 worth of cocaine, and smoked five or six marijuana cigarettes. He went to Smith's house with the intent to steal money or cocaine. He was frightened because he believed that there were vicious Rottweiler dogs inside to protect the cocaine or money. He thought that only the dogs might get shot. Before Smith arrived he developed second thoughts about the theft. Before he could withdraw from the crime, however, Smith arrived; and Ward said to defendant, "It's too late. We can't leave now." When Smith left her car Ward shot her. Defendant was surprised when Ward shot Smith. Ward then said, "You're going to shoot now, too; you're going to do it." Defendant then shot without aiming because he felt that Ward might shoot him if he didn't shoot. Afterward defendant expressed his surprise to Ward by stating, "What the heck were you doing?" and "Why did you ever do that?"

Dr. Brown explained that defendant's statements were necessary to his diagnoses because they reflected that defendant was preoccupied with obtaining cocaine, which is consistent with chronic substance abuse. Defendant's disregard for the danger posed by the Rottweilers he thought were inside is also typical of those with chronic and acute intoxication since they "lack capacity to appreciate . . . dangerous consequences." Dr. Brown explained:

> Because you can see in the pattern of his thinking that evening at that time, the clear evidence of the mental impairment from the chronic and acute drug usage and the parsing out of the pathological patterns of thinking, the differential susceptibility to suggestion and urging of another, the particular kind of poor, faulty judgment exercised by someone with far advanced addiction, that all of that medical information distinguishes him from many other people that don't have those medical conditions.

Defendant contends that statements he made to Dr. Brown should have been admitted as substantive evidence since they were made for the purpose of medical diagnosis and since they were statements against interest; he also contends they should have been admitted as corroborative evidence since they formed part of the basis of Dr. Brown's opinion. We deal with these arguments in turn.

1.

**[1]** Rule of Evidence 803(4) provides that the following statements are not excluded by the hearsay rule:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C.G.S. § 8C-1, Rule 803(4) (1992).

This hearsay exception permits witnesses to testify to statements made for the purpose of medical treatment or diagnosis. *State v. Jackson*, 320 N.C. 452, 462, 358 S.E.2d 679, 684 (1987); *State v. Aguallo*, 318 N.C. 590, 595, 350 S.E.2d 76, 79 (1986). This exception applies to statements made to psychiatrists and psychologists. *See, e.g.*, *Jackson*, 320 N.C. at 462, 358 S.E.2d at 684; *State v. Bullock*, 320 N.C. 780, 782, 360 S.E.2d 689, 690 (1987).

This hearsay exception is founded on the premise that a statement made for the purpose of medical diagnosis or treatment is inherently trustworthy. *See* Rule 803 commentary (basis for exception is "patient's strong motivation to be truthful"). We have recognized, however, that statements made to a psychiatrist for the purpose of preparing for trial lack the trustworthiness generally attributed to statements made for medical diagnosis or treatment. *State v. Bock*, 288 N.C. 145, 162-63, 217 S.E.2d 513, 524 (1975) (statements made two days before trial were made "for the purpose of [the psychiatrist] testifying as a witness for defendant" and hence unreliable), *judgment vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976), *in light of Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976); *see also State v. Stafford*, 317 N.C. 568, 572-73, 346 S.E.2d 463, 466-68 (1986) (statements made three days before trial were made to establish State's theory, not for diagnosis or treatment and hence inadmissible); *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 840 (1985) (statements to Rape Task Force volunteer inadmissible under Rule 803(4)); *compare*

*State v. Aguallo*, 318 N.C. at 595, 350 S.E.2d at 79 (holding statements to doctor admissible where visit to doctor "was primarily for diagnosis and treatment" and not for litigation). Thus, where statements are made not for the purpose of diagnosis or treatment alone, but rather for diagnosis for the purpose of preparing for trial, they are not admissible under Rule 803(4).

Dr. Brown stated on direct examination, "You [defense counsel] asked me to look at him with regard to any medical diagnoses that might be present in his case—actually Mr. Connor had by phone, and had explained that there was concern that—." At that time the court sustained the prosecutor's objection. On cross-examination it was revealed that Dr. Brown saw defendant on 4 January 1992 for three and one-half hours and that he had not seen him since that time.

Based on this evidence we find that defendant's statements to Dr. Brown on 4 January 1992 were made for the purpose of preparing for litigation. Dr. Brown saw defendant less than two months before trial and nine months after the killing. The proximity of the statements to the trial tends to indicate that the statements were made to prepare for trial. The fact that defense counsel arranged the interview between defendant and Dr. Brown also indicates that the purpose of the interview was to prepare for litigation. While this factor is not dispositive, *State v. Jones*, 89 N.C. App. 584, 593, 367 S.E.2d 139, 144 (1988), it militates against admitting the statements. Also, while Dr. Brown diagnosed defendant's mental condition, there was no evidence that he planned or proposed any course of treatment. Similarly, Dr. Brown's contact with defendant prior to trial was limited to one occasion while defendant was in jail; this tends to show that Dr. Brown did not intend to treat defendant.

Since defendant's statements to Dr. Brown were made in preparation for trial, they were not admissible under the hearsay exception contained in Rule 803(4).

2.

**[2]** Defendant next argues that his statements were admissible under Rule 804(b)(3), which makes admissible:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to

> be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C.G.S. § 8C-1, Rule 804(b)(3) (1992). This hearsay exception applies only where the declarant is "unavailable." N.C.G.S. § 8C-1, Rule 804 (1992). Initially, we note that we are not convinced that a defendant may challenge his own availability.[1] In any event, we hold that defendant's statements to Dr. Brown did not "so tend[] to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

First, the incriminating statements defendant made to Dr. Brown were quite similar to statements he had already made to police. In his statement to Officer Harris, defendant said that he picked up Ward and they rode to Smith's store. Upon seeing Smith in her store they drove to Smith's house and parked across the street. They then hid in some bushes next to Smith's driveway and waited for her to come home. When Smith got out of her truck Ward began shooting and defendant shot one time. At Ward's instruction defendant obtained the box and bag containing the money.

The only additional incriminating information in the statements to Dr. Brown was that defendant and Ward initially intended to break and enter Smith's house to obtain cocaine or money. Under the version of events defendant related to Dr. Brown, however, this was the only crime originally intended. Were this statement true, it would tend to disprove: that defendant intended to kill Smith, that defendant intended to rob Smith, and that defendant conspired to commit

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1. Rule 804(a) provides that:

> A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

Where a defendant does not testify, it seems that his "refusal . . . or absence is due to [his] procurement . . . for the purpose of preventing [his] . . . testifying." That a defendant cannot assert his own unavailability is consistent with the principle that "[t]o take advantage of the hearsay exceptions under Rule 804(b), the proponent must, under Rule 804(a)(5), show at least a good-faith, genuine, and bona fide effort to procure the declarant's attendance . . . ." 32B Am. Jur. 2d *Federal Rules of Evidence* § 265 (1982). *See also United States v. Evans*, 635 F.2d 1124, 1126 n.1 (4th Cir. 1980), *cert. denied*, 452 U.S. 943, 69 L. Ed. 2d 958 (1981) (expressing doubt that defendant may assert his own unavailability).

these crimes. Thus, defendant's statement to Dr. Brown relating to breaking and entering served only to reduce his potential criminal liability.

Moreover, the bulk of defendant's statements to Dr. Brown were exculpatory. The account of 3 April 1991 that defendant related to Dr. Brown showed that defendant had consumed an enormous amount of alcohol, cocaine and marijuana that day. Defendant told Dr. Brown that he and Ward had weapons only to protect themselves from vicious dogs inside Smith's house. He also told Dr. Brown that he was surprised by Smith's arrival, that he wanted to back out of the crime, that Ward told him to remain and that Ward told him to fire his rifle.

In light of the exculpatory nature of defendant's statements to Dr. Brown and the other evidence against defendant, including his statements to police, the statements to Dr. Brown were not so incriminating "that a reasonable man in his position would not have made the statement[s] unless he believed [them] to be true."

3.

**[3]** Defendant last argues that the statements he made to Dr. Brown should have been admitted to support Dr. Brown's expert opinion regarding defendant's mental disorders. Assuming arguendo, that exclusion of this evidence for this purpose was error, defendant has not shown prejudice.

Dr. Brown testified that on 3 April 1991 defendant suffered from chronic and acute abuse of marijuana, cocaine and alcohol which would have impaired his ability to form the specific intent to kill. The jury, however, refused to find defendant guilty of first-degree murder based on premeditation and deliberation. Instead the jury found defendant guilty of first-degree murder based on lying in wait and on the felony of armed robbery. Dr. Brown's diagnosis could have had no effect on the finding of first-degree murder by lying in wait since a defense of lack of mental capacity does not apply to lying in wait. *State v. Baldwin*, 330 N.C. 446, 461-62, 412 S.E.2d 31, 40-41 (1992).

Also, there is no reasonable possibility that defendant's convictions for armed robbery and conspiracy were affected by the exclusion of defendant's statements offered to support Dr. Brown's diagnoses.[2] A fair reading of the record reveals that Dr. Brown's testi-

2. We also note that had defendant introduced his statements to Dr. Brown to corroborate Dr. Brown's opinions, the State could have used them as substantive evidence under Rule 801(d), relating to admissions. The statements show that defendant and

mony addressed only the crime of murder, focusing on whether defendant could have formed the intent to kill, whether defendant could premeditate and deliberate, and whether defendant could act with malice.

Even if Dr. Brown's testimony were construed to indicate that defendant could not form the intent required for armed robbery and could not agree to commit certain acts, the record reflects that defendant's statements to Dr. Brown were of only minimal significance to Dr. Brown's opinions. Defendant's statements to Dr. Brown were relevant only in that they showed that defendant's thought process at the time of the murder was consistent with chronic and acute substance abuse. With regard to chronic substance abuse, however, Dr. Brown testified that the most important consideration is a "detailed history . . . [of the patient's] life predating active drug use" and the patient's activity over the most recent few years. With regard to acute substance abuse, there was ample evidence, other than defendant's thought processes on the day of the murder, that he had consumed large quantities of intoxicating substances. Thus, to the extent that defendant's thought processes as reflected by his statements to Dr. Brown were relevant to establish defendant's chronic and acute substance abuse, their significance was minimal as there was other substantial evidence that was probative of these impairing conditions.

We are also persuaded that Dr. Brown's opinions were not without effect, notwithstanding the exclusion of defendant's statements underlying those opinions, as the jury found defendant not guilty of murder by premeditation and deliberation even though he admitted to police that he went to Smith's house with a loaded pistol, waited for her to arrive, fired one time, and fled with Smith's money.

To conclude, defendant's statements to Dr. Brown were made primarily for litigation and were thus not admissible under Rule 803(4). As they were not against his penal interest they were not admissible under Rule 804(3). And since their exclusion as the basis for Dr. Brown's opinions did not prejudice defendant, their exclusion does not amount to reversible error.

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Ward went to Smith's house with the intent to steal money or cocaine. That defendant intended to steal cocaine or money from Smith's house is a strong indication that he had the capacity to commit armed robbery. Similarly, that he intended to do so with Ward is a strong indication that he had the ability to form an agreement to commit armed robbery and murder.

B.

**[4,5]** Defendant next argues that the trial court erred in sustaining the State's objections to questions concerning: whether defendant's father abandoned him; defendant's drug use, including when it began and whether it was regular; whether Dr. Brown thought defendant could premeditate and deliberate; the nature of the area where the crime occurred; and the location of Smith's husband, the reasons he was in jail, and his relationship with Ward. This evidence, however, is either immaterial, inadmissible on other grounds, or its exclusion could not have prejudiced defendant in light of other evidence adduced.

Whether the defendant was abandoned by his father was not material to any issue in the case. Dr. Brown did not testify that defendant's relationship with his father affected his diagnoses of defendant. Regarding questions concerning defendant's drug use, Dr. Brown was permitted to testify that defendant suffered from chronic and acute intoxication of cocaine, marijuana and alcohol on the day of the offense. Further, several of defendant's acquaintances testified to his use of drugs on the day of the offense and to his intoxicated appearance. Dr. Brown did not state that when defendant began using drugs affected his diagnoses; in fact, Dr. Brown stressed the importance of the years immediately preceding the murder to his diagnoses. Regarding the character of the neighborhood, defendant was permitted to elicit from Ronald Clark that the area was known for drug activity; defendant has not shown how the dangerousness of the area near the convenience store was material to any issue in the case. Nor has defendant shown the materiality of the whereabouts of Smith's husband or his relationship with Ward. As to Dr. Brown's opinion that defendant could not premeditate and deliberate, such opinion testimony is improper as it relates to a legal standard. *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988).

C.

**[6]** Defendant next argues that the trial court erred by denying his motion *in limine* to prevent the State from introducing or making reference to certain items found in the duffel bag in his apartment. Specifically, the defendant sought to exclude evidence relating to walkie-talkies, a crowbar, a Redfield scope, extra clips, ammunition, and a .22-caliber, single-shot, bolt-action rifle. These items were introduced and passed to the jury at the close of evidence. Defendant argues that these items were not linked to the crimes for which he

was charged, and thus irrelevant, and that they prejudiced his case. Assuming arguendo that the admission of this evidence was error, we conclude there is no reasonable possibility that this evidence affected defendant's convictions. N.C.G.S. § 15A-1443(b) (1988).

At trial the State did not assert, either explicitly or implicitly, that any of the items referred to by defendant in this assignment of error were linked to the charged crimes in any manner. In fact, the only reference at trial to these items was by Officer Kraft, who explained that a Redfield scope "fits on a rifle" and "draws objects nearer, so you can see them better I guess." Further, the State introduced the .32-caliber, semi-automatic pistol and the Ruger, semi-automatic .22-caliber rifle found at defendant's apartment and linked those guns to a bullet and cartridge cases found at the crime scene. In light of the State's evidence, including defendant's inculpatory statement and the firearms found at his home which were linked to the crimes, and the minimal reference to these items at trial, there is no reasonable possibility that the admission of the other items found at defendant's home affected the outcome of his trial.

D.

**[7]** Defendant next challenges the trial court's excusing several prospective jurors for cause.

Juror DeLong stated that he had negative feelings toward the district attorney, but that he could apply the law fairly. Juror Joyner indicated that he knew the defendant but that he could give the State and defendant a fair trial. Juror Jackson stated that he did not want to spend the time necessary for a first-degree murder trial. Jurors Simpson, Sperlin, Andrews and Hubbard wavered on the issue of whether they could vote for the death penalty. All of these prospective jurors were removed for cause by the trial judge.

We find that, assuming arguendo, the trial court erred in excusing these jurors for cause, defendant has not shown that he was prejudiced. A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror. Defendant concedes that neither he nor the State exhausted their peremptory challenges, which evidences satisfaction with the jury which was empaneled. *State v. Atkinson*, 275 N.C. 288, 308-09, 167 S.E.2d 241, 253 (1969), *rev'd on other grounds*, 403 U.S. 948, 29 L. Ed. 2d 859 (1971); *State v. Vann*, 162 N.C. 534, 538, 77 S.E. 295, 297 (1913).

Defendant has not shown that he was harmed by the exclusion of jurors DeLong, Joyner and Jackson.

**[8]** Since defendant was not sentenced to death, he was not harmed by any improper exclusion of jurors on the basis of their death penalty views. *State v. Rannels*, 333 N.C. 644, 655, 430 S.E.2d 254, 260 (1993).

**[9]** Defendant also argues that the practice of death qualifying a jury violates his right to a fair trial. We have already held, however, that this practice is not unconstitutional. *State v. Taylor*, 332 N.C. 372, 420 S.E.2d 414 (1992). Thus this contention is without merit.

E.

In his final argument, defendant contends that the trial judge erred in permitting the district attorney to make certain remarks during closing arguments. We note at the outset that defendant failed to object to any of these comments and that our inquiry is therefore limited to whether the prosecutor's statements were grossly improper. *State v. Jolly*, 332 N.C. 351, 368, 420 S.E.2d 661, 671 (1992).

**[10]** In his opening statement, Mr. Osborn, counsel for defendant, stated that defendant and Ward originally intended to commit a breaking and entering, not a robbery. Defendant attempted to withdraw from the robbery but felt compelled to stay. They were armed only because of the vicious dogs they expected to encounter inside the mobile home. In closing arguments Mr. Osborn again made reference to the possibility that defendant went to the victim's house to break and enter.

During his closing argument, the district attorney referred to these assertions by Mr. Osborn:

> I heard Mr. Osborn say that the defendant—the defendant, Mr. Harris over here—went to this residence to commit a breaking and entering. Where did you hear that? Where? Seriously, now, folks; what witness said that? I've heard Mr. Osborn say that the defendant was carrying a gun because he was scared of dogs in this house. What witness said that? I heard Mr. Osborn say that David Ward pointed a gun, his gun, at the defendant and told him to shoot. What witness said that? I heard Mr. Osborn say that all of this, these events, were the idea of David Ward. What witness said that? Again, I'm talking to you about the ingenuity of counsel.

> I suggest to you that's what you call smoke screen, folks. There's not one scintilla of evidence to support those remarks.

Defendant argues that the district attorney's closing arguments were an impermissible comment on his failure to testify. We disagree.

The district attorney's question "What witness said that?" was a fair response to the opening statements of defendant's counsel. Since the evidence did not support the facts contained in defendant's opening statement, it was not improper for the district attorney to highlight that absence of evidence.[3] Moreover, the district attorney's question focused on the defendant's failure to present evidence generally and in no way implicated the defendant's failure to testify. *Cf. State v. Wilson*, 322 N.C. 117, 139-40, 367 S.E.2d 589, 602 (1988) (State may refer to defendant's failure to offer evidence refuting State's case).

Defendant also challenges other statements made in closing arguments. The district attorney referred to the defendant as a "cold-blooded murderer" and a "doper" and characterized the defendant's act as "shooting her down just like a dog." He also referred to the defense strategy as "ingenuity of counsel."

It is well established that

> counsel will be allowed wide latitude in the argument of hotly contested cases. 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. Decisions as to whether an advocate has abused this privilege must be left largely to the sound discretion of the trial court.

*State v. Huffstetler*, 312 N.C. 92, 112, 322 S.E.2d 110, 123 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985) (citations omitted).

**[11-13]** As this was a trial for first-degree murder involving a calculated armed robbery and an unprovoked killing, it was not improper for the State to refer to defendant as "cold-blooded murderer." Similarly, the State's and defendant's evidence showed that defendant had

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3. In all fairness to the defense, we recognize that its opening statements were made with the expectation that it would later be able to introduce the statements defendant made to Dr. Brown. Those statements, however, have been held to be inadmissible as substantive evidence. The defendant's expectations of the admissibility of evidence do not deprive the State of the ability to point out that facts alluded to in opening statements were not supported by evidence introduced at trial.

a history of drug abuse and therefore the use of the word "doper," while colloquial, was an accurate term describing the defendant as portrayed by the evidence. The statement that the defendant shot her down "just like a dog" did not compare defendant to an animal. *Compare State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984) (references to defendant as an "animal" disapproved). The district attorney's reference to the defense strategy as "ingenuity of counsel" clearly was not "so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the alleged error." *State v. Jolly*, 332 N.C. at 368, 420 S.E.2d at 671.

For the reasons given, we conclude defendant's trial was fair and free from prejudicial error.

NO ERROR.

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LORETTA MORRELL, As Guardian Ad Litem for JONATHAN LONG and JOSHUA LONG, individually and on behalf of all others similarly situated v. DAVID T. FLAHERTY, in his official capacity as Secretary of the North Carolina Department of Human Resources and MARY DEYAMPERT, in her official capacity as Secretary of the North Carolina Division of Social Services

No. 203PA93

(Filed 3 November 1994)

**Social Services and Public Welfare § 17 (NCI4th)— AFDC benefits—siblings and non-siblings as one assistance unit—policy not violative of federal statutes and regulations**

The policy of the N.C. Division of Social Services under the AFDC program which requires that a needy caretaker relative and all needy children, siblings and non-siblings, when living in the same household, be included in the same AFDC assistance unit does not contravene federal statutes and regulations prohibiting a state from assuming the availability of income to an AFDC claimant without determining that it has actually been contributed to the claimant if it is assumed to have come from a person who is not a member of the assistance unit and who is not legally responsible for supporting the child. Nor does this policy conflict with federal regulations that mandate equitable treatment for AFDC recipients. Therefore, where plaintiff, her husband, her nine children, and her two grandchildren live in the same household, and plaintiff is the specified relative caretaker

legally obligated to spend the AFDC funds to benefit all of the dependent children in her household, the DSS was not required to consider plaintiff's grandchildren as a separate assistance unit and properly provided plaintiff with a single thirteen-person grant.

**Am Jur 2d, Welfare Laws §§ 15 et seq.**

**Supreme Court's views as to construction and application of Aid to Families with Dependent Children (AFDC) provisions of Social Security Act (42 USCS §§ 601-615). 84 L. Ed. 2d 917.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 109 N.C. App. 628, 428 S.E.2d 492 (1993), affirming an order of summary judgment for plaintiff entered 25 November 1991 by Ferrell, J., and modifying an order certifying a class entered 30 September 1991 by Downs, J., both in Superior Court, Mecklenburg County. Heard in the Supreme Court 7 December 1993.

*Legal Services of Southern Piedmont, Inc., by Douglas S. Sea and Theodore O. Fillette, for plaintiff.*

*Michael F. Easley, Attorney General, by Marilyn A. Bair, Assistant Attorney General, and Elizabeth L. Oxley, Associate Attorney General, for defendants.*

WHICHARD, Justice.

Plaintiff Loretta Morrell brought this class action as guardian ad litem for two plaintiffs, minor children Jonathan and Joshua Long, to challenge the validity of a policy promulgated by the North Carolina Division of Social Services (hereinafter "DSS") under the Aid to Families with Dependent Children program (hereinafter "AFDC"). The trial court held that the policy—which requires that a needy caretaker relative and all needy children, siblings and non-siblings, when living in the same household, be included in the same AFDC assistance unit—violated federal AFDC availability regulations. The court issued a permanent injunction and a declaratory judgment in favor of plaintiff. The Court of Appeals affirmed the judgment but modified the definition of the certified class. *Morrell v. Flaherty*, 109 N.C. App. 628, 630-31, 428 S.E.2d 492, 494 (1993). The dispositive question is whether defendant agency's policy contravenes federal availability regulations, as well as federal regulations that mandate equitable

treatment for AFDC recipients. We hold that the policy does not contravene any federal regulation. Accordingly, we reverse.

I.

AFDC is a public assistance program funded and administered jointly by the federal and state governments under Title IV, Part A of the Social Security Act (hereinafter the "Act"). 42 U.S.C. §§ 601-17 (1988 & Supp. IV 1993). States are not required to participate, but those states that do must administer their AFDC programs pursuant to a state plan that complies with federal statutes and regulations. *Heckler v. Turner*, 470 U.S. 184, 189, 84 L. Ed. 2d 138, 143 (1985).

AFDC assistance is available to children who have been deprived of parental support because of the death, absence or incapacity of a parent; who live with certain specified relatives; and who satisfy age requirements and state-determined financial need standards. 42 U.S.C. §§ 602(a), 606(a). If the caretaker relative is also needy, he or she may also receive AFDC benefits in addition to those received by eligible dependent children. 42 U.S.C. § 602(a).

Before assistance can be granted, states must determine the composition of the assistance unit and then establish eligibility for need of that assistance unit, which includes determining the income and resources available to members of the unit. Pursuant to section 402(a)(38) of the Act, 42 U.S.C. § 602(a)(38), and section 206.10(a)(1)(vii) of the regulations promulgated pursuant thereto, 45 C.F.R. § 206.10(a)(1)(vii) (1993), an application on behalf of a dependent child must also include in a single assistance unit, as applicants, if living in the same household as the dependent child, his or her natural or adoptive parent or stepparent (where the state has a law of general applicability holding a stepparent legally responsible for support of the child) and blood-related or adoptive siblings who are themselves dependent children.

Section 402(a)(7)(A) of the Act provides:

> [T]he State agency . . . shall, in determining need, take into consideration any other income and resources of any child or relative claiming [AFDC], or of any other individual (living in the same home as such child and relative) *whose needs the State determines should be considered in determining the need of the child or relative claiming such aid* . . . .

42 U.S.C. § 602(a)(7)(A) (emphasis added). Section 206.10(b)(5) of the regulations states that the assistance unit is "the group of individuals whose income, resources and needs are considered as a unit for purposes of determining eligibility and the amount of payment." 45 C.F.R. § 206.10(b)(5) (1993).

North Carolina's state plan requires that a needy caretaker relative and all needy children, siblings and non-siblings, when living in the same household, be included in the same assistance unit. *AFDC Manual* § 2100 II (N.C. Department of Human Resources, Division of Social Services, Public Assistance Section, 1991) ("A specified relative cannot be payee for more than one AFDC check. Include all children who are under his day-to-day care and supervision in the same assistance unit."). The State awards AFDC assistance according to the size of the assistance unit without regard to the actual cost of food, shelter, clothing and other expenses. This is called a "flat grant" system. Recognizing the economies generated by families sharing living expenses, the amount of assistance for each person added to an assistance unit is less than the amount awarded to a one-person unit. For example, an assistance unit consisting of one person receives $181; two persons, $236; three persons, $272; four persons, $297; five persons, $324; etc. Because of this feature of the plan, an assistance unit of five persons, for example, receives an AFDC grant which is smaller than the total grant received by two separate assistance units made up of two and three persons respectively.

Jonathan and Joshua Long are the minor children of Latrice Long Alexander and the grandchildren of plaintiff. Prior to May 1991 they resided with their mother in their plaintiff grandmother's household and received AFDC benefits in the amount of $224 per month from the Mecklenburg County Department of Social Services (hereinafter "Mecklenburg DSS"). In May 1991 Alexander notified Mecklenburg DSS that the children would be left in plaintiff's care, and asked that plaintiff be designated the payee for the children's AFDC payments. At approximately the same time, plaintiff applied for a separate AFDC grant for herself, her husband, and their nine minor dependent children. Mecklenburg DSS determined that all thirteen persons were eligible for AFDC benefits but, pursuant to policy 2100 II, provided plaintiff with a single thirteen-person AFDC grant of $483 per month instead of an eleven-person grant for herself, her husband and her children, and a separate two-person grant for the grandchildren.

On 24 June 1991 plaintiff commenced this action on behalf of herself and all others similarly situated. She contends that because she was not legally responsible under state law for the support of her grandchildren, they should be treated as a separate assistance unit. Plaintiff estimates that had her grandchildren been so treated, the household would have received grants totaling $671 per month instead of the $483 provided under the policy. Plaintiff sought declaratory and injunctive relief invalidating the policy on the basis that it contravened certain federal statutes and regulations prohibiting the State from assuming the availability of income to an AFDC claimant without determining that it has actually been contributed to him or her, if it is assumed to have come from a person who is not legally responsible for supporting the child, 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), 233.90(a)(1) (1993),[1] and

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1. Section 233.20(a)(2)(viii) provides, in pertinent part, that a state plan for AFDC must

> [p]rovide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and [section] 233.51 of this part.

45 C.F.R. § 233.20(a)(2)(viii) (1993). (Section 233.20(a)(3)(xiv) deals with stepparents, and section 233.51, with sponsored aliens; they are not pertinent here. Section 233.20(a)(5) states that a state plan for AFDC must "[p]rovide that the State agency may prorate allowances in the need and payment standards for shelter, utilities, and similar needs when the AFDC assistance unit lives together with other individuals as a household . . . .").

Section 233.20(a)(3)(ii)(D) provides in pertinent part:

> To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D).

Section 233.90(a)(1) provides in pertinent part:

> The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his or her parent who is the principal earner will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natu-

also on the basis that it contravened the regulations requiring equitable treatment of AFDC recipients. 45 C.F.R. § 233.10(a)(1) (1993).[2] Plaintiff also sought costs and attorney's fees pursuant to 42 U.S.C. § 1988 (Supp. IV 1993).

On 30 September 1991 the trial court certified the class. It defined the class to include: All dependent children not living with a parent or other legally financially responsible relative for whom AFDC benefits are, have been, or will be denied, terminated, or reduced by a North Carolina County Department of Social Services based on the requirement that the children be included in a single AFDC assistance unit with other dependent children who are not their siblings. On 25 November 1991 it entered summary judgment in favor of plaintiff, finding that the policy on its face and as applied violates federal regulations 45 C.F.R. §§ 233.90(a)(1), 233.20(a)(2)(viii), and 233.20(a)(3)(ii)(D). Based on this finding, the court invalidated the policy and permanently enjoined defendants from continuing to enforce it; ordered defendants to ensure that all class members would be provided AFDC benefits as separate units from other children living in the same home who were not their siblings; and precluded defendants from considering in computing AFDC benefits any of the income, except for actual contributions made by them, of non-legally responsible relatives.

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> ral or adoptive parents are required to support their children. *Under this requirement*, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State . . . .

45 C.F.R. § 233.90(a)(1) (emphasis added).

2. Section 233.10(a)(1) provides, in pertinent part:

> A State plan under title . . . IV-A . . . of the Social Security Act must:
>
> (1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, *and must not result in inequitable treatment of individuals or groups* in the light of the provisions and purposes of the public assistance titles of the Social Security Act.

45 C.F.R. § 233.10(a)(1) (1993) (emphasis added).

On this appeal, plaintiffs also cite section 233.20(a)(2)(iii), which provides in pertinent part that a state plan for AFDC must "[p]rovide that the standard will be uniformly applied throughout the State . . . ." 45 C.F.R. § 233.20(a)(2)(iii) (1993).

Defendants appealed to the Court of Appeals. As noted, the Court of Appeals affirmed that judgment.[3] *Morrell*, 109 N.C. App. at 635, 428 S.E.2d at 497. Relying upon *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), in which the Court of Appeals for the Ninth Circuit invalidated a substantially similar Washington state regulation, the court concluded that

> [b]y making those children a part of an already existing [AFDC assistance] unit, the household receives only an incremental increase in benefits based on the concept of economies of scale. Thus, the policy discourages needy people from taking in dependent relatives, frustrating the very purpose of the AFDC program, a program designed to keep dependent children with their families.

*Morrell*, 109 N.C. App. at 634-35, 428 S.E.2d at 496. The court held that "the DSS policy at issue violates the federal regulations against imputing income from a non-legally responsible relative adult [caretaker] to a dependent child." *Id.* at 635, 428 S.E.2d at 497. The court clarified that its holding did not preclude the agency from determining that the income and resources of the needy relative caretaker were actually available for the support of the dependent child. *Id.*

Both defendants and plaintiffs petitioned this Court for discretionary review. On 1 July 1993 we allowed both petitions and defendants' motion for a temporary stay of the judgment of the Court of Appeals.

II.

As noted, AFDC is a public assistance program funded and administered by the federal and state governments that requires states choosing to participate to administer their state plans in conformity with federal statutes and regulations. *Heckler*, 470 U.S. at 189, 84 L. Ed. 2d at 143. "[T]he starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Dandridge v. Williams*, 397 U.S. 471,

3. The court, however, limited the class to include only:

> [N]amed plaintiffs and other members of the class whose DSS mandated assistance unit contains not only dependent children who are not their siblings, but also an adult who is legally responsible for the non-sibling children, but not legally responsible for the class members.

*Morrell*, 109 N.C.App. at 630-31, 428 S.E.2d at 494.

478, 25 L. Ed. 2d 491, 498 (1970). " '[S]o long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them." *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 423 n.29, 37 L. Ed. 2d 688, 700 n.29 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 541, 32 L. Ed. 2d 285, 293 (1972)).

Defendants basically argue that the Court of Appeals failed to accord the deference due to the interpretation of the statutory scheme propounded by the Department of Health and Human Services (hereinafter "HHS"), the agency responsible for administering the Act and drafting the regulations, and that their policy does not conflict with the federal regulations the Court of Appeals cited to invalidate it. We agree.

Subsequent to the ruling by the trial court, the decision of the Court of Appeals, and the argument of this appeal, HHS issued Action Transmittal No. ACF-AT-94-6 (16 March 1994) "restat[ing] the policy governing the authority of State agencies to consolidate assistance units in certain situations and . . . clarify[ing] that such a consolidation does not conflict with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed." *Id.* at 1. In response to "several recent challenges to State practices concerning consolidation of assistance units," *id.*, HHS clarified that "[a]part from complying with [42 U.S.C. § 602(a)(38) and 45 C.F.R. § 233.20(a)(1)(iii)[4]], States are authorized to set the State-wide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units." *Id.* at 2 (citing Action Transmittal No. SSA-AT-86-1 (13 January 1986); 57 Fed. Reg. 30132, 30136-30137 (8 July 1992)). HHS specifically concluded that those regulations, cited as invalidating defendants' policy in this case, "do not conflict with the State policy option to consolidate assistance units in the same household." *Id.* at 3.

"It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Martin v. OSHRC*, 499 U.S. 144, 150-51, 113 L. Ed. 2d 117, 127 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939, 90 L. Ed. 2d 921, 934 (1986)).

4. Section 233.20(a)(1)(iii) provides that, when a person is required to be included in two or more assistance units in the same household, these units must be consolidated and treated as one for purposes of determining eligibility and the amount of payment.

> Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " [*Udall v. Tallman*, 380 U.S. 1, 16-17, 13 L. Ed. 2d 616, 625-26 (1965) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 89 L. Ed. 1700, 1702 (1945).] In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430, 99 L. Ed. 2d 515, [528] (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697, 115 L. Ed. 2d 604, [624] (1991).

*Thomas Jefferson Univ. v. Shalala*, — U.S. —, —, 129 L. Ed. 2d 405, 415 (1994) (approving the Secretary of HHS's interpretation of certain Medicare regulations). Broad deference is equally warranted in this case because "AFDC is certainly a complex and highly technical regulatory program, and the issue at hand, which involves the allocation of limited AFDC resources, necessarily entails the exercise of judgment grounded in policy concerns." *Wilkes v. Gomez*, 32 F.3d 1324, 1329 (8th Cir. 1994) (holding that substantially similar Minnesota state regulation, which consolidates non-sibling AFDC recipient children who reside with a single adult caretaker into a single assistance unit, is not inconsistent with federal statutes and regulations). For the foregoing reasons and reasons that follow, we defer to HHS's interpretation of the regulations as plausible and consistent with their language, and hold that "an 'alternative reading is [not] compelled by the regulation[s'] plain language or by other indications of the Secretary's intent at the time of the regulation[s'] promulgation." *Thomas Jefferson Univ. v. Shalala*, — U.S. at —, 129 L. Ed. 2d at 415.

Section 233.20(a)(2)(viii) provides that the money amount of any need item will not be reduced "solely because of the presence *in the household* of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support *of the assistance unit* [with certain exceptions]." 45 C.F.R. § 233.20(a)(2)(viii) (emphasis added). Defendant agency contends,

and we agree, that by its express terms this regulation precludes the states from assuming, without actually determining, that there will be available to the dependent children in the assistance unit the income or resources of an individual who lives in the household but is not a member of the assistance unit and is not legally responsible for the support of any of the members thereof.

Section 233.20(a)(3)(ii)(D) provides that, when determining the income and resources of individuals in the assistance unit, income and resources are considered available both when actually available to a member of the assistance unit and when the member has a legal interest in a liquidated sum and the legal ability to make it available for support of that member. By its express terms, this regulation prohibits the states from counting as available to the assistance unit income or resources that are not actually or legally available to any of the members thereof.

Section 233.90(a)(1) provides that when the State is making the determination about whether a child has been deprived of parental support or care, the State will consider as a "parent" *for this purpose* only the child's natural or adoptive parent or a stepparent who is married under state law to the child's natural or adoptive parent, if that stepparent is legally obligated under state law to support the child to the same extent as the natural or adoptive parents. Specifically, the presence in the household of a "substitute parent" or "man-in-the-house" or "any individual other than one described in this paragraph" is not an acceptable basis for assuming the availability of parental income or resources for support if that individual does not meet the terms of the immediately foregoing sentence. Defendant agency contends, and we again agree, that by its terms this regulation precludes the State from finding an applicant ineligible for AFDC assistance because it finds that, due to the presence of such an individual, the applicant child is not deprived of parental support. We agree that these regulations are intended to prohibit the State from counting as available to the assistance unit income or resources that are not actually or legally available to one of the members of the unit.[5] Instead,

5. HHS states that, in 1981, this section was revised to eliminate another sentence that had provided:

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

the Act and regulations promulgated pursuant thereto expressly require that all income and resources of all members of the assistance unit be counted to consider the need, eligibility and amount of payment to the unit. 42 U.S.C. § 602(a)(7)(A); 45 C.F.R. § 206.10(b)(5).

The Department of Health, Education and Welfare (hereinafter "HEW"), predecessor to HHS, promulgated these regulations to implement the Supreme Court's decisions in *King v. Smith*, 392 U.S. 309, 20 L. Ed. 2d 1118 (1968), *Lewis v. Martin*, 397 U.S. 552, 25 L. Ed. 2d 561 (1970), and *Van Lare v. Hurley*, 421 U.S. 328, 44 L. Ed. 2d 208 (1975). We agree with the Second Circuit Court of Appeals that the Supreme Court was concerned about the imputation of income from non-AFDC sources; *King*, *Lewis* and *Van Lare* invalidated state regulations presuming that non-AFDC recipients would contribute to the support of members of an assistance unit with whom they shared a household because, absent some legal responsibility, such support might not be forthcoming. *Bray v. Dowling*, 25 F.3d 135, 144 (2d Cir. 1994). *See King*, 392 U.S. 309, 20 L. Ed. 2d 1118 (disapproving Alabama's "substitute father" regulation, under which AFDC assistance was denied to the children of a mother who cohabits with a man who was not the children's father, in or outside her home, because the regulation defined "parent" in a manner inconsistent with the Act, 42 U.S.C. § 606(a)); *Lewis*, 397 U.S. 552, 25 L. Ed. 2d 561 (invalidating a California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible nonadoptive stepfather or "common law" husband of an AFDC recipient's mother); *Van Lare*, 421 U.S. 328, 44 L. Ed. 2d 208 (invalidating New York's "lodger" regulation that reduced *pro rata* the shelter allowance provided an AFDC assistance unit that lived in the same household as a nonpaying lodger).

Pursuant to section 405 of the Act,[6] North Carolina law requires that the caretaker use the AFDC grant for the benefit of the depend-

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Action Transmittal No. ACF-AT-94-6 at 5 (citing 46 Fed. Reg. 46750, 46768 (21 September 1981)). "With this change, we have made clear that section 233.90 does *not* require that income of members of the assistance unit must be proven to be actually contributed to other members." *Id.* at 6 (emphasis in original).

6. Section 405 of the Act provides:

Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it

ent child, and provides for the appointment of a protective payee or personal representative:

> Whenever a county director of social services shall determine that a recipient of assistance is unwilling or unable to manage such assistance to the extent that deprivation or hazard to himself or others results, the director shall file a petition before a district court or the clerk of superior court in the county alleging such facts and requesting the appointment of a personal representative to be responsible for receiving such assistance and to use it for the benefit of the recipient.

N.C.G.S. § 108A-37(a) (1988) ("Personal representative for mismanaged public assistance").[7] We agree with the Second Circuit Court of Appeals that

> [t]his legal obligation to spend the grant on behalf of the children in the AFDC unit distinguishes this case from those involving presumption of support from outside [non-AFDC] income. The state law obligation to spend the AFDC funds in the children's best interests "makes it reliably certain that [t]his income is actually available for the support of the children in the household."

*Bray*, 25 F.3d at 144-45 (quoting *Lewis*, 397 U.S. at 558, 25 L. Ed. 2d at 566) (citation omitted).

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> deems advisable in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments as provided under section 406(b)(2) [42 U.S.C. § 606(b)(2)], or in seeking appointment of a guardian or legal representative as provided in section 1111 [42 U.S.C. § 1311], or in the imposition of criminal or civil penalties authorized under State law if it is determined by a court of competent jurisdiction that such relative is not using or has not used for the benefit of the child any such payments made for that purpose; and the provision of such services or advice by the State agency (or the taking of the action specified in such advice) shall not serve as a basis for withholding funds from such State under section 404 [42 U.S.C. § 604] and shall not prevent such payments with respect to such child from being considered aid to families with dependent children.

42 U.S.C. § 605.

7. Alternatively,

> [i]nstead of the use of personal representatives provided for by G.S. 108A-37, when necessary to comply with any present or future federal law or regulation in order to obtain federal participation in public assistance payments, the payments may be made direct to vendors to reimburse them for goods and services provided the applicants or recipients, and may be made to protective payees who shall act for the applicant or recipient for receiving and managing assistance.

N.C.G.S. § 108A-38 (1988) ("Protective and vendor payments").

Plaintiff urges us to follow the decision of the Ninth Circuit in *Beaton v. Thompson*, 913 F.2d 701.[8] However, *Beaton* relied upon *Gurley v. Wohlgemuth*, 421 F. Supp. 1337 (E.D. Pa. 1976), and an earlier Ninth Circuit decision, *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982). *Gurley* invalidated the application of a Pennsylvania state regulation, requiring that all AFDC recipients living in a household (except for boarders and their dependents) be combined into a single assistance unit, to a case where two sisters lived in a single household with minor children entitled to AFDC assistance, for whom the sisters were separately responsible. *Gurley*, 421 F. Supp. at 1338 & n.2. The court held that the regulation violated section 233.90(a) of the federal regulations because each sister "only ha[d] an obligation to spend the [AFDC] funds to benefit the children for whom . . . she is the specified relative, not to benefit some other AFDC child." *Id.* at 1346. In contrast, plaintiff is the specified relative caretaker legally obligated to spend the AFDC funds to benefit all the dependent children in her household. "*McCoog* involved Oregon regulations that reduced the shelter component of the AFDC grant when children receiving benefits lived with non-legally responsible relatives who were not receiving benefits." *Beaton*, 913 F.2d at 703-04. We agree with the Second Circuit that *Beaton* is unpersuasive: "In relying upon *McCoog* and *Gurley*, *Beaton* did not recognize or discuss the distinction between a single caretaker who is obligated to expend AFDC funds for the benefit of all the minor children in her household and a non-legally responsible individual who has no corresponding obligation." *Bray*, 25 F.3d at 145; *see also Wilkes*, 32 F.3d at 1330.

For these reasons, we conclude that HHS's interpretation of the regulations is "faithful to the regulations' plain language," *Thomas Jefferson Univ.*, — U.S. at —, 129 L. Ed. 2d at 418, and that these regulations—45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1)—were intended to preclude the State from assuming the availability of income to an AFDC claimant without determining that it has actually been contributed to the claimant, if it is assumed to have come from an individual *who is not a member of the assistance*

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8. Plaintiff also relies upon two recently reversed federal district court decisions, *Bray v. Kaladjian*, No. 90-CV-831, 1992 WL 106322 (N.D.N.Y. May 5, 1992), *rev'd sub nom Bray v. Dowling*, 25 F.3d 135 (2d Cir. 1994), and *Wilkes v. Steffen*, 831 F. Supp. 723 (D. Minn. 1993), *rev'd sub nom Wilkes v. Gomez*, 32 F.3d 1324 (8th Cir. 1994); and another Ninth Circuit decision, *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993), *cert. granted sub nom Anderson v. Healy*, 63 U.S.L.W. 3213 (U.S. Sep. 26, 1994) (No. 93-1883). *Edwards* simply follows *Beaton*.

*unit* and who is not legally responsible for supporting the child. We hold that defendant agency's policy consolidating assistance units comprised of siblings and non-siblings living in the same household, when they are under the care of the same relative caretaker, is consistent therewith. *Accord Wilkes*, 32 F.3d at 1330; *Bray*, 25 F.2d at 145 (noting that our Court of Appeals opinion in the present case was "strongly influenced by the *Beaton* ruling" and "misconstrues the impact of the enactment of [amendments to the Act] upon" the discretion afforded to states regarding the definition of AFDC assistance units).

III.

Plaintiff also contends that the policy violates federal regulations that require equitable treatment among AFDC recipients. As previously noted, section 233.10(a)(1) requires that eligibility conditions imposed by the State must not result in inequitable treatment, and section 233.20(a)(2)(iii) requires that the standard of assistance "must be uniformly applied throughout the State." Plaintiff contends that under the state's "flat grant" system, Jonathan and Joshua would receive higher benefits if they lived with a wealthy, non-needy relative caretaker. She argues: "Defendant's policy thus singles out the most needy children for penalty—those unable to live with their parents and taken in by relatives who are themselves needy." Plaintiff contends that federal regulations require that Jonathan and Joshua, and other children similarly situated, receive the same assistance they would have received had they been taken into a non-AFDC household. We disagree.

North Carolina has chosen to consolidate assistance units in order to promote equitable treatment for households of similar composition, providing the same level of payment to similarly sized households with one relative caretaker. Plaintiff has not persuaded us that the federal regulations invalidate that choice and require the alternative she suggests. *Accord Wilkes*, 32 F.3d at 1330; *Bray*, 25 F.3d at 146; Action Transmittal No. ACF-AT-94-6 at 7 ("The program authorizes a State to determine need standards and payment standards that accommodate the balance of equity in that State. The decision to consolidate assistance units or to retain separate units in a single household is also a policy determination that a State makes balancing the equities.").

IV.

The foregoing disposition of defendants' appeal makes it unnecessary for us to pass upon plaintiff's appeal.

V.

For the reasons stated, we hold that the trial court erred in holding that the policy of defendant agency violated federal regulations, and that the Court of Appeals erred in affirming the trial court. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to that court with instructions to remand to the Superior Court, Mecklenburg County, for entry of an order consistent with this opinion.

REVERSED AND REMANDED.

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STATE OF NORTH CAROLINA v. RANDOLPH WILSON

No. 282A93

(Filed 3 November 1994)

**1. Evidence and Witnesses § 2878 (NCI4th)— first-degree murder—purpose of defendant's presence in county—admissibility**

The trial court did not err in a prosecution for first-degree murder, conspiracy to commit murder, and first-degree burglary by prohibiting defendant from introducing evidence regarding his presence in Warren County where one of the State's theories was that defendant came down from New York to orchestrate a drug ring in North Carolina and defendant complains that he was not allowed to elicit testimony that defendant had relatives in Warren County. The trial court erred in excluding the witness's response to the question, "do you know for a fact that this defendant had relatives in Warren County?" because the witness's response to that question was based on his personal knowledge and it was relevant to establish that defendant had a motive other than selling drugs in moving to Warren County. However, there was no error in excluding further testimony that defendant had come to Warren County to visit family because the witness lacked personal knowledge and there was no prejudice from excluding the first

question because it leads only to the possibility that defendant had a mixed motive in coming to North Carolina and does not negate the State's evidence.

**Am Jur 2d, Witnesses §§ 484 et seq.**

**2. Homicide § 371 (NCI4th)— accessory to murder—evidence sufficient**

There was sufficient evidence of accessory before the fact to murder where there was testimony that after an argument one Royster had with the victim, defendant asked Royster what he wanted to do about it and Royster said he wanted to kill the victim; defendant later handed another man a sawed-off shotgun and told him to "go do that"; and defendant ordered the witness to go with the other man or he would wind up dead like the victim. Although defendant argued that the actions of the others were independent of anything he said or did and that the victim would have been murdered without any involvement by the defendant, the evidence must be considered in the light most favorable to the State when ruling on a motion to dismiss and the evidence here was sufficient to persuade a rational trier of fact that the defendant was guilty as an accessory before the fact beyond a reasonable doubt.

**Am Jur 2d, Homicide § 445.**

**3. Homicide § 17 (NCI4th)— first-degree murder—accessory before the fact—plea bargains by principals—not an acquittal**

Defendant could be found guilty of first-degree murder as an accessory before the fact where all of the people who perpetrated the killing pled guilty to second-degree murder. Although a person may not be convicted of an offense such as accessory before the fact if all of the principals are acquitted, a plea bargain is not the same as an acquittal.

**Am Jur 2d, Homicide § 28.**

**4. Evidence and Witnesses § 1070 (NCI4th)— first-degree murder—flight—evidence sufficient**

The evidence in a prosecution for first-degree murder, conspiracy to commit murder, and burglary supports a finding by the jury that defendant was in flight, and the pattern jury instruction on flight was a correct statement of law, where the jury received

testimony that defendant told everyone to pack up and go to a motel as soon as he heard that the victim had been murdered; defendant decided that he and another man were going to leave town; and defendant ordered the other man to drive them to the bus station, where they boarded a bus for New York. Although defendant contends that there was evidence to rebut the State's inference of flight, it was for the jury to decide whether all of the facts and circumstances supported the State's contention that defendant had fled and the trial court appropriately told the jury that evidence of flight "may" be considered.

**Am Jur 2d, Evidence §§ 532 et seq.**

**5. Criminal Law § 1133 (NCI4th)— conspiracy to murder—first-degree burglary—aggravating factors—inducement of others—position of leadership or dominance**

The trial court did not err by finding as aggravating factors for conspiracy to murder and first-degree burglary that defendant induced others to participate and that he occupied a position of leadership or dominance where there was testimony that defendant handed a shotgun to another with the order that that person kill the victim, defendant ordered another person to accompany the first or be killed himself, and all of the participants described defendant as the leader of the group. Although in *State v. Nobles*, 329 N.C. 239, it was found that the idea to commit the crime originated with defendant, that case does not stand for the proposition that the idea must originate with defendant; the State must show only that the participants would not have engaged in the activity but for the inducement by the defendant.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**6. Criminal Law § 1098 (NCI4th)— conspiracy to commit murder—first-degree burglary—aggravating factors—use of elements of offense**

There was no error in sentencing defendant for conspiracy to commit murder and first-degree burglary where the defendant contended that the same evidence used to convict him was used to support the aggravating factors that he induced others to participate in the commission of the offense and that he occupied a position of leadership or dominance. The jury was instructed that they had to find beyond reasonable doubt that the defendant "knowingly advised and encouraged" the other persons to commit

the offenses. A person can advise and encourage without inducing, and one can advise and encourage without being a leader or in a dominant position.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**7. Criminal Law § 1142 (NCI4th)— conspiracy to commit murder and first-degree burglary—aggravating factors—offenses committed to disrupt enforcement of laws and to hinder enforcement**

There was sufficient evidence when sentencing defendant for conspiracy to commit murder and first-degree burglary to support the aggravating factors that the offenses were committed to disrupt the lawful exercise of the enforcement of the laws and to hinder the lawful exercise of the enforcement of the laws where the evidence was sufficient to lead to the inference that the victim was killed to get rid of a "snitch" and also to deter others from reporting the drug activity of the gang.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**8. Criminal Law § 1100 (NCI4th)— conspiracy to commit murder and first-degree burglary—aggravating factors—offenses committed to disrupt enforcement of laws and to hinder enforcement—supported by same evidence**

A defendant was entitled to a new sentencing hearing for conspiracy to commit murder and first-degree burglary where the terms for each exceeded the presumptive and the aggravating factors that the offense was committed to disrupt the lawful exercise of the enforcement of the laws and that it was committed to hinder the lawful exercise of the enforcement of the laws were based on the same evidence concerning a gang's drug activity and were inherently duplicative.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**9. Criminal Law § 439 (NCI4th)— accessory before the fact to murder, conspiracy, burglary—prosecutor's argument—not grossly improper**

There was no gross impropriety in a prosecution for first-degree burglary, conspiracy to murder, and first-degree murder by being an accessory before the fact where the prosecutor's argument compared defendant to Hitler, told the jury that the killing was the most brutal in this country or in any land, told the

jury that the case was being tried because the victim had been denied his constitutional rights, and told the jury that the status of the economy and the war on drugs was dependent on the jury's verdict. This case was hotly contested in that it focused on the credibility of witnesses and, although the closing argument was vigorous and aggressive, it was not grossly improper.

**Am Jur 2d, Trial §§ 567 et seq., 648, 681, 682, 692 et seq.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.**

**Supreme Court's views as to what courtoom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**10. Homicide §§ 371, 374 (NCI4th)— conspiracy to commit murder—accessory before the fact—not merged**

Convictions for conspiracy to commit murder and for first-degree murder by being an accessory did not merge because the same evidence was used to prove both offenses, as defendant contended, because each offense contained an essential element not a part of the other.

**Am Jur 2d, Homicide § 445.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hight, J., at the 4 January 1992 Criminal Session of Superior Court, Warren County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to the additional judgments imposed for conspiracy to commit murder and first-degree burglary was allowed 21 July 1993. Heard in the Supreme Court 2 February 1994.

*Michael F. Easley, Attorney General, by Robert J. Blum, Special Deputy Attorney General, for the State.*

*Nora Henry Hargrove for defendant-appellant.*

MEYER, Justice.

Defendant was charged with first-degree murder, conspiracy to commit murder, and first-degree burglary. He was tried noncapitally at the 4 January 1992 Criminal Session of Superior Court, Warren County, and was found guilty as charged. The trial court found aggravating and mitigating factors and sentenced defendant to two consecutive life sentences for the murder and burglary convictions plus thirty years for the conspiracy conviction. On appeal, defendant raises seven assignments of error. For the reasons discussed herein, we find no error in defendant's conviction and sentence for first-degree murder but remand for resentencing on defendant's conspiracy to commit murder and first-degree burglary convictions.

This case surrounds the conspiratorial murder of Calvin Hargrove. Implicated in the murder were defendant, Jeremiah Royster, Shannon Norris, Hashim O'Neal, Rofae Davis, and Lamont Alston. On 27 May 1991, Royster engaged in a crack cocaine transaction with his cousin, Calvin Hargrove. An argument ensued over the cocaine. Later that day, Royster approached Hargrove with a gun and threatened to kill him. Hargrove reported this to his mother, his brother, and his girlfriend (Debra). Hargrove decided to take out a warrant for the arrest of Royster, and he spoke with Deputy Davis of the Warren County Sheriff's Department at 10:30 p.m. After being told that he would have to go to the magistrate's office, which closed at 11:00 p.m., Hargrove decided to wait until the next day. When the police arrived at Royster's house, he flushed the cocaine down a toilet.

Some of Royster's friends (Davis and O'Neal and two others) noticed the police cars at Royster's house. They went to defendant's trailer and, with defendant and Alston, went back to Royster's house to investigate the matter. Royster told them that Hargrove had "called the police on him." According to Davis and Alston, defendant asked Royster what he wanted to do about it, and Royster said, "I want to kill him because he violated." Alston stated that defendant asked Royster if that was really what he wanted, and Royster said yes. O'Neal testified for the defendant that it was Norris who asked Royster what he wanted done. According to Davis' statement to an officer, defendant acted as though he did not want to kill Hargrove, but Royster told him it had to be done to prevent others from "messing with" them. There was some discussion about burning Hargrove's

house down, but this idea was rejected. They returned to defendant's trailer in Norlina.

Davis testified that at defendant's trailer, defendant handed O'Neal a sawed-off shotgun and told him to "go do that." Further, defendant ordered Davis to go with O'Neal, and O'Neal handed Davis a shotgun shell. When Davis indicated that he did not want to kill Hargrove, defendant threatened that if he refused he would end up dead like Hargrove. Defendant then handed Davis a .22 pistol. O'Neal testified that after they returned to the trailer, defendant smoked "reefer" and drank beer until he passed out. It was then that Davis, O'Neal, and Norris discussed the situation further. Norris got a shotgun, gave it to O'Neal, and told O'Neal and Davis to kill Hargrove. According to Norris, O'Neal and Davis left and then returned. They said they were going to "catch a body." O'Neal and Davis then left again. According to Davis, they went to Royster's house, where Royster got his .9-mm gun and headed for Hargrove's.

O'Neal, Davis, and Royster went through a window of Hargrove's home, and either O'Neal or Davis shot Hargrove, who died of a shotgun wound to the head. Davis testified that O'Neal shot him, and O'Neal testified that Davis shot him. They then returned to defendant's trailer. Norris, who was still at the trailer, testified that Davis and O'Neal said they had killed someone.

Norris testified that O'Neal walked outside to get rid of the shotgun. Defendant asked if "they" wanted to go to a hotel that night and they went. Davis testified that defendant told everyone to pack their clothes and hide the shotgun. Davis, at defendant's request, took defendant and O'Neal to various bus stations. Defendant told Davis to throw the shell out of the window and he did so. Davis dropped O'Neal and defendant off and returned to Warrenton. According to O'Neal, Norris suggested that they go to the motel. O'Neal testified that he and defendant went to New York afterward. Davis testified that O'Neal and defendant called from New York a couple of days later to find out what happened. The shell was later found, and the shotgun was found behind defendant's trailer.

I.

**[1]** In his first assignment of error, defendant contends that the trial court erred in prohibiting defendant from introducing evidence regarding his presence in Warren County. Defendant contends that he was thereby deprived of his right to confront the witnesses against

him and present a defense, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

One of the State's theories was that defendant came down from New York to orchestrate a drug ring in North Carolina. The State sought to show that defendant was the ringleader of the drug operation and thus was responsible for the shooting of Calvin Hargrove. Defendant complains that during the cross-examination of Shannon Norris, a witness for the State, he was not allowed to elicit testimony that defendant had relatives in Warren County. Defendant sought to present the jury with a legitimate reason for his relocating to North Carolina other than to start a drug business. After the State objected to the testimony, the trial judge excused the jury and allowed defendant to perform a voir dire of the witness. Norris' testimony as brought out by defense counsel was as follows:

> Q. The question is, do you know for a fact that this defendant had relatives in Warren County? Question one.
>
> A. Yes.
>
> Q. And do you know that he has—from the time that you've known him do you know for a fact that he had come to Warren County to visit his relatives?
>
> A. I can't really say because I was locked up in New York. When I came out of jail up there, that's when I first came down here, but I heard, you know, that he had came down here to visit his people down here before.
>
> Q. Heard he had what?
>
> A. Had came down here to visit his family.

The trial judge sustained the State's objection without further argument by counsel or comment.

The trial court erred in excluding Norris' response to defense counsel's question, "do you know for a fact that this defendant had relatives in Warren County?" Norris' testimony in response to this question was based on his personal knowledge and thus was competent under N.C.G.S. § 8C-1, Rule 602. Further, the testimony, albeit weak, was relevant to establish that defendant had a motive other than selling drugs in moving to Warren County. " '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 (1992). Since the State's theory of the case was that defendant had moved to Warren County to act as the leader of a drug ring, and as such had ordered a "hit" on the victim, evidence demonstrating that defendant may have had alternative motivations in moving to Warren County was relevant. The testimony may have had the tendency to make the State's theory less plausible than it would have been without the testimony.

However, the trial court did not err in excluding Norris' further testimony that "he had heard . . . that [defendant] had . . . c[o]me down here [to Warren County] to visit his family." Norris lacked personal knowledge and thus was incompetent to respond to defense counsel's question, "do you know for a fact that [defendant] had come to Warren County to visit his relatives?" Further, the basis of Norris' information was clearly hearsay. The testimony was being offered to establish the truth of the matter asserted—that defendant had visited his family in Warren County before. The statement does not fit within any exception to the general rule that hearsay is not admissible. N.C.G.S. § 8C-1, Rule 802 (1992).

The question thus becomes whether the trial court's error as to defense counsel's first question was harmless error. The error involved a ruling on the evidence and does not implicate a right arising under the federal or state Constitution. Therefore, the test is whether there is a reasonable possibility that had the error not occurred, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1993); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). Applying this test, we find that the error is harmless. Two of the State's witnesses, Shannon Norris and Lamont Alston, testified that defendant had come down from New York to sell drugs. The only evidence improperly excluded by the trial court was the testimony that Norris knew that defendant had family in North Carolina. Even if the jury believed that defendant had family here, it would not directly rebut the State's evidence since it only leads to the possibility that defendant had a mixed motive in coming to North Carolina. It does not negate in any way the State's evidence.

Therefore, we conclude that had the evidence been admitted, there is no reasonable possibility that a different result would have been reached at trial. This assignment of error is overruled.

II.

**[2]** In his second assignment of error, defendant contends that the evidence was insufficient to persuade a rational trier of fact that the defendant was guilty of first-degree murder beyond a reasonable doubt. The State's theory was that the defendant was an accessory before the fact. To be an accessory before the fact, the defendant must have: (1) counseled, procured, commanded, encouraged, or aided the principal to murder the victim; (2) the principal must have murdered the victim; and (3) defendant must not have been present when the murder was committed. *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987).

The State's evidence in this case that best supports the theory of accessory before the fact is the testimony of Rofae Davis. Davis testified that after the argument Royster had with Hargrove, who had called the police, defendant asked Royster what he wanted to do about it. Royster said that he wanted to kill Hargrove. Davis testified that later, at the trailer in Norlina, defendant handed O'Neal a sawed-off shotgun and told him to "go do that." Further, defendant ordered Davis to go with O'Neal and threatened that if he refused he would end up dead like Hargrove.

Defendant argues that there was insufficient evidence to show that he was an accessory before the fact. He argues that the actions of Davis, Royster, and O'Neal were independent of anything defendant said or did. Calvin Hargrove would have been murdered without any involvement by the defendant. Defendant further argues that even though Davis testified that he (Davis) was forced by defendant to go to Hargrove's, Davis said he did not shoot Hargrove. Defendant argues that the gun was not his and that he did not organize or plan the killing. Moreover, his statement "go do that" is ambiguous.

When ruling on defendant's motion to dismiss, the trial court must consider the evidence in the light most favorable to the State. *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989). The State is entitled to every reasonable inference to be drawn from the evidence presented. *Id.* Evidence favorable to the State is to be considered as a whole, and the test of sufficiency to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *State v. Earnhardt*, 307 N.C. 62, 696 S.E.2d 649 (1982). In viewing the evidence in the light most favorable to the State, we find that it was sufficient to persuade a rational trier of fact that the defendant was

guilty of murder beyond a reasonable doubt as an accessory before the fact.

**[3]** Defendant also contends that all of the people who perpetrated the killing pled guilty to second-degree murder, so it is as though they were acquitted of first-degree murder. Therefore, defendant's conviction of murder based on an accessory before the fact cannot stand since his cohorts were effectively acquitted.

The State concedes that a person may not be convicted of an offense such as accessory before the fact if all of the principals in the first-degree murder are acquitted. *State v. Robey*, 91 N.C. App. 198, 371 S.E.2d 711, *disc. rev. denied & appeal dismissed*, 323 N.C. 479, 373 S.E.2d 874 (1988). The primary difference between an accessory before the fact and a principal is that the former was not present at the scene of the crime when it was committed. *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980). Therefore, if the only principal is "acquitted" of first-degree murder but is found guilty of second-degree murder, the most an accessory before the fact could be convicted of is second-degree murder.

In this case, the principals plea bargained for second-degree murder. The State maintains and we agree that a plea bargain is not the same as an acquittal. In *State v. Cassell*, 24 N.C. App. 717, 212 S.E.2d 208, *cert. denied & appeal dismissed*, 287 N.C. 261, 214 S.E.2d 433 (1975), the Court of Appeals determined that the defendant could properly be tried for second-degree murder as an aider and abettor even though the State had previously allowed the actual perpetrator to plead guilty to voluntary manslaughter. Because the principals here were not acquitted of first-degree murder, we find that this defendant can be found guilty of first-degree murder. Accordingly, this assignment of error is overruled.

III.

**[4]** In his third assignment of error, defendant contends that the trial court erred in instructing the jury as to flight. The trial court gave the following pattern jury instruction on flight:

> In this case, the State contends that the defendant fled. Evidence of flight may be considered by you, together with all of the facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show consciousness of guilt.

> However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further this circumstance has no bearing on the question of whether the defendant acted with premeditation or deliberation. Therefore, it must not be considered by you as evidence of premeditation and deliberation.

Defendant argues that it is improper to give such an instruction because it tends to emphasize that particular evidence to the exclusion of other evidence, presents an implication that the trial court has an opinion about the evidence of flight, and lessens the State's burden of proving each essential element beyond a reasonable doubt. Defendant further argues that the instruction is confusing because the jury was not instructed as to which offense the evidence of flight should apply.

Defendant concedes that this issue was recently raised and decided by this Court in *State v. Jeffries*, 333 N.C. 501, 428 S.E.2d 150. In *Jeffries*, we held that the flight instruction is a correct statement of the law and was appropriate to give to the jury. *Id.* at 511, 428 S.E.2d at 155.

Furthermore, we believe that the evidence in this case supports a finding by the jury that the defendant was in flight. Here, the jury received testimony from Davis that as soon as the defendant heard that Calvin Hargrove had in fact been murdered, he told everyone to pack up and go to a motel. Defendant also decided that O'Neal and he were going to leave town. Davis testified that the defendant ordered him to drive them to the bus station the next day, where they boarded a bus for New York. " '[F]light from a crime shortly after its commission is admissible as evidence of guilt.' " *State v. Tucker*, 329 N.C. 709, 722, 407 S.E.2d 805, 813 (1991) (quoting *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972)). A trial court may properly instruct on flight " '[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.' " *State v. Green*, 321 N.C. 594, 607, 365 S.E.2d 587, 595 (quoting *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977)), *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). We hold that the evidence in this case supports the instruction on flight.

Defendant further argues that O'Neal testified that it was not the defendant, but someone else, who decided that they would go to a motel. O'Neal stated that defendant had to be awakened to accompany them. Thus, defendant maintains that this was evidence to rebut the State's inference of flight. We disagree. It was for the jury to

decide whether these facts, together with all other facts and circumstances, supported the State's contention that defendant had fled. The trial court appropriately told the jury that evidence of flight "may" be considered. Therefore, we find that the trial court did not err in giving the flight instruction.

IV.

**[5]** In his fourth assignment of error, defendant contends that the trial court erred in finding as factors in aggravation of the offenses of conspiracy to commit murder and first-degree burglary (1) that defendant induced others to participate in the commission of the offense and (2) that defendant occupied a position of leadership or dominance. N.C.G.S. § 15A-1340.4(a).

Defendant first argues that the evidence did not support the finding of these factors. He relies on *State v. Nobles*, 329 N.C. 239, 404 S.E.2d 668 (1991), to support his argument that in order to induce others, the idea to commit a crime must "originate" with the defendant. Defendant argues that there is insufficient evidence in this case to show that the idea to kill Hargrove originated with the defendant and that he then induced others to go along with him. Although in *Nobles* we did find that the idea to commit the crime originated with the defendant, that case does not stand for the proposition that the idea must originate with the defendant. *Id.* at 242, 404 S.E.2d at 670. The State must show only that the participants would not have engaged in the activity but for the inducement by the defendant. *State v. Hager*, 320 N.C. 77, 357 S.E.2d 615 (1987); *State v. Payne*, 311 N.C. 291, 316 S.E.2d 64 (1984). To support the second aggravating factor, the State must show that the defendant was in a position of dominance or leadership. *State v. Gore*, 68 N.C. App. 305, 314 S.E.2d 300 (1984). These findings in aggravation must be proved by a preponderance of the evidence. *State v. Canty*, 321 N.C. 520, 364 S.E.2d 410 (1988).

There is sufficient evidence in this case to prove by a preponderance of the evidence that the defendant induced the others to participate in the commission of the offense and that the defendant occupied a position of leadership or dominance. Davis testified that the defendant handed O'Neal the shotgun with the order for O'Neal to kill Hargrove. Davis also stated that the defendant ordered him to accompany O'Neal or be killed himself. In addition, Davis, Alston, and Norris all described the defendant as the leader of the group.

**[6]** Next, defendant argues that the same evidence used to convict him was used to support the aggravating factors that he induced others to participate in the commission of the offense and that he occupied a position of leadership or dominance. Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. N.C.G.S. § 15A-1340.4(a)(1) (1993); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Here, the trial court considered these aggravating factors only as to the offense of conspiracy to commit murder and the offense of first-degree burglary. In the trial judge's instructions to the jurors, he stated that they had to find beyond a reasonable doubt that the defendant "knowingly advised and encouraged" the other persons to commit the offenses. The State argues that knowingly advising and encouraging others to commit an offense does not require "inducing" as an element of proof, nor does it require that the defendant occupy a position of leadership or dominance of other participants. A person can advise and encourage an act without inducing the act. Furthermore, one can advise and encourage without being a leader or in a dominant position. We agree with the State that the same evidence used to support defendant's convictions was not necessary to prove the aggravating factors.

V.

**[7]** In his fifth assignment of error, defendant contends that the trial court erred in finding as factors in aggravation of the offenses of conspiracy to commit murder and first-degree burglary (1) that the offenses were committed *to disrupt* the lawful exercise of the enforcement of the laws and (2) that the offenses were committed *to hinder* the lawful exercise of the enforcement of the laws. N.C.G.S. § 15A-1340.4(a) (emphasis added). Defendant argues that the evidence was insufficient to support these findings. He maintains that the State's theory was that Hargrove was killed in order to protect the drug ring. Defendant argues that the evidence does not show a drug ring, but rather the occasional use of drugs. Moreover, the State's evidence showed that Royster was upset with Hargrove because he had complained to the police that Royster had pointed a weapon at him and threatened his life. Davis testified that Royster said he wanted to kill Hargrove because "he violated," meaning he had "called the police on him." Defendant argues that this evidence shows that the killing was motivated by revenge.

For this argument, defendant relies on *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1988). In *Parker*, defendant complained that the evidence was insufficient to sustain the aggravating factor that the murder was committed to escape the processes of the law. The State's evidence showed that the defendant participated in a robbery of the victim. After the robbery, which included stabbing the victim, the defendant went up the road to act as a look-out. The codefendants then tied the victim to a tree, and he bled to death. Further evidence tended to show that defendant participated in the murder because of ill will harbored toward the victim because the victim had accused him of other break-ins and had reported his brother to the police. Also, defendant had planned to leave town because he thought he would be arrested for failing to appear in court for fishing violations. We determined that this evidence did not support the finding that the murder was committed to escape the processes of the law. *Id.* at 256-57, 337 S.E.2d at 501.

*Parker* is not applicable here. There is sufficient evidence in this case to support the aggravating factors. Norris testified that he and the defendant were in Warren County from New York and that they made their living selling drugs. Lamont Alston testified that Jeremiah Royster was selling drugs for the defendant. Alston further testified that the argument between Hargrove and Royster was over two rocks of crack cocaine and that Hargrove had called the police. Royster was angry and wanted Hargrove dead. Davis testified that Royster said that he wanted to kill Hargrove because "he violated." Further, Davis told an officer that Royster told Davis he had to aid in the murder so that no one else would "mess with" them. We believe this evidence is sufficient to lead to the inference that Hargrove was killed to get rid of a "snitch" and also to deter others from reporting the drug activity of the gang.

**[8]** Although we find that the aggravating factors are supported by the evidence, we are nonetheless concerned by their duplicity. Defendant failed to address this issue in his brief. However, where an error appears on the face of the record, this Court can deal with it whether it was raised by the parties or not. *State v. McLean*, 282 N.C. 147, 191 S.E.2d 598 (1972), *cert. denied*, 410 U.S. 968, 35 L. Ed. 2d 704 (1973).

It is well settled that the same evidence may not be used to prove more than one aggravating circumstance. *State v. Jones*, 327 N.C. 439, 396 S.E.2d 309 (1990); *State v. Davis*, 325 N.C. 607, 386 S.E.2d 418

(1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990); *State v. Green*, 321 N.C. 594, 365 S.E.2d 587 (1988); *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987). In *Quesinberry*, defendant was found guilty of first-degree murder by premeditation and deliberation. We held that the trial court erred by submitting as aggravating circumstances both that the murder was committed while the defendant was engaged in the commission of an armed robbery and that it was committed for pecuniary gain. On the facts in *Quesinberry*, we concluded that submission of both circumstances was impermissibly duplicative. "Although the pecuniary gain factor addresses motive specifically, the other cannot be perceived as conduct alone, for . . . the motive of pecuniary gain provided the impetus for the robbery itself." 319 N.C. at 238, 354 S.E.2d at 452. In *Quesinberry*, "[n]ot only [was] it illogical to divorce the motive from the act . . . , but the same evidence [was underlying] proof of both factors." *Id.* at 239, 354 S.E.2d at 452.

We believe that like *Quesinberry*, the aggravating factors in this case, that the offense was committed *to disrupt* the lawful exercise of the enforcement of the laws and that the offense was committed *to hinder* the lawful exercise of the enforcement of the laws, are based on the same evidence and are inherently duplicative. Both factors involve the drug activity of the gang.

When the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985). On the conspiracy conviction, defendant was sentenced to the maximum term of thirty years. On the first-degree burglary conviction, defendant was sentenced to the maximum term of life. The terms imposed for each offense exceeded the presumptive terms set out in N.C.G.S. § 15A-1340.4(f). Therefore, defendant is entitled to resentencing on his convictions for conspiracy to commit murder and for first-degree burglary.

VI.

**[9]** In his sixth assignment of error, defendant contends that the prosecutors' closing argument to the jury was grossly improper and should have been stricken *ex mero motu* in that it placed facts not in evidence before the jury and was calculated solely to inflame the jury.

Defendant submits that the prosecutors' closing argument was grossly improper in that: (1) they compared defendant to Hitler,

(2) the jury was told that the killing was the most brutal in this country or in any land, (3) the jury was informed that the case was being tried because Calvin Hargrove had been denied his constitutional rights, and (4) the status of the economy and the future of the war on drugs was dependent on the jury's verdict.

Defendant acknowledges that he failed to object to any of these statements at trial. Ordinarily, an objection to portions of the State's final argument to the jury should be made before the case is submitted to the jury. Nevertheless, the Supreme Court, in the exercise of its supervisory jurisdiction, may take cognizance of grossly improper remarks *ex mero motu* to preserve defendant's constitutional right to a fair and impartial trial. *State v. King*, 326 N.C. 662, 392 S.E.2d 609 (1990); *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

This Court has held that counsel must be allowed wide latitude in the argument of a hotly contested case. *King*, 326 N.C. at 676, 392 S.E.2d at 618. The present case was hotly contested in that it focused upon the credibility of witnesses. Although the closing argument was vigorous and aggressive, we do not believe that it was grossly improper. As a result, the trial court did not err by failing to intervene *ex mero motu* during the final argument. This assignment of error is overruled.

VII.

**[10]** In his final assignment of error, which defendant raised by a motion to amend his brief filed with this Court and which we allowed on 31 January 1994, defendant contends that the conviction for conspiracy to commit murder merges with the conviction of first-degree murder.

Defendant was found guilty of first-degree murder based on his conduct as an accessory before the fact of the actual murder of Hargrove. To be an accessory before the fact, the defendant must have: (1) counseled, procured, commanded, encouraged, or aided the principal to murder the victim; (2) the principal must have murdered the victim; and (3) the defendant must not have been present when the murder was committed. *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340. The State's evidence supporting this theory was that the defendant handed O'Neal a shotgun and told him to "go do that." In addition, when Davis told the group that he did not want to kill anyone, the defendant told him to go or he would end up dead like Hargrove.

Defendant was also found guilty of conspiracy to commit murder. A conspiracy to commit murder requires an agreement with at least one other person to commit murder and that the defendant and at least one other person intended at the time of the agreement that murder would in fact be carried out. *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982). Defendant argues that the State used the same evidence to show defendant conspired with O'Neal and Royster to kill Hargrove as it used to show defendant was an accessory before the fact. Therefore, the conviction for conspiracy and the conviction for first-degree murder should merge because the same evidence is used to prove both offenses. We disagree.

We addressed this exact issue in *State v. Gallagher*, 313 N.C. 132, 326 S.E.2d 873 (1985). In *Gallagher*, the defendant argued that the trial court erred by permitting the jury to return guilty verdicts for both conspiracy to commit murder and accessory before the fact to murder. Defendant Gallagher maintained that conspiracy to commit murder was a lesser included offense of murder, and therefore she could not be convicted and sentenced for both. This Court disagreed, stating: "It is sufficient to note that each of these offenses contains an essential element not a part of the other." *Id.* at 142, 326 S.E.2d at 880. We stand by our decision in *Gallagher* and therefore overrule this assignment of error.

In summary, we find no error in defendant's first-degree murder conviction but remand for resentencing as to defendant's convictions for conspiracy to commit murder and for first-degree burglary.

91CRS1215, FIRST-DEGREE MURDER: NO ERROR;

91CRS1239, CONSPIRACY TO COMMIT MURDER: REMANDED FOR RESENTENCING;

91CRS1240, FIRST-DEGREE BURGLARY: REMANDED FOR RESENTENCING.

HOUSE OF RAEFORD FARMS, INC., A NORTH CAROLINA CORPORATION AND NASH JOHNSON AND SONS FARMS, INC., A NORTH CAROLINA CORPORATION v. STATE OF NORTH CAROLINA, EX REL., ENVIRONMENTAL MANAGEMENT COMMISSION AND DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 481PA93

(Filed 3 November 1994)

**Administrative Law and Procedure § 30 (NCI4th)— petition for contested case hearing—not timely filed—erroneous assertion of superior court jurisdiction—time for filing petition tolled**

The Court of Appeals erred in holding that the Office of Administrative Hearings was without subject matter jurisdiction over their contested case petition because petitioners failed to file such petition within sixty days of receiving notice of respondents' assessment of civil penalties where the superior court asserted jurisdiction over the assessment and that assertion of jurisdiction was vacated by the Court of Appeals more than sixty days from the notice of assessment. The application of the general rule that the right to appeal an administrative agency ruling is statutory and compliance with statutory provisions is necessary is inappropriate where a party fails to comply with the statutory time requirements because of the superior court's erroneous assertion of jurisdiction. Here, while petitioners stood ready to file a petition for a contested case hearing, they failed to seek administrative review in reliance on the superior court's erroneous assertion of jurisdiction. N.C.G.S. § 150B-23(f).

**Am Jur 2d, Administrative Law §§ 340-375.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 112 N.C. App. 228, 435 S.E.2d 106 (1993), reversing and remanding a judgment entered by Brown, J., in the Superior Court, Duplin County, on 10 June 1992. Heard in the Supreme Court 13 May 1994.

*Jordan, Price, Wall, Gray & Jones, by Henry W. Jones, Jr., and Laura J. Wetsch, for petitioner-appellants.*

*Michael F. Easley, Attorney General, by Edwin L. Gavin II, Assistant Attorney General, for respondent-appellees.*

FRYE, Justice.

In this appeal, petitioners contend that the Court of Appeals erred in holding that the Office of Administrative Hearings (OAH) was without subject matter jurisdiction over their contested case petition because petitioners failed to file such petition within sixty days of receiving notice of respondents' assessment of civil penalties. Petitioners contend that the 60-day time limitation of N.C.G.S. § 150B-23(f) was tolled by the superior court's assertion of subject matter jurisdiction over this assessment and remained tolled until the court's assertion of jurisdiction was vacated by the Court of Appeals. Accordingly, petitioners contend that the OAH had subject matter jurisdiction over their petition since it was filed in the OAH within sixty days of the Court of Appeals' decision. We agree that the 60-day time limitation was tolled during this period and that the OAH had subject matter jurisdiction over petitioners' contested case petition. Therefore, we reverse the decision of the Court of Appeals.

On 29 February 1988, petitioners House of Raeford Farms, Inc. and Nash Johnson and Sons' Farms, Inc., entered into a consent judgment with respondents Environmental Management Commission and the Department of Environment, Health and Natural Resources [formerly the Department of Natural Resources and Community Development]. This consent judgment settled ten cases which arose from respondents' assessment of civil penalties against petitioners for violations of the environmental laws of North Carolina. The consent judgment also established deadlines for construction of a new wastewater treatment facility, set penalties for petitioners' failure to meet applicable deadlines, and set interim effluent limits and monitoring requirements. The consent judgment further provided that the civil contempt provisions of Article 2 of Chapter 5A of the General Statutes of North Carolina were available to the superior court to enforce the terms of the consent judgment, and the Duplin County Superior Court retained necessary jurisdiction of the matter to enforce the terms of the consent judgment, resolve any matters in dispute and determine any motions for further relief based on changed circumstances.

On 4 May 1989, petitioners filed a motion in Duplin County Superior Court for modification of the interim effluent limits contained in the consent judgment. On 12 May 1989, while this motion was pending, respondents assessed civil penalties and investigatory costs in the amount of $294,449.20 against petitioners, primarily for dis-

charges in excess of the interim effluent limits established in the consent judgment. Petitioners received notice of this assessment on 15 May 1989. This notice advised petitioners that in order to request an administrative hearing, they must file a written petition conforming with Chapter 150B of the General Statutes in the OAH within sixty days of receipt of the notice.

On 18 May 1989, petitioners filed an amendment to their earlier motion for modification of the consent judgment, requesting that the superior court dismiss the civil penalties assessed by respondents on 12 May 1989 and stay any further enforcement action by respondents. On 19 May 1989, Superior Court Judge Henry L. Stevens, III, heard arguments on petitioners' motions. Respondents argued that the superior court lacked subject matter jurisdiction to dismiss the penalties and that the penalties could be properly adjudicated only through the administrative process. However, Judge Stevens ruled in open court that the superior court had jurisdiction over the matter. On 5 June 1989, Judge Stevens issued an order stating that the superior court had jurisdiction over the civil penalties without the parties having to proceed through the administrative process pursuant to N.C.G.S. § 150B-23 *et seq.* This order also temporarily modified the interim effluent limits and, in an attempt to maintain the status quo and discourage the stockpiling of repetitive litigation, stayed all deadlines and contested requirements inconsistent with his order until Superior Court Judge D. Marsh McLelland could hear the matter during the 10 July 1989 superior court session.

On 23 June 1989, the petitioners filed in superior court a verified response to respondents' 12 May 1992 assessment of penalties. In light of Judge Stevens' determination that jurisdiction over the penalties was proper in the superior court, petitioners' response expressly provided that it was filed in lieu of a petition for a contested case hearing under N.C.G.S. § 150B-23 *et seq.*

On 3 July 1989, respondents filed a motion in superior court asking the court to reconsider its 5 June 1989 order. Respondents challenged Judge Stevens' determination that the superior court had jurisdiction to hear any matters dealing with the civil penalties and contended that Chapter 150B provided the exclusive vehicle for contesting the penalty assessment. However, on 10 July 1989, the parties argued the issue of the superior court's jurisdiction over the civil penalties before Judge McLelland, and Judge McLelland ruled, as had Judge Stevens, that the superior court had jurisdiction over the penal-

ties without requiring the parties to proceed through the administrative process. By order filed 1 August 1989, Judge McLelland set aside the $294,449.20 assessment of civil penalties and investigatory costs on the ground that respondents' perfunctory consideration of statutory criteria in setting the penalty amounts rendered them purely discretionary and largely punitive.

On appeal, the Court of Appeals held, *inter alia*, that the superior court's decision to reverse the penalty assessment was in error, because the superior court lacked subject matter jurisdiction over the penalties since petitioners had failed to exhaust their administrative remedies under the Administrative Procedure Act by commencing a contested case in the OAH and obtaining a final agency decision. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 101 N.C. App. 433, 400 S.E.2d 107 (1991) [hereinafter *House of Raeford I*]. This Court denied petitioners' petition for writ of supersedeas, motion for temporary stay and petition for discretionary review on 3 April 1991. *State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms*, 328 N.C. 576, 403 S.E.2d 521 (1991).

Following the Court of Appeals' decision, on 26 March 1991, petitioners filed a verified petition for a contested case hearing in the OAH. On 29 May 1991, respondents filed a motion to dismiss this petition pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) (1990). On 9 August 1991, Administrative Law Judge (ALJ) Fred G. Morrison, Jr., granted respondents' motion and dismissed the petition, concluding that pursuant to N.C.G.S. § 150B-23(f), the agency lacked subject matter jurisdiction because petitioners failed to file a contested case petition within sixty days of receiving notice of the penalty assessment.

On 3 September 1991, petitioners filed a petition for judicial review and request for stay in the Duplin County Superior Court pursuant to N.C.G.S. § 150B-43. On 10 June 1992, Superior Court Judge Frank R. Brown issued a judgment on judicial review reversing the ALJ's decision. Judge Brown concluded, *inter alia*, that N.C.G.S. § 150B-23(f)'s 60-day time limitation was tolled when the superior court exercised its jurisdiction over the penalties and continued to be tolled while the matter was considered on appeal. Accordingly, Judge Brown remanded the matter to the OAH for further proceedings on petitioners' verified petition for a contested case hearing consistent with his judgment and in accordance with N.C.G.S. § 150B-22 *et seq.*

Respondents appealed this decision to the Court of Appeals, and the Court of Appeals reversed the superior court's judgment. The

Court of Appeals held that the 60-day time limitation of N.C.G.S. § 150B-23(f) was not tolled by the superior court's exercise of jurisdiction and, therefore, petitioners' failure to file a petition for a contested case hearing within sixty days after they received notice of respondents' penalty assessment divested the OAH of subject matter jurisdiction over the petition. *House of Raeford Farms v. State ex rel. Envir. Mgmt. Comm.*, 112 N.C. App. 228, 435 S.E.2d 106 (1993) [hereinafter *House of Raeford II*]. This Court allowed petitioners' petition for discretionary review on 28 January 1994. *House of Raeford Farms v. State ex rel. Envir. Mgmt. Comm.*, 335 N.C. 555, 441 S.E.2d 115 (1994).

N.C.G.S. § 150B-23(f) provides the procedure for filing a contested case petition as follows:

> (f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, *the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency* by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition.

N.C.G.S. § 150B-23(f) (1990) (emphasis added). It is undisputed that petitioners did not file a petition for a contested case hearing within sixty days of 15 May 1989, the date they received notice of respondents' assessment of penalties. However, petitioners contend that the 60-day time limitation was tolled by the superior court's assertion of jurisdiction over the penalties. Petitioners further contend that the superior court's assertion of jurisdiction continued to toll this time limitation until vacated by the Court of Appeals' mandate in *House of Raeford I* issued on 25 February 1991. Accordingly, petitioners contend that the OAH still had subject matter jurisdiction over their contested case petition since it was timely filed on 26 March 1991, some twenty-eight days after issuance of the Court of Appeals' mandate. We agree.

Respondents contend, and the Court of Appeals agreed, that petitioners are not entitled to OAH review because of their failure to comply with N.C.G.S. § 150B-23(f)'s 60-day time limitation. The Court of Appeals reasoned that "the language of [N.C.G.S. § 150B-23(f)] leaves no room for judicial construction because it clearly provides that a petition must be filed within the 60-day limitation." *House of Raeford II*, 112 N.C. App. at 230, 435 S.E.2d at 108. In support of its decision, the court cited two of its recent decisions, *Gummels v. N.C. Dept. of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990) (upholding an ALJ's order dismissing a petition for contested case hearing where the petition was mailed, but not filed, within the 30-day time limitation provided by N.C.G.S. § 131E-188(a)), and *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 375 S.E.2d 712 (1989) (upholding the dismissal of an employee grievance appeal where the appeal was filed one day later than the 15-day time limitation of N.C.G.S. § 126-35). Respondents also rely on these cases before this Court.

In holding that petitioners are not entitled to a contested case hearing in the OAH, the Court of Appeals correctly stated, as it had in *Lewis* and *Gummels*, the general rule that the right to appeal an administrative agency ruling is statutory and compliance with statutory provisions is necessary to avail oneself of this right. *House of Raeford II*, 112 N.C. App. at 230, 435 S.E.2d at 108. However, *Lewis* and *Gummels* are distinguishable from the present case in that neither case involved an erroneous assertion of jurisdiction by the superior court over an administrative agency ruling. We believe that application of this general rule is inappropriate where, as here, a party fails to comply with the statutory time requirements for seeking administrative review because of the superior court's erroneous assertion of jurisdiction over an administrative agency ruling.

The issue of whether the superior court's erroneous assertion of subject matter jurisdiction tolls the time limitation for filing a petition for administrative review appears to be one of first impression in North Carolina. Consequently, petitioners rely on the Michigan Court of Appeals' decision in *Elgammal v. Macomb County Intermediate Sch. Dist. Bd. of Educ.*, 83 Mich. App. 444, 268 N.W.2d 679 (1978), in support of their argument that the 60-day time limitation of N.C.G.S. § 150B-23(f) was tolled by the superior court's erroneous assertion of subject matter jurisdiction over respondents' penalty assessment. We find the decision in *Elgammal*, while not binding on this Court, to be instructive on the issue before the Court today.

In *Elgammal*, the plaintiff, a tenured school teacher, was dismissed by the school board and proceeded through the administrative process. The plaintiff first requested a hearing from the school board, however, the school board denied this request. The plaintiff then sought review by the State Teacher Tenure Commission, which upheld the plaintiff's dismissal. Finally, the plaintiff sought review by the circuit court, which reversed the decision of the tenure commission and remanded the case for a hearing before the local school board. In addition, the circuit court directed that the school board's decision be forwarded directly to the circuit court, bypassing an administrative appeal to the tenure commission, so that the circuit court could decide the teacher's additional request for reinstatement and back pay which it had held in abeyance until the school board hearing was held.

After the ordered hearing, the school board again dismissed the plaintiff, and the board's decision was delivered to the circuit court which entered an order upholding the board's dismissal. The plaintiff moved the court for a rehearing and requested that the court set aside its order and permit the plaintiff to exhaust his administrative remedies by obtaining tenure commission review of the board's decision to dismiss him. The circuit court denied plaintiff's motion.

On plaintiff's appeal, the Michigan Court of Appeals held that the circuit court had erred in ordering that the results of the school board's second hearing be forwarded directly to that court, because that order improperly expanded the appellate jurisdiction of the circuit court at the expense of the plaintiff's right to administrative review. The court next considered the school board's argument that plaintiff was not entitled to administrative review because he failed to request tenure commission review within thirty days from the date of the school board's decision as required by statute. In determining the effect of the circuit court's erroneous assertion of jurisdiction, the *Elgammal* court stated:

> Here, it has been many more than thirty days since the school board decision of which plaintiff complains. However, in proper circumstances the thirty-day period may be tolled. The statute of limitations on an action at law is held to be tolled where a suit is commenced and jurisdiction over the defendant is obtained. A similar rule is appropriate where, as here, a court order truncates administrative review and brings the dispute into court. Defendant can hardly contend that it was prejudiced by lack of timely

> notice of the claim which it was called upon to defend. Accordingly, we hold that the court's erroneous assertion of jurisdiction tolled the limitations period for appeal to the tenure commission.

*Elgammal*, 83 Mich. App. at 450-51, 268 N.W.2d at 682-83 (citations omitted).

We also believe that in appropriate circumstances the 60-day time limitation of N.C.G.S. § 150B-23(f) may be tolled. Specifically, such tolling is appropriate where, as here, a court's erroneous assertion of jurisdiction brings a dispute over an administrative agency's ruling into the court which would normally review decisions of that agency, and—in reliance on this assertion of jurisdiction—a party fails to seek administrative review within the statutory time limit.

In reliance on the superior court's assertion of jurisdiction, on 23 June 1989, petitioners filed a verified response to respondents' assessment of penalties in superior court, expressly providing in the response that it was being filed *in lieu* of a petition for a contested case hearing. Clearly, had petitioners filed a petition for a contested case hearing on that same date, that filing would have been well within the 60-day time limitation of N.C.G.S. § 150B-23(f). The 60-day time period for requesting a contested case hearing, which began to run with petitioners' receipt of respondents' penalty assessment on 15 May 1989, would have expired in mid-July. Consequently, petitioners' time period for filing a contested case petition expired while both parties awaited receipt of Judge McLelland's order which was filed on 1 August 1989. Because petitioners failed to seek administrative review within the statutory time limit in reliance on the superior court's erroneous assertion of jurisdiction, we believe that the 60-day time limitation of N.C.G.S. § 150B-23(f) should be tolled in the present case.

Respondents, however, contend that this Court should not afford petitioners the benefit of tolling the time limitation of N.C.G.S. § 150B-23(f) because, unlike the plaintiff in *Elgammal*, petitioners sought and argued in favor of the superior court's assertion of jurisdiction over the penalties. Respondents argue that petitioners' selection of the wrong forum in which to contest the penalties should preclude them from complaining that the time period for filing a contested case petition expired. We disagree.

While petitioners did inform the superior court that they believed it had jurisdiction over the penalties pursuant to the consent judg-

ment, the final determination of whether the superior court had jurisdiction rested not with petitioners, but with the court itself. At the initial hearing on the penalties in the superior court in May 1989, petitioners asked Judge Stevens to make a timely determination of the proper forum for contesting the penalties and informed him that they were ready to proceed in the superior court, the OAH, or both, depending on his ruling. In July 1989, petitioners specifically requested that Judge McLelland resolve the issue of jurisdiction, because the 60-day time period for filing a petition for contested case hearing in OAH was about to expire. On both occasions, the superior court ruled that it had jurisdiction over the penalty assessment without the parties having to proceed through the administrative process. Accordingly, while petitioners stood ready to file a petition for a contested case hearing, in reliance on the superior court's erroneous assertion of jurisdiction, petitioners failed to seek administrative review of respondents' penalty assessment.

For the foregoing reasons, we hold that the 60-day time limitation of N.C.G.S. § 150B-23(f) was tolled by the superior court's erroneous assertion of subject matter jurisdiction over respondents' penalty assessment and remained tolled until the court's assertion of jurisdiction was vacated by the Court of Appeals' mandate issued on 25 February 1991. Furthermore, we hold that the OAH had subject matter jurisdiction over petitioners' contested case petition filed on 26 March 1991, since this petition was timely filed in the OAH following the issuance of the Court of Appeals' mandate. Consequently, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Superior Court, Duplin County, for reinstatement of the 10 June 1992 judgment entered by Judge Frank R. Brown which remanded this matter to the OAH for further proceedings on petitioners' verified petition for a contested case hearing.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. TROY PEREASE HERRING

No. 44A94

(Filed 3 November 1994)

**1. Homicide § 393 (NCI4th)— noncapital first-degree murder—intoxication—evidence insufficient**

The trial court did not err in a noncapital first-degree murder prosecution by refusing to submit voluntary intoxication to the jury where defendant was able to testify regarding the details of the evening of the murder; he recalled who his companions were that evening; he was able to describe what he was wearing and he was certain of who fired the gun; he had the presence of mind to flee and remembered the getaway route; he remembered the make and model of the getaway car, the name of the gas station where they stopped, who hid the gun, and the time the shooting occurred; and a detective testified that defendant had no odor of alcohol when he made his statement five hours later. The evidence shows that defendant may have been intoxicated but does not show that he was utterly incapable of forming a deliberate and premeditated purpose to kill.

**Am Jur 2d, Homicide § 447.**

**Modern status of the rules as to voluntary intoxication as defense to criminal charge. 8 ALR3d 1236.**

**Modern status of test of criminal responsibility—state cases. 9 ALR4th 526.**

**2. Homicide § 245 (NCI4th)— noncapital first-degree murder—premeditation and deliberation—circumstantial evidence—intoxication**

Defendant in a noncapital first-degree murder prosecution was not entitled to an instruction on second-degree murder on the theory that his intoxication negated the elements of premeditation and deliberation and that the jury was free to disregard the evidence of premeditation and deliberation because it was entirely circumstantial. The trial court did not err by refusing to submit second-degree murder based on voluntary intoxication and the evidence, while circumstantial, tended to show that defendant was guilty either of first-degree murder or not guilty. There was no evidence tending to show that defendant shot and killed the victim with malice but without premeditation and deliberation.

**Am Jur 2d, Homicide §§ 437 et seq.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

**3. Criminal Law § 794 (NCI4th)— noncapital first-degree murder—acting in concert—evidence sufficient**

The evidence presented at a noncapital first-degree murder trial was sufficient to justify an acting in concert instruction where, when referring to the sale of cocaine, defendant testified, "Ain't nobody sold none separate; we was altogether"; defendant testified that he and his associates searched for the man who stole his cocaine and that "everybody was like, yeah" when someone offered to lead them; defendant claimed that Costa did the shooting but conceded that he knew that Costa had a gun and went with Costa and another willingly; defendant also conceded that the three men approached the victim together; and there was other testimony about the joint pursuit of the cocaine thief and that there were three people, including defendant, around the victim when he was shot.

**Am Jur 2d, Trial §§ 1255 et seq.**

**4. Criminal Law § 724 (NCI4th)— noncapital first-degree murder—expression of opinion by court on guilt—inadvertent**

There was no prejudicial error in the instructions to the jury in a noncapital first-degree murder trial where the court instructed the jury that "There is evidence which tends to show that the defendant confessed and—that he committed the crime charged in this case." The inadvertent addition of the word "and" did not mislead the jury to believe that the trial court was expressing an opinion as to defendant's guilt and it is clear from the instructions as a whole that the jury was not misled.

**Am Jur 2d, Trial §§ 1195 et seq.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Strickland, J., at the 11 October 1993 Criminal Session of Superior Court, Pitt County. Heard in the Supreme Court 12 October 1994.

*Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.*

*Mark A. Ward for defendant-appellant.*

FRYE, Justice.

Defendant was indicted for the first-degree murder of Jerome Hopkins. He was tried noncapitally by a jury, found guilty as charged, and sentenced to a mandatory term of life imprisonment. Defendant appeals to this Court asserting four assignments of error. We find no reversible error.

The evidence presented at trial tended to show the following facts and circumstances. On 10 April 1992, defendant and three of his associates, Anthony Ellis, Tony Costa, and Demetrice Williams were selling crack cocaine in the Moyewood subdivision of Greenville. At approximately 11:30 p.m. that evening, a potential customer, Jerome Gorham, pretended to examine two "twenty size rocks" of cocaine and ran off with them. Defendant and his three associates searched for Gorham for thirty minutes to an hour, but were unable to locate him.

The following evening, defendant, Costa, and Ellis were standing on a corner, in Moyewood, drinking alcoholic beverages. At about 10:30 p.m., Willie Jones approached the three men and offered to lead them to Jerome Gorham. Jones led them to Mark Gorham and Jerome Hopkins. Jones mistakenly believed that Jerome Hopkins was Jerome Gorham. Ellis, Costa, and defendant approached Hopkins and Hopkins was shot and killed.

After the shooting, defendant, Ellis, and Costa went to a nightclub. While at the club, they were able to secure a ride to Scotland Neck. They were apprehended by the police before they reached their destination.

An autopsy revealed that when the victim was shot the "gun was at light contact with the clothing surface of the body at the time of the discharge." The entry wound was on the left side of the chest by the armpit, and the bullet punctured Hopkins' lung, diaphragm, spleen, aorta, and liver.

Mark Gorham, Jerome Gorham's brother, testified that, when the three men approached Jerome Hopkins, one of them said "Is this the one?" Jerome Hopkins responded, "My name is not Jerome," as if he

was attempting to say "my name is not Jerome Gorham." According to Mark Gorham, defendant shot Jerome Hopkins at close range.

Demetrice Williams, who was charged with conspiring to murder Jerome Hopkins, testified that he was drinking with defendant, Costa, and Ellis the day of the shooting, but they were "not drinking to get drunk." Williams testified further that when he saw defendant after the shooting, defendant told him, "I had capped the M-F." Williams understood defendant to be referring to Jerome Hopkins.

Detective Best, an investigating officer for the Greenville Police Department, was called as a witness for the State. Detective Best and his colleague, Detective Thomas Ne'Velle, interviewed several witnesses. Detective Best testified that he was sitting close to defendant during the interrogation and he smelled "no alcohol" and "no body odor." Best testified that defendant was coherent and appeared to know what he was doing.

Detective Best further testified that he read the *Miranda* warnings to defendant and defendant signed an acknowledgement in the presence of Detectives Best and Ne'Velle. Detective Best testified that defendant made a written statement in his own handwriting and gave an oral statement as well. Best read the following handwritten statement into the record:

> 4-12-92. On April 10, 1992, some guy I know had some drugs tooken from him by a guy named Jerome. So they chased him, but couldn't find him. So on April 11th, 1992, at about 10:45 p.m., a friend named Willie came and told us he knew where Jerome was and bring us to him and that's when I shot him. Troy P. Herring 4-12-92.

Testifying on his own behalf, defendant stated that he and his four associates sold cocaine together. Defendant's testimony indicated that the day before the murder, 10 April 1992, he consumed between forty and sixty ounces of a fortified wine named "Sisco," which is also known as "liquid crack." He also drank four cans of a malt liquor beer, known as "Bull," and smoked marijuana. Defendant testified that on the day of the murder he began drinking and smoking around two o'clock in the afternoon; he drank another forty ounces of "Sisco," four twelve-ounce malt liquor beers, and smoked three "marijuana joints." Defendant further testified that he was "messed up," he "wasn't sober," that he was "drunk," and that his state of intoxication continued up until the time of the shooting.

Defendant thought Costa, Ellis, and Jones shared his intentions to get either his money or his drugs back from Jerome Gorham. According to defendant, it was Costa who shot the victim. Defendant indicated he did not remember giving a statement to Detective Best because his intoxication rendered him impaired.

Defendant also called Tony Costa, Anthony Ellis, and Detective Best as witnesses. Both Costa and Ellis refused to answer the majority of defendant's questions and invoked their Fifth Amendment rights. Detective Best read into evidence a statement taken from Ellis on 12 April 1992. Ellis' statement to Detective Best corroborated defendant's statement that he had been drinking "Sisco" and beer the night of the shooting.

The jury was given the choice of finding defendant guilty of first-degree murder or not guilty. The jury returned a verdict of guilty of first-degree murder.

**[1]** In his first assignment of error, defendant contends that the trial court committed reversible error by failing to instruct the jury on voluntary intoxication as a defense to first-degree murder. We disagree.

Defendant contends that he became intoxicated after consuming large amounts of alcohol and smoking marijuana in the forty-eight hour period preceding the shooting. Defendant further argues that his inability to remember giving a statement to the police is evidence of his intoxication at the time of the shooting. Additionally, defendant contends that his attempts to elicit testimony regarding his intoxication from his witnesses were thwarted by the witnesses' invocation of the Fifth Amendment.

A defendant who wants to raise the issue of whether he was so intoxicated by the voluntary consumption of alcohol or other drugs "that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on the evidence produced by the state, of his intoxication." *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). "Evidence of mere intoxication" does not meet this burden. *Id.* The defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill." *Id.* The evidence on which the defendant relies

> must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditat-

> ed purpose to kill. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913). In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975).

*Mash*, 323 N.C. at 346, 372 S.E.2d at 536 (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)).

In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), this Court rejected the defendant's claim that the trial court erred in not giving an instruction on voluntary intoxication. In reaching its decision, the *Goodman* Court relied on evidence which showed that the defendant could drive, give directions, lead a search, and participate "in planning a scheme for disposing of the victim's body." *Id.* at 14, 257 S.E.2d at 579.

The evidence in this case is analogous to that in *Goodman*; it disclosed a defendant with a detailed memory, a defendant in control of his actions. Defendant was able to testify regarding the details of the evening of the murder. Defendant recalled who his companions were that evening. He was able to describe what he was wearing and he was certain Costa fired the gun. Defendant had the presence of mind to flee the scene and remembered the getaway route. He remembered the make and model of the getaway car, the name of the gas station where they stopped, who hid the gun, and the time the shooting occurred. Detective Best testified that defendant had no odor of alcohol when he made his statement five hours later.

Viewing the evidence in the light most favorable to defendant, the evidence shows that defendant may have been intoxicated but the evidence does not show defendant was "utterly incapable of forming a deliberate and premeditated purpose to kill." *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987). For this reason we reject defendant's first assignment of error and hold that the trial court did not err in refusing to submit a voluntary intoxication charge to the jury.

**[2]** Defendant's second assignment of error is related to his first. Defendant contends that the trial court erred by failing to submit, as an alternative verdict, second-degree murder on the theory that defendant's intoxication negated the elements of premeditation and deliberation. Defendant also argues that because the evidence of premeditation and deliberation was entirely circumstantial, the jury was at liberty to disregard it; therefore, the jury should have been given

the opportunity to consider second-degree murder as a lesser-included offense of first-degree murder.

We find no merit in defendant's contention that the jury could have disregarded the evidence of premeditation and deliberation because it was circumstantial. This Court has often acknowledged "that it is difficult to prove premeditation and deliberation and that these factors are usually proven by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence." *State v. Thomas*, 332 N.C. 544, 556, 423 S.E.2d 75, 82 (1992). "The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence." *State v. Adcock*, 310 N.C. 1, 36, 310 S.E.2d 587, 607 (1984).

For the reasons stated in conjunction with defendant's first assignment of error, we conclude that the trial court did not err by refusing to submit second-degree murder based on voluntary intoxication. "Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). The absence of premeditation and deliberation distinguishes second-degree murder from first-degree murder. *State v. Cummings*, 326 N.C. 298, 316, 389 S.E.2d 66, 76 (1990).

In this case the evidence, while circumstantial, tended to show that defendant was guilty of either first-degree murder or not guilty. Some of the evidence supporting first-degree murder included: (1) Demetrice Williams' testimony that on 11 April 1992, the day of the shooting, defendant "kept saying when I find him [the man defendant believed had stolen his cocaine] I am going to do something to him." (2) Two detectives testified that when they informed defendant that he shot the wrong "Jerome," defendant responded, "He said his name was Jerome. He probably needed killing anyway." There was no evidence tending to show that defendant shot and killed the victim with malice, but without premeditation and deliberation; therefore, defendant was not entitled to an instruction on second-degree murder.

**[3]** For his third assignment of error, defendant contends the trial court committed reversible error by instructing the jury on acting in concert. Defendant argues that while the evidence shows that Costa, Jones, and Ellis were with defendant before and after the shooting, it does not show that anyone other than defendant did any act consti-

tuting first-degree murder. Therefore, none of the actions of Costa, Jones, and Ellis should be attributable to defendant under a theory of acting in concert.

In support of his argument, defendant directs this Court to the following question, which was asked by the jury: "If he [defendant] conspired is he guilty of murder whether or not he pulled the trigger?" Defendant contends that this question makes it clear that the jury was speculating upon a theory of guilt not supported by the evidence, and the jury could have convicted defendant on a theory that someone other than defendant committed the murder. We reject defendant's argument.

Defendant's testimony, and the testimony of other witnesses, support the acting in concert instruction. When referring to the sale of cocaine defendant testified: "Ain't nobody sold none separate; we was altogether [sic]." Defendant testified that he and his associates searched for the man who stole his cocaine and when Willie Jones offered to lead defendant, Costa, and Ellis to Jerome "everybody was like, yeah." Although defendant claimed Costa actually did the shooting, he conceded that he knew Costa had a gun and he went with Ellis and Costa willingly. Additionally, defendant conceded that the three men together approached the victim.

Furthermore, there was testimony from Demetrice Williams about the joint pursuit of Jerome Gorham on the night before the shooting. Mark Gorham testified that, while he "never saw the pistol," there were three people, including defendant, around the victim when he was shot.

The evidence presented at trial was sufficient to justify an acting in concert instruction. Accordingly we reject defendant's argument and find no error.

**[4]** As his final assignment of error, defendant contends the trial court expressed an improper and prejudicial opinion as to defendant's guilt. Defendant objects to the inclusion of the word "and" in the first sentence of the following instruction:

> There is evidence which tends to show that the defendant confessed and—that he committed the crime charged in this case. If you find that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it.

Defendant argues that the instruction implied to the jury that the court believed the evidence showed defendant was guilty. We disagree.

In *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1988), the defendant was convicted of first-degree murder after a trial that included evidence of his confession. In rejecting defendant's argument that a similar instruction, without the word "and" in the first sentence, constituted an expression of opinion by the trial court, we said:

> The use of the words "tending to show" or "tends to show" in reviewing the evidence does not constitute an expression of the trial court's opinion on the evidence. *State v. Allen*, 301 N.C. 489, 272 S.E.2d 116 (1980); *State v. Huggins*, 269 N.C. 752, 153 S.E.2d 475 (1967). Nor did the trial court's statement that the evidence tended to show that the defendant had "confessed" that he "committed the crime charged" amount to an expression of opinion by the trial court, *because* evidence had been introduced which in fact tended to show that the defendant had confessed and to the *crime charged*, first degree murder.

*State v. Young*, 324 N.C. at 495, 380 S.E.2d at 98.

We are convinced the inadvertent addition of the word "and" did not mislead the jury to believe that the trial court was expressing an opinion as to defendant's guilt. We have held "a mere slip of the tongue by the trial judge in his charge to the jury . . . will not constitute prejudicial error when it is apparent from the record that the jury was not misled thereby." *State v. Simpson*, 303 N.C. 439, 450, 279 S.E.2d 542, 549 (1981). It is clear from the instructions as a whole that the jury was not misled. Accordingly, we find no prejudicial error in the instructions.

Defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. CHAD ANSON ROSS

No. 52A94

(Filed 3 November 1994)

1. **Homicide § 589 (NCI4th)— murder trial—self-defense instruction not required**

The trial court did not err in failing to instruct the jury on the State's burden of proof with regard to self-defense in a first-degree murder trial where all of the evidence, including defendant's statement, tended to show that the victim was unarmed and walking away from defendant when defendant shot him in the back, since defendant was not facing an imminent threat of death or great bodily harm from the victim when he fired the fatal shot, and a reasonable person of ordinary firmness could not have believed it was necessary to use deadly force on the victim.

**Am Jur 2d, Homicide §§ 519 et seq.**

**Duty of trial court to instruct on self-defense, in absence of request by accused. 56 ALR2d 1170.**

**Homicide: modern status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.**

2. **Jury § 258 (NCI4th)— peremptory challenge of black juror—failure to show racial discrimination**

Defendant failed to make a prima facie showing of racial discrimination in the State's exercise of a peremptory challenge to remove a black male juror from the jury in defendant's trial for first-degree murder where the record reveals that the jury consisted of ten white jurors and two black jurors; this was the only peremptory challenge exercised by the prosecutor in defendant's trial; the prosecutor accepted two black women as members of the jury; the prosecutor accepted one of the black women at the same time he challenged the black male juror, indicating that he was not attempting to strike all blacks; the prosecutor did not move to strike any jurors for cause and thus accepted 66% of the black potential jurors; nothing in the prosecutor's questions or statements in the exercise of his challenge to the black male juror evidenced any discriminatory motive; and defendant pointed to no evidence indicating discriminatory intent. The mere facts that defendant is a member of a cognizable racial group and that the

prosecutor used one peremptory challenge to exclude a member of defendant's race do not raise the necessary inference of discrimination on account of the juror's race.

**Am Jur 2d, Jury § 235.**

**Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.**

**Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.**

**Supreme Court's view as to use of peremptory challenges to exclude from jury persons belonging to same race as criminal defendant. 90 L. Ed. 2d 1078.**

**3. Homicide § 237 (NCI4th)— prior altercation—shooting victim in back—sufficient evidence of first-degree murder**

The evidence was sufficient to sustain defendant's conviction of first-degree murder where it tended to show that defendant and the victim fought earlier in evening, denoting ill will between the parties, which is a circumstance tending to prove premeditation and deliberation; defendant followed the victim to a convenience store parking lot to continue the fight; defendant knew the victim was unarmed; and at the time defendant shot the victim, the victim had turned his back to defendant and was walking away from him.

**Am Jur 2d, Homicide § 452.**

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Barnette, J., on 3 November 1993 in Superior Court, Lee County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 October 1994.

*Michael F. Easley, Attorney General, by John H. Watters, Special Deputy Attorney General, for the State.*

*G. Hugh Moore for defendant-appellant.*

WHICHARD, Justice.

Defendant was indicted for the first-degree murder of James Wilson Redwine and tried noncapitally. A jury found him guilty, and the trial court sentenced him to life imprisonment. We find no error.

The State's evidence tended to show that on the evening of 24 March 1993 William Jenkins, some friends, and the victim were drinking beer at the victim's apartment. They later went to Family Billiards in Jonesboro. That same evening Alfred Creque, some friends, and defendant also went to Family Billiards. As defendant, Creque, and the others were about to go inside, the victim approached them and acted as if he were looking in the car. Members of the group argued with the victim. Defendant then went into Family Billiards, but returned shortly thereafter. Both defendant and Creque argued with the victim again when the victim said something about "nigger" (both defendant and Creque are black; the victim was white). While the three were arguing, William Jenkins grabbed the victim, and they got into a cab. Before closing the door, the victim told Creque and defendant to follow him.

Creque and defendant followed the cab to The Pantry, a convenience store. The cab drove away, and members of the group began to argue again. Jenkins informed the victim that he was going home, and he left. After Jenkins was gone, the victim repeatedly told Creque and defendant he wanted a ride home. Defendant told the victim he was not going anywhere in their car. He and the victim then began to argue again, and eventually began to fight. After a brief fistfight, the victim walked over to Creque, struck him in the face, and walked away. The victim then got into a karate-like stance, and defendant hit him. They began to fight again. After fighting for a few minutes, they stopped, and the victim started towards Creque as if he were going to hit him. At this point defendant reached into the driver's side of the car and pulled out a .38 pistol from behind the seat. The victim apparently saw the weapon and turned his back to defendant. Defendant shot the victim in the back one time. He and Creque then got into the car and drove to Creque's house.

The victim died as a result of complications due to the gunshot wound. At the time of his death, he had a blood alcohol level of .16 on the breathalyzer scale.

Defendant presented evidence that on the evening of 24 March 1993, the victim and the billiard hall owner's husband got into an argument when the victim insisted on calling the black customers in the billiard hall "nigger" and the owner's husband asked him to keep his mouth shut. They almost got into a fistfight, and as a result the husband refused to serve the victim any alcoholic beverages. When the victim later asked for something to drink and the owner informed

him that he had been cut off, he cursed and asked the owner to call him a cab. The billiard hall owner testified that she also saw defendant that night, but did not see him consume any alcohol.

Another defense witness, Ross Hunter, testified that he was a friend of Alfred Creque, and that he had stolen a gun from his father's girlfriend and given it to Creque to sell for him. Hunter and Creque were to split equally the proceeds from the sale of the weapon. Hunter also identified the weapon that was used to kill the victim as the weapon he had stolen, but he testified that he had never seen defendant with the weapon.

**[1]** Defendant first assigns as error the trial court's failure to instruct on the State's burden of proof with regard to self-defense. Defendant contends that based on the evidence that he allegedly was assaulted by a drunken man who was moving erratically, assuming a martial arts stance, and bragging about his time in prison, the jury should have been allowed to consider whether perfect or imperfect self-defense might be applicable.

There are two types of self-defense: perfect and imperfect. *State v. McKoy*, 332 N.C. 639, 643-44, 422 S.E.2d 713, 716 (1992). Perfect self-defense excuses a killing altogether, while imperfect self-defense may reduce a charge of murder to voluntary manslaughter. *Id.* For defendant to be entitled to an instruction on either perfect or imperfect self-defense, the evidence must show that defendant believed it to be necessary to kill his adversary in order to save himself from death or great bodily harm. *Id.* at 644, 422 S.E.2d at 716; *State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982). In addition, defendant's belief must be "reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness." *McKoy*, 332 N.C. at 644, 422 S.E.2d at 716; *see also Bush*, 307 N.C. at 160, 297 S.E.2d at 569.

We hold that the evidence here was not sufficient to warrant an instruction on either perfect or imperfect self-defense. Defendant failed to present evidence to support a finding that he in fact formed a belief that it was necessary to kill the victim in order to protect himself from death or great bodily harm; nor is there evidence that if defendant had formed such a belief, the belief was reasonable under the circumstances. Defendant's own statement acknowledged that the victim was unarmed and walking away from defendant when defendant shot him in the back. Thus, defendant was not facing an imminent threat of death or great bodily harm from the victim when

defendant fired the fatal shot. Under these circumstances, a reasonable person of ordinary firmness could not have believed it was necessary to use deadly force on the victim. Therefore, the trial court did not err in failing to instruct on the State's burden of proof with regard to self-defense. *See State v. Exxum*, 338 N.C. 297, 449 S.E.2d 554 (1994).

**[2]** Defendant next assigns as error the trial court's ruling, in response to defendant's objection to the State's peremptory challenge of a prospective juror, that defendant had not made a prima facie showing of racial discrimination. The State exercised only one peremptory challenge during jury selection, removing a black man from the jury. Defendant asserts that none of the prospective juror's answers materially distinguished him from the jurors accepted, and his answers to the questions posed on voir dire gave no indication that he would be unable to render a fair and impartial verdict. Consequently, defendant concludes that the State was motivated by discrimination to eliminate from the jury the only person who was a true peer of defendant, who is a black man. Defendant contends that the high acceptance rate of other jurors by the State and the fact that the black male juror was singled out are sufficient to make a prima facie showing of racial discrimination.

Article I, Section 26 of the North Carolina Constitution prohibits the exercise of peremptory challenges based solely on the race of the prospective juror. *State v. Glenn*, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993). The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution also prohibits such discrimination. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). In *Batson* the United States Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89, 90 L. Ed. 2d at 83.

In *Batson* the Supreme Court also established a three-part test for determining whether a defendant has established a prima facie case of purposeful discrimination:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. 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). Thus, the initial burden rests "on the defendant who alleges such racial discrimination to make a prima facie showing that the prosecutor exercised peremptory challenges to exclude jurors because of their race." *Glenn*, 333 N.C. at 302, 425 S.E.2d at 692.

In the cases since *Batson* addressing the issue of peremptory challenges, this Court has identified several factors which may be relevant in determining whether a defendant has raised an inference of discrimination. Among these are the defendant's race, the victim's race, and the race of key witnesses. *State v. Thomas*, 329 N.C. 423, 431, 407 S.E.2d 141, 147 (1991); *State v. Smith*, 328 N.C. 99, 120, 400 S.E.2d 712, 724 (1991). Another may be questions and statements made by the prosecutor during jury selection which tend to support or refute an inference of discrimination. *Thomas*, 329 N.C. at 431, 407 S.E.2d at 147; *Smith*, 328 N.C. at 120-21, 400 S.E.2d at 724; *State v. Robbins*, 319 N.C. 465, 489, 356 S.E.2d 279, 293, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987). Finally, one of the most important considerations is whether there was repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, *Smith*, 328 N.C. at 121, 400 S.E.2d at 724, or "the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case . . . ." *Robbins*, 319 N.C. at 490-91, 356 S.E.2d at 294.

On the other hand, one factor tending to refute an allegation of purposeful discrimination is the acceptance rate of black jurors by the State. *Smith*, 328 N.C. at 121, 400 S.E.2d at 724. The frequency with which a prosecutor accepts blacks on the jury is relevant to the determination of whether he or she is discriminating against black jurors on the basis of race. *Id.*; *see State v. Allen*, 323 N.C. 208, 219, 372 S.E.2d 855, 862 (1988) (minority acceptance rate of 41% failed to establish prima facie case of discrimination); *State v. Abbott*, 320 N.C. 475, 481-82, 358 S.E.2d 365, 369 (1987) (acceptance rate of 40% failed to establish prima facie case); *State v. Belton*, 318 N.C. 141, 159-60, 347 S.E.2d 755, 766 (1986) (acceptance rate of 50% failed to establish

prima facie case). However, the acceptance rate of minorities is not necessarily the dispositive factor in the inquiry. *Smith*, 328 N.C. at 121, 400 S.E.2d at 724. The acceptance rate may not necessarily reveal the prosecutor's intent to discriminate if the prosecutor exhausts his or her peremptory challenges and has no choice but to accept the replacement jurors. *Id.* Further, regardless of the acceptance rate, a number of other factors or circumstances may evidence an intent to discriminate. *Id.* (acceptance rate of 42.8% not sufficient to refute allegations of discriminatory intent when the case involved an interracial killing with highly charged racial emotions, the prosecutor made statements with respect to race, and the State exercised 80% of its peremptories to remove black potential jurors). Nevertheless, absent such circumstances, the acceptance rate of black jurors may be the best evidence of an intent to discriminate *vel non*. *Id.*

From all the evidence we conclude that defendant failed to establish a prima facie case of purposeful discrimination. The mere facts that defendant is a member of a cognizable racial group and that the prosecutor used one peremptory challenge to exclude a member of defendant's race do not raise the necessary inference of discrimination on account of the juror's race. The record reveals that the jury consisted of ten white jurors and two black jurors. The only peremptory challenge exercised by the prosecutor excused a black man from the jury. However, the prosecutor also accepted the two women who were the other black members of the jury venire. He accepted one at the same time he challenged the black male juror, indicating that he was not attempting to strike all blacks. Further, he did not move to strike any jurors for cause. Thus, he accepted 66% of the black potential jurors.

In addition, nothing in the prosecutor's questions or statements in the exercise of his challenge to the black male potential juror evidenced any discriminatory motive. Except for evidence that defendant was black and the victim was white, no facts or circumstances suggest any inference of purposeful discrimination. Defendant does not offer any specific examples of the prosecutor's discriminatory use of the peremptory challenge or point to any evidence indicating discriminatory intent.

Defendant's unsubstantiated allegation that a prospective black juror was excluded from the jury on the basis of race is not sufficient to establish a prima facie case of racial discrimination. Therefore, the trial court did not err in ruling that defendant had not established a prima facie case of racial discrimination.

**[3]** By his final assignment of error, defendant contends the trial court erred in denying his motion to dismiss the first-degree murder charge. He argues that the evidence was insufficient to sustain a conviction.

In ruling on a motion to dismiss a charge of first-degree murder, 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 that evidence. *State v. Carter*, 335 N.C. 422, 429, 440 S.E.2d 268, 271 (1994); *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992). Any contradictions and discrepancies in the evidence are for the jury to resolve and do not require dismissal. *Carter*, 335 N.C. at 429, 440 S.E.2d at 271-72. Further, there must be substantial evidence tending to prove each element of the offense charged and that defendant committed the crime. *Id.*; *State v. Jackson*, 317 N.C. 1, 22, 343 S.E.2d 814, 827 (1986), *judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

First-degree murder is the unlawful killing of a human being with malice, premeditation and deliberation. *See* N.C.G.S. § 14-17 (1993); *Carter*, 335 N.C. at 429, 440 S.E.2d at 272. "Premeditation" means that the defendant formed the specific intent to kill " 'for some length of time, however short,' " before committing the murderous act. *State v. Joyner*, 329 N.C. 211, 215, 404 S.E.2d 653, 655 (1991) (quoting *State v. Biggs*, 292 N.C. 328, 337, 233 S.E.2d 512, 517 (1977)); *see also Carter*, 335 N.C. at 429, 440 S.E.2d at 272. "Deliberation" is defined as an intent to kill formed by defendant in a cool state of blood, and not as a result of a violent passion arising from legally sufficient provocation. *Carter*, 335 N.C. at 429, 440 S.E.2d at 272; *McAvoy*, 331 N.C. at 589, 417 S.E.2d at 494.

The evidence, taken in the light most favorable to the State, showed that defendant and the victim fought earlier in the evening, denoting previous ill-will between the parties. Ill-will or previous difficulty between the parties is a circumstance tending to prove premeditation and deliberation. *Carter*, 335 N.C. at 429, 440 S.E.2d at 272; *State v. Huffstetler*, 312 N.C. 92, 109-10, 322 S.E.2d 110, 121 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Further, defendant followed the victim to the convenience store parking lot, presumably to continue the fight. More importantly, at the time

defendant shot the victim, the victim had turned his back to defendant and was walking away from him. Defendant knew the victim was unarmed. A reasonable juror clearly could accept this evidence as sufficient to support a conclusion that defendant acted with malice, premeditation and deliberation, and the trial court thus did not err in denying defendant's motion to dismiss the first-degree murder charge.

We conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

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GEORGE A. BRYANT v. NORTH CAROLINA STATE BOARD OF EXAMINERS OF ELECTRICAL CONTRACTORS, GARFIELD B. GWYN, WILLIAM T. EASTER, EDWARD H. MARROW JR., J. MICHAEL SILVER, J. ALAN BARRINGER, WILLIAM H. ROBERTS, AND WILLIAM R. HOKE

No. 504PA93

(Filed 3 November 1994)

**Contractors § 31 (NCI4th); Administrative Law and Procedure § 38 (NCI4th)— charges against electrical contractor—refusal of State Board to hear and decide—right to hearing by ALJ**

A plaintiff who filed charges implicating N.C.G.S. § 87-47(a1)(7) against another licensed electrical contractor with the State Board of Examiners of Electrical Contractors was entitled to a hearing and decision from the Board on the charges. Where the Board was unable or unwilling to provide plaintiff with a hearing and decision, plaintiff had a right under N.C.G.S. § 150B-40(e) to a contested case hearing and a proposal for decision on the charges by an administrative law judge designated by the Director of the OAH. N.C.G.S. § 87-47(a3).

**Am Jur 2d, Administrative Law §§ 340-375; Occupations, Trades, and Professions §§ 65, 68.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of a unanimous panel of the Court of Appeals, 111 N.C. App. 875, 433 S.E.2d 814 (1993), affirming an order dismissing plaintiff's com-

plaint entered 10 July 1992 by Allen (W. Steven, Sr.), J., in Superior Court, Wake County. Heard in the Supreme Court 12 September 1994.

*George A. Bryant, plaintiff-appellant, pro se.*

*Michael F. Easley, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for defendant-appellee.*

WHICHARD, Justice.

Plaintiff's complaint alleges that on 11 January 1991, plaintiff George Bryant, who is licensed by the North Carolina State Board of Examiners of Electrical Contractors [hereinafter "the Board"], filed charges with the Board alleging that another licensee had violated Chapter 87 of the North Carolina General Statutes. On 6 May 1991 the Board's Disciplinary Review Committee heard plaintiff's charges and made recommendations to be presented to the Board at its 8 June 1991 meeting. By letter prior to the Board's June meeting, plaintiff requested that the Board reject the Disciplinary Review Committee's recommendations and hold an administrative hearing on his charges. At the June meeting the Board voted that an administrative hearing was prohibited because the Board's members were "prejudiced by prior knowledge of the charges." Plaintiff gave oral notice of his disagreement with the Board's action. On 17 June 1991 plaintiff petitioned the Board in writing requesting a contested case hearing before an administrative law judge. The Board did not apply to the Office of Administrative Hearings [hereinafter "OAH"] for a contested case hearing.

Plaintiff then filed this action in Superior Court, Wake County, seeking to compel the Board to apply for a contested case hearing pursuant to N.C.G.S. § 150B-40(e). Defendants moved to dismiss plaintiff's action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The superior court granted the motion and entered an order of dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. Plaintiff appealed to the Court of Appeals, which unanimously affirmed the order of dismissal. On 27 January 1994, we granted discretionary review.

The issue is whether plaintiff is entitled to a hearing and proposal for decision from an administrative law judge designated by the Director of the OAH if plaintiff does not receive a hearing and decision from the Board. The Court of Appeals held that plaintiff does not

have a right under N.C.G.S. § 150B-40(e) to a contested case hearing before the OAH. It determined that plaintiff's rights, duties, or privileges are not at stake and therefore his case is not a contested one as defined in N.C.G.S. § 150B-2(2). The Court of Appeals relied on its decision in *Carter v. N.C. State Bd. for Professional Engineers*, 86 N.C. App. 308, 357 S.E.2d 705 (1987), wherein it determined that a plaintiff who had brought charges against another licensee lacked standing to seek judicial review of that board's decision. Based on that holding, the Court of Appeals reasoned that because plaintiff here "would not have standing to seek judicial review of an administrative decision on his complaint, . . . it would be inconsistent to hold that he nonetheless has a right to demand that an administrative decision be reached." *Bryant v. State Bd. of Examiners of Electrical Contractors*, 111 N.C. App. 875, 878, 433 S.E.2d 814, 816 (1993).

We disagree with the Court of Appeals' reasoning, and we therefore reverse. Whether plaintiff has standing to seek judicial review of an administrative decision, a question which is not before us and which we therefore do not address, is a distinct issue from whether he has a right to a hearing and decision on the charges he has brought before the Board. We conclude from our review of the applicable statutes that the General Assembly intended that "[a]ny person" who "prefer[s] charges" against, *inter alia*, a licensee of the Board, be entitled to a hearing and decision on those charges.

The statute governing the jurisdiction of the Board provides:

> In the interest of protecting the public, whenever the Board finds that . . . (v) a person . . . to whom . . . a certification or license has been issued, is guilty of one or more of the following:
>
> . . .
>
> (7) Malpractice, unethical conduct, fraud, deceit, gross negligence, gross incompetence, or gross misconduct in the practice of electrical contracting;
>
> the Board may refuse or revoke certification as a qualified individual, or may refuse to issue or renew a license.

N.C.G.S. § 87-47(a1)(7) (1989). Plaintiff brought his charges, which implicated N.C.G.S. § 87-47(a1)(7), to the Board pursuant to the following provision:

> The Board shall, in accordance with Chapter 150B of the General Statutes, formulate rules of procedure governing the *hearings of*

> *charges* against applicants, qualified individuals and licensees. Any person may prefer charges against any applicant, qualified individual, or licensee, and such charges must be sworn to by the complainant and submitted in writing to the Board. In conducting *hearings of charges*, the Board may remove the hearings to any county in which the offense, or any part thereof, was committed if in the opinion of the Board the ends of justice or the convenience of witnesses require such removal.

*Id.* § 87-47(a3) (emphasis added). Under the "any person" language of this statute, plaintiff qualifies as a proper person to prefer charges against a licensee. Though the language is not explicit in requiring that the Board hold a hearing on the charges, such a requirement is implicit both in the language referring to "hearings of charges" and in the stated purpose of the statute governing the jurisdiction of the Board to hear such charges. It would be contrary to the intent expressed in N.C.G.S. § 87-47(a1), that of protecting the public, to determine that plaintiff is not entitled to a hearing and decision on charges brought to effectuate that very purpose. We must adhere to the intent of the legislature in matters of statutory interpretation. *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763 (1992). Accordingly, we hold that plaintiff is entitled to a hearing and decision from the Board on the charges.

The provisions of Article 3A of the North Carolina Administrative Procedure Act [hereinafter "NCAPA"] apply to occupational licensing agencies, *see* N.C.G.S. § 150B-38(a)(1) (Supp. 1993), of which the Board is one. When an agency such as the Board determines that it is unable to provide a hearing or chooses not to do so, the NCAPA mandates the following:

> When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article.

N.C.G.S. § 150B-40(e) (1991). When a contested case must be transferred due to an agency's inability or refusal to hear the case, the legislature has prescribed the administrative law judge's role as follows:

> The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under

> this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

*Id.* Thus, where an agency is unable or refuses to hear a case, the administrative law judge serves the function that the agency would have, had it been able and willing to hear the case. In this situation the administrative law judge does not review the agency's decision because one has not yet been reached; rather, the OAH provides what the party who initiated the contested case is entitled to under the statute and has not yet received: a hearing and a proposal for decision.

The definition of "contested case" found in Article 1 of the NCAPA applies to those uses of that phrase in Chapter 150B, including Article 3A. *See* N.C.G.S. § 150B-2 (1991) (providing definitions of words "[a]s used in this Chapter"). A contested case is "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty." *Id.* § 150B-2(2). We have determined above that the legislature intended that plaintiff, who is qualified to prefer charges against another licensee, have a hearing and decision from the Board on those charges. Plaintiff's right to that hearing and decision is involved in the present dispute between plaintiff and the Board. Plaintiff's case therefore is a contested case as that term is used in Article 3A, Section 150B-40(e). Accordingly, the statutory mandate that the Board transfer the contested case to the OAH when it determines that it is unable or unwilling to provide plaintiff with a hearing and decision is applicable to this case.

Because plaintiff is entitled to a hearing and decision on his charges brought pursuant to N.C.G.S. § 87-47(a3), we reverse the Court of Appeals' decision and remand the case to that court for further remand to the Superior Court, Wake County. If the superior court determines that plaintiff has not received a hearing and decision from the Board, as appears to be the case from the somewhat unartful allegations of plaintiff's pro se complaint, it shall order the Board either to hear the charges and render a decision thereon or to request that the OAH designate an administrative law judge to "sit in place of the agency and . . . make a proposal for decision." N.C.G.S. § 150B-40(e).

REVERSED AND REMANDED.

IRT PROPERTY COMPANY, A GEORGIA CORPORATION v. PAPAGAYO, INC., A NORTH CAROLINA CORPORATION

No. 499PA93

(Filed 3 November 1994)

**Landlord and Tenant § 12 (NCI4th); Evidence and Witnesses § 1994 (NCI4th)— breach of lease—change of shopping area to offices—language of lease not ambiguous**

The language of a lease was not ambiguous and the superior court was not in error in excluding evidence of negotiations or representations made by either party prior to the execution of the lease, where the lease stated that the "[l]andlord shall have the right at all times, *in its sole discretion, to change the size,* location, elevation, nature, and/or use of any portion or all of the Commons Areas, the Shopping Center or any part thereof as the Landlord may from time to time determine"; the landlord converted the mall from retail to office suites; and defendant claimed that this was a breach of the lease which caused the traffic on the mall to be reduced so that it could not continue in business. The words "shopping center," "mall," and "Galleria" in the portions of the lease describing the premises do not unambiguously refer to areas which contain only retail establishments, as defendant contended.

**Am Jur 2d, Contracts §§ 260-263; Landlord and Tenant §§ 230 et seq.**

**Comment Note.—The parol evidence rule and admissibility of extrinsic evidence to establish or clarify ambiguity in written contract. 40 ALR3d 1384.**

**Shopping center lease restrictions on type of business conducted by tenant. 1 ALR4th 942.**

**Provision in lease as to purpose for which premises are to be used as excluding other uses. 86 ALR4th 259.**

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of a unanimous decision of the Court of Appeals, 112 N.C. App. 318, 435 S.E.2d 565 (1993), reversing judgment in favor of plaintiff entered 29 January 1992, by Llewellyn, J., based on a jury verdict rendered at the 13 January 1992 Civil Session of Superior Court, New Hanover County. Heard in the Supreme Court 12 September 1994.

This is an action to recover damages for the failure of the defendant to pay rent on premises it leased from the plaintiff in a shopping center mall in Wrightsville Beach, North Carolina. The defendant operated a restaurant on the premises.

The defendant filed an answer in which it alleged that it was excused from paying rent because of a breach of the terms of the lease by the plaintiff. The defendant contended the breach by the plaintiff occurred when the plaintiff converted the mall from a place with retail merchants as tenants to a place which contained "key man" office suites. Papagayo contended this was a breach of the lease that caused the traffic on the mall to be so reduced that it could not continue in business on the mall.

The superior court granted a motion *in limine* by the plaintiff, excluding evidence of negotiations or representations made by either party prior to the execution of the lease. The jury returned a verdict for the plaintiff and the defendant appealed. The Court of Appeals ordered a new trial on the ground that the terms of the lease were ambiguous and it was error for the superior court to exclude evidence to explain the terms of the lease.

We granted the plaintiff's petition for discretionary review.

*Clark, Newton, Hinson & McLean, by Reid G. Hinson, for plaintiff-appellant.*

*Parker, Poe, Adams & Bernstein, L.L.P., by Charles C. Meeker and Stephen D. Coggins, for defendant-appellee.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by James D. Blount, Jr. and Susan Milner Parker, for International Council of Shopping Centers, Inc., amicus curiae.*

WEBB, Justice.

The resolution of this case depends on the interpretation of certain provisions of the lease which are as follows:

> 1.1 <u>Shopping Center</u>. The term "Shopping Center" means all that certain land and the main mall building and associated improvements, equipment and facilities now or hereafter erected thereon known as THE GALLERIA AT WRIGHTSVILLE located in New Hanover County, State of North Carolina, as more particularly described on <u>Exhibit "A"</u> attached hereto and by this reference

made a part hereof, as same may be altered, expanded or reduced from time to time. Detached buildings shall not be deemed a part of the Shopping Center.

2.1 Lease. Landlord hereby leases and demises to Tenant those certain Premises crosshatched in red on the Floor Plan attached hereto as Exhibit "B" and by this reference made a part hereof, containing approximately 4,300 gross square feet of interior second floor space together with approximately 1,600 gross square feet of enclosed patio area located on the roof area of the adjoining premises (hereinafter referred to as the "Premises") in the Shopping Center together with the nonexclusive license to use the Common Areas subject to such rules and regulations as Landlord shall adopt.

4.7 Common Area Control/Right of Relocation. Landlord grants to Tenant and his agents, employees, and customers a nonexclusive license to use the Common Areas in common with others during the term, subject to the exclusive control and management thereof at all times by Landlord and subject, further, to the rights of Landlord set forth hereinbelow. *Landlord shall have the right at all times, in its sole discretion, to change the size, location, elevation, nature and/or use of any portion or all of the Common Areas, the Shopping Center or any part thereof as Landlord may from time to time determine,* including the right to change the size thereof, to erect buildings thereon, to sell or lease part or parts thereof, to change the location and size of the landscaping and buildings on the site, and to make additions to, subtractions from or rearrangements of said buildings.

14.11 Headings, Captions and References. The section captions contained in this Lease are for convenience only and do not in any way limit or amplify any term or provision hereof. The use of the terms "hereof," "hereunder" and "herein" shall refer to this Lease as a whole except where noted otherwise. . . .

14.17 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Premises, the Shopping Center or this Lease *except as expressly set forth herein.*

14.24 Entire Agreement. This Lease constitutes the entire agreement between the parties hereto with respect to the subject

> matter hereof and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party. . . .

(Emphasis added.)

The language of Section 4.7 of the lease which provides that the "[l]andlord shall have the right at all times, in its sole discretion, to change the size, location, elevation, nature and/or use of any portion or all of the Common Areas, the Shopping Center or any part thereof as Landlord may from time to time determine" seems by its plain language to allow the plaintiff to change the character of the mall from a place for retail establishments to a place for "key man" office suites. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992).

The defendant contends that Sections 1.1 and 2.1, when read together, provide that it leased premises in the main mall building of the Galleria shopping center. It says the meanings of the words "shopping center," "mall," and "Galleria" are clear and unambiguous, and all mean a retail area. It says with this clear meaning, as to the type area in which it leased the premises, the plaintiff cannot change the type businesses on the mall without breaching the terms of the lease. The defendant says that in light of the use of these words which demonstrate the type businesses allowed, Section 4.7 can only be read to allow changes from one type retail business to another type retail business.

We do not believe the words "shopping center," "mall," and "Galleria" unambiguously refer to areas which contain only retail establishments. "Shopping Center" is defined in Section 1.1 of the lease as certain land and buildings without any requirement that it contain retail outlets. We can take judicial notice of the fact that the building in which this Court is housed is on the Fayetteville Street Mall, which is not predominately a place of retail businesses. "Mall" does not connote retail establishments only. We do not believe "Galleria" is a word which limits an area to retail businesses only. These are non-technical words and giving them their ordinary meaning they do not limit the type businesses which may be established on the mall to retail outlets. *Woods v. Insurance Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). At the least, they do not affect the plain words of Section 4.7.

The defendant also argues and the Court of Appeals agreed that Section 4.7 is ambiguous in that the title of the section "Common Area Control/Right of Relocation" and the first sentence of the section

limit the right of the plaintiff to change only the common areas of the mall. Section 14.11 of the lease prevents us from considering the caption of Section 4.7 in interpreting the lease. The first sentence of Section 4.7 provides that the defendant has a nonexclusive license to use the common areas of the mall subject to the control of the common areas by the plaintiff. We can find no reason why this sentence limits the right given the plaintiff by the second sentence of the section to change the use of the mall.

We hold, based on the plain language of the lease, that the lease is not ambiguous and the superior court was not in error in excluding evidence of negotiations or representations made by either party prior to the execution of the lease.

Each party has presented questions for review which are moot in light of our decision. We do not discuss them.

For the reasons stated in this opinion, we reverse the decision of the Court of Appeals and remand to the Court of Appeals for further remand to the Superior Court, New Hanover County for the reinstatement of the judgment.

REVERSED AND REMANDED.

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STATE OF NORTH CAROLINA v. JOHN EARL EXXUM

No. 83A94

(Filed 3 November 1994)

**Homicide § 566 (NCI4th)— first-degree murder trial—imperfect self-defense—voluntary manslaughter—failure to instruct not error**

A defendant on trial for first-degree murder was not entitled to an instruction on voluntary manslaughter based on imperfect self-defense where the undisputed evidence showed that defendant shot the unarmed victim in the back as the victim was walking away from defendant, fired three more shots into the victim as the victim lay prone and unable to defend himself, and reloaded his weapon and again fired it in the direction of the victim's head, since there was no evidence that defendant believed it necessary to kill the victim in order to save himself from death or

great bodily harm, and any such belief would not have been reasonable under the circumstances. Assuming *arguendo* that the evidence did merit a voluntary manslaughter instruction, the jury's rejection of the second-degree murder option and its finding defendant guilty of first-degree murder on the theory of premeditation and deliberation rendered any error harmless. Again assuming error *arguendo*, defendant failed to object at trial to the absence of a voluntary manslaughter instruction, and defendant has not carried his burden of establishing that the error amounted to plain error.

**Am Jur 2d, Homicide §§ 525 et seq.**

**Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.**

**Lesser-related state offense instructions: modern status. 50 ALR4th 1081.**

**Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.**

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Thompson, J., on 9 June 1993 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 October 1994.

*Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Charles L. Alston, Jr., Assistant Appellate Defender, for defendant-appellant.*

WHICHARD, Justice.

Defendant was tried noncapitally on an indictment charging him with the first-degree murder of Bobby Simmons. The jury returned a verdict finding defendant guilty on the theory of premeditation and deliberation, and he was sentenced to life imprisonment. We find no error.

The State's evidence tended to show that on 17 August 1992 at approximately 5:08 p.m., law enforcement officers received a call about a shooting in front of a halfway house in Raleigh. Shortly thereafter, officers arrived at the scene and found the victim lying face-up in the street in a pool of blood. He had been shot four times: once in the neck, once in the elbow, once in the back, and once in the abdomen.

Ted Boyd, a resident of Raleigh, testified that he had heard the shooting. James Percy was unable to identify defendant as the perpetrator, but testified that he had seen someone shoot the victim several times while standing over him. Anthony Travis Bryant testified that he had both seen and heard the shooting while waiting at a stoplight. According to Bryant, defendant shot the victim once, knocking him down. Defendant then advanced on the victim while firing three more shots into the victim's prone body. Finally, defendant pulled the trigger a fifth time, but the gun did not fire. Defendant stepped back, reloaded, and discharged his gun in the direction of the victim's head. Four bullets were recovered from the victim's body, and a fifth was recovered from the street pavement.

The State's evidence further indicated that an argument had precipitated this event. Earlier in the day Eloise Dowtin, the owner and operator of the halfway house, had asked defendant, a resident, to move out because he had violated one of the "house rules." Following this request Dowtin and the victim left to run errands, expecting defendant to be gone when they returned. They returned, however, to find defendant standing in front of the house. After a brief argument, the victim threatened to "blow [defendant's] G.D. head off" and began walking toward the truck where he normally kept his gun. Defendant pulled his gun and fired the first shot as the victim walked toward the truck with his back to defendant. Following this first shot, Dowtin ran inside to call the police, but she heard several additional shots. As set forth above, defendant had advanced upon the victim and fired additional shots.

The trial court instructed the jury that it could find defendant guilty of first-degree murder, guilty of second-degree murder, or not guilty. It also instructed on self-defense. As noted, the jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation.

Defendant contends it was plain error for the trial court not to instruct the jury on voluntary manslaughter, which is the unlawful

killing of a human being without malice and without premeditation and deliberation. *State v. Norris*, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Under the law of imperfect self-defense, a defendant may be found guilty of voluntary manslaughter if: (1) the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm; and (2) the defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; but (3) the defendant, although without murderous intent, was the aggressor in bringing on the difficulty; or (4) the defendant used excessive force. *Id.* at 530, 279 S.E.2d at 573; *accord State v. McAvoy*, 331 N.C. 583, 596, 417 S.E.2d 489, 493 (1992).

It is "an elementary rule of law that a trial judge is required to declare and explain the law arising on the evidence and to instruct according to the evidence." *State v. Strickland*, 307 N.C. 274, 284, 298 S.E.2d 645, 652 (1983), *modified on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). The trial judge is not required, however, to instruct the jury on lesser-included offenses " 'when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.' " *Id.* (quoting *State v. Shaw*, 305 N.C. 327, 342, 289 S.E.2d 325, 333 (1982)). Thus, the question is whether there was evidence that would have supported a voluntary manslaughter conviction.

Defendant was not entitled to an instruction on voluntary manslaughter based on imperfect self-defense. The undisputed evidence showed that defendant shot the victim in the back as the victim was walking away from defendant. There was no evidence that defendant believed it necessary to kill the victim in order to save himself from death or great bodily harm. If defendant had presented evidence of such a belief, the belief would not have been reasonable under the circumstances, given that the victim was unarmed and walking away from defendant when defendant shot him. The victim thus posed no danger to defendant at the time. *See State v. Ross*, 338 N.C. 280, 449 S.E.2d 556 (1994).

Assuming *arguendo* that the evidence did merit a voluntary manslaughter instruction, the jury's rejection of the second-degree murder option, and finding defendant guilty of first-degree murder on the theory of premeditation and deliberation, renders any error harmless. In *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969), we held that if a jury, given the choice between first- and second-degree mur-

der, finds a defendant guilty of first-degree murder upon a theory of premeditation and deliberation, there is no harm in errors in instructions related to a lesser manslaughter offense. *See also State v. Young*, 324 N.C. 489, 492, 380 S.E.2d 94, 96 (1989) ("[E]rrors in voluntary manslaughter instructions are deemed harmless when the jury has chosen to convict for first degree murder rather than second degree murder."). The finding of premeditation, deliberation and malice required for a first-degree murder conviction precludes the possibility of the same jury finding the defendant guilty of a lesser manslaughter charge. *Id.* at 493-94, 380 S.E.2d at 96.

> A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of [defendant's] guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant.

*Freeman*, 275 N.C. at 668, 170 S.E.2d at 465.

Again assuming error *arguendo*, defendant has not carried his burden of establishing that the error amounted to "plain error." The "plain error" rule, to which defendant must resort because he failed to object at trial to the absence of a voluntary manslaughter instruction, "applies only in truly exceptional cases." *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). "Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *Id.*

The uncontroverted evidence here established that defendant first shot his unarmed victim in the back as the victim was walking away from defendant. He then fired three more shots into the victim as the victim lay prone and unable to defend himself. After reloading his weapon, defendant again discharged it in the direction of the helpless victim's head. Given these uncontroverted facts, we cannot conclude that this is the truly exceptional case in which, absent an error in failing to instruct on voluntary manslaughter, the jury probably would have reached a different verdict. *See id.* at 40, 340 S.E.2d at 84.

NO ERROR.

NORTH BUNCOMBE ASSOCIATION OF CONCERNED CITIZENS, INC., SUCCESSOR TO THE FLAT CREEK UNINCORPORATED ASSOCIATION OF CONCERNED CITIZENS; GARY HENSLEY, PRESIDENT OF THE CORPORATION; AND GARY HENSLEY, INDIVIDUALLY, AND WIFE, DEBBIE HENSLEY, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, RESPONDENT, AND VULCAN MATERIALS COMPANY, INTERVENOR

No. 506PA93

(Filed 3 November 1994)

**Administrative Law § 30 (NCI4th)— permit to operate rock quarry—contested case hearing—jurisdiction**

The Court of Appeals erred by holding that the Office of Administrative Hearings did not have jurisdiction to conduct a contested case hearing regarding a permit to operate a rock quarry. The Administrative Procedure Act grants the right to a contested case hearing to all persons aggrieved by a state agency decision unless jurisdiction is expressly excluded by the APA or the organic act which created the right. There was no such exclusion in this case.

**Am Jur 2d, Administrative Law §§ 340-375.**

On discretionary review of an unpublished opinion of the Court of Appeals, 112 N.C. App. 366, 437 S.E.2d 539 (1993), reversing orders by Lewis (Robert D.), J., entered at the 1 July 1991 and 3 September 1991 sessions of Superior Court, Buncombe County. Heard in the Supreme Court 13 May 1994.

This case brings to the Court a question as to the proper way to review an agency decision of the North Carolina Department of Environment, Health and Natural Resources (DEHNR). DEHNR, after a public hearing, issued on 18 April 1988, a mining permit to Vulcan Materials Company to operate a rock quarry. On 31 May 1988, the petitioners filed an action in the Superior Court, Buncombe County for a declaratory judgment. The petitioners alleged five different claims among which were that the Mining Act of 1971, N.C.G.S. §§ 74-46 to -68, is unconstitutional on its face and as applied to them, that DEHNR failed to comply with the Mining Act in issuing the permit, and that DEHNR's action in awarding a permit without requiring an environmental impact statement as mandated by Buncombe County, rendered the agency action void. The superior court allowed summary judgment for respondents on the first two claims and summary

judgment on the third claim for petitioners. The superior court ordered the permit cancelled.

The Court of Appeals reversed. It held that the superior court did not have jurisdiction because the petitioners had not exhausted their administrative remedies. The Court of Appeals said that the Administrative Procedure Act, N.C.G.S. § 150B-1 *et seq.* (APA), required that the petitioners petition the Office of Administrative Hearings (OAH) for a contested case hearing.

After the Court of Appeals rendered its decision, the petitioners filed a petition with the OAH on 7 November 1990 for a contested case hearing. An administrative law judge (ALJ) held on 7 May 1991, that there was no statutory provision which time barred the petitioners from having a contested case hearing because the agency decision was made prior to the effective date of N.C.G.S. § 150B-23(f). The ALJ held, however, that based on the record the petition was not timely filed. The ALJ dismissed the case.

The superior court reversed the ALJ. It held that the ALJ could not decide questions of law such as laches, or reasonable or unreasonable time limitations within which to determine a person's rights, duties, or privileges. The superior court set the case for a hearing on this question. Both sides appealed to the Court of Appeals.

The Court of Appeals reversed the superior court. The panel of the Court of Appeals which heard the second appeal in this case held, contrary to the holding of the panel which heard the first appeal, that the petitioners had no right to a contested case hearing by the OAH. The Court of Appeals remanded the case with an order that it be dismissed. It ordered further that the petitioners be allowed to refile the original action.

We granted discretionary review.

*Long, Parker & Payne, P.A., by Robert B. Long, Jr., and Reynolds & McArthur, by Steve Warren, for petitioner-appellees.*

*Michael F. Easley, Attorney General, by Philip A. Telfer, Special Deputy Attorney General, for respondent-appellant North Carolina Department of Environment, Health, and Natural Resources.*

*Womble, Carlyle, Sandridge & Rice, by H. Grady Barnhill, Jr., Keith A. Clinard, Yvonne C. Bailey and Roddey M. Ligon, Jr., for intervenor-appellant Vulcan Materials Company.*

WEBB, Justice.

The resolution of this appeal depends on whether the petitioners are entitled to a contested case hearing by the OAH on their claim that the mining permit should not have been issued. If they were, it was error for the Court of Appeals to order this case dismissed. The Court of Appeals, relying on *Batten v. N.C. Dept. of Corrections*, 326 N.C. 338, 389 S.E.2d 35 (1990), held that the APA does not provide for the right to a contested case hearing, but only provides for the method of hearing when the organic statute which delineates a substantive right provides for such a hearing. The Mining Act of 1971 does not provide for a contested case hearing for the petitioners in this case and the Court of Appeals concluded that the petitioners had no such right.

After the Court of Appeals rendered its decision in this case we decided *Empire Power Co. v. N.C. DEHNR*, 337 N.C. 569, 447 S.E.2d 768 (1994), a case based on facts very similar to this case. In that case, we clarified some of the language of *Batten* and held that the APA grants the right to a contested case hearing to all persons aggrieved by a state agency decision unless jurisdiction is expressly excluded by the APA or the organic act which created the right. There is no such exclusion in this case. It was error for the Court of Appeals to hold that the OAH did not have jurisdiction to conduct a contested case hearing on the petitioners' claim. This case must be returned to the superior court for a hearing as to whether the petition was timely filed.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. STACY RICHARD PHIPPS

No. 527PA93

(Filed 3 November 1994)

**Cemeteries and Burial § 23 (NCI4th)— defacing cemetery fence—presence of body of deceased person required**

In order to be a cemetery, a plot must either contain the body of a deceased person or be held for the burial of the body of a deceased person. Therefore, defendant could not properly be convicted of removing a part of the brick fence enclosing a family cemetery in violation of N.C.G.S. § 14-148(a)(2) where the evidence showed that the only body formerly buried in the plot had been removed to another location, and there was no evidence that the plot would be used in the future for the burial of the dead.

**Am Jur 2d, Cemeteries § 44.**

**Private or family cemeteries. 75 ALR2d 591.**

**Liability for desecration of graves and tombstones. 77 ALR4th 108.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 112 N.C. App. 626, 436 S.E.2d 280 (1993), reversing a judgment entered upon the defendant's conviction for defacing a grave site by Read, J., at the 28 August 1992 Criminal Session of Superior Court, Sampson County. Heard in the Supreme Court 14 September 1994.

The defendant was charged in three separate warrants with removing a part of the fence enclosing the George Washington Hudson family cemetery in violation of N.C.G.S. § 14-148(a)(2), defacing the headstone of George Washington Hudson in violation of N.C.G.S. § 14-148(a)(3) and defacing the corner marker located within the Frank Johnson cemetery in violation of N.C.G.S. § 14-148(a)(3). The defendant was convicted of the three charges in the district court.

The defendant appealed to the superior court for a trial *de novo*. The evidence in the trial in superior court tended to show that the body of George Washington Hudson had been buried in the Oak Ridge Cemetery in Turkey, North Carolina, but had been moved to Grand-

view Memorial Cemetery in Clinton, North Carolina. There was no evidence of an intention to bury anyone else in the plot in which the body of Mr. Hudson had been previously buried. The defendant, without the permission of any of the next of kin of Mr. Hudson, removed some of the bricks from a border around the lot in which Mr. Hudson's body had been buried.

The jury found the defendant guilty of removing a part of the fence around the George Washington Hudson family cemetery. He was found not guilty of defacing the headstone of George Washington Hudson and not guilty of defacing the corner marker within the Frank Johnson cemetery.

The defendant appealed to the Court of Appeals which reversed the superior court and ordered the charge dismissed. We granted discretionary review.

*Michael F. Easley, Attorney General, by Valerie L. Bateman, Assistant Attorney General, for the State-appellant.*

*Philip E. Williams and John M. Cooper for defendant-appellee.*

WEBB, Justice.

This case brings to the Court a question as to the interpretation of N.C.G.S. § 14-148(a) which provides:

> It is unlawful to willfully:
>
> . . . .
>
> (2) Take away, disturb, vandalize, destroy or change the location of any stone, brick, iron or other material or fence enclosing a cemetery without authorization of law or consent of the surviving spouse or next of kin of the deceased thereby causing damage of less than one thousand dollars ($1,000); . . . .

The resolution of this case depends on the definition of a cemetery as used in the statute. If the bricks which were removed did not enclose a cemetery, the section of the statute does not apply. We hold that the site from which the bricks were removed was not a cemetery.

"Cemetery" is defined in *Black's Law Dictionary* 223 (6th ed. 1990) as "[a] graveyard; burial ground. Place or area set apart for interment of the dead. . . ." As we understand this definition, in order to be a cemetery, a plot must either contain the body of a deceased

person or be held for the burial of the body of a deceased person. We believe this is the common understanding of the word. In this case, the evidence showed there was not a body buried on the lot and there was no evidence that the lot would be used in the future for the burial of the dead. The lot was not a cemetery and N.C.G.S. § 14-148(a)(2) does not apply. The charge against the defendant should have been dismissed.

*State v. Wilson*, 94 N.C. 1015 (1886), upon which the State relies, is not helpful to it. In that case, the defendant was convicted of removing a monument of stone erected for the purpose of designating the spot where a certain dead body was buried. In affirming the conviction we said, "[i]t is not questioned that the Legislature has the authority to protect burial grounds, and monuments to the dead, from desecration and outrage of every kind, by declaring such acts criminal . . . ." *Id.* at 1020. We are not faced with the question of whether the General Assembly may prohibit the removal of a monument erected to honor the dead which is not a part of a cemetery. The General Assembly has not done so in the enactment of N.C.G.S. § 14-148(a)(2).

The State does not contend that the Hudson tract is a part of a larger cemetery.

For the reasons stated in this opinion, we affirm the decision of the Court of Appeals.

AFFIRMED.

BROOKS v. N.C. DEPT. OF TRANSPORTATION

No. 334P94

Case below: 115 N.C.App. 163

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

CANADY v. McLEOD

No. 484P94

Case below: 116 N.C.App. 82

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

CREEKSIDE APARTMENTS v. POTEAT

No. 453P94

Case below: 116 N.C.App. 26

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

DAVIS v. PUBLIC SCHOOLS OF ROBESON COUNTY

No. 406P94

Case below: 115 N.C.App. 728

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

DEANS v. DEANS

No. 344P94

Case below: 115 N.C.App. 565

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

DENTON v. CONVALESCENT CENTER OF SANFORD

No. 430P94

Case below: 115 N.C.App. 567

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

DOCKSIDE DISCOTHEQUE v. BD. OF ADJUSTMENT OF SOUTHERN PINES

No. 320P94

Case below: 115 N.C.App. 303

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

EURY v. EMPLOYMENT SECURITY COMM.

No. 426P94

Case below: 115 N.C.App. 590

Notice of appeal by plaintiffs (substantial constitutional question) dismissed 2 November 1994. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

FIRST SOUTHERN SAVINGS BANK v. TUTON

No. 306P94

Case below: 114 N.C.App. 805

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994. Motion by plaintiff to dismiss petition for discretionary review dismissed as moot 8 November 1994.

FITCH v. FITCH

No. 425A94

Case below: 115 N.C.App. 722

Notice of appeal by defendant (substantial constitutional question) dismissed 2 November 1994.

FRALEY v. CHEROKEE SANFORD GROUP

No. 470P94

Case below: 115 N.C.App. 567

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

HEDGEPETH v. NORTH RIDGE ESTATES ASSOC.

No. 457P94

Case below: 115 N.C.App. 397

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

HENDERSON v. LEBAUER

No. 460P94

Case below: 115 N.C.App. 728

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

HUSSEY v. STATE FARM MUT. AUTO. INS. CO.

No. 445PA94

Case below: 115 N.C.App. 464

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1994.

IN RE POLLEN-BROWNING

No. 548P94

Case below: 116 N.C.App. 735

Petition by appellant for writ of supersedeas denied 10 November 1994. Motion for temporary stay denied 10 November 1994.

J. H. CARTER BUILDER v. PHELPS

No. 424P94

Case below: 115 N.C.App. 567

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

JONES v. KILLENS

No. 496P94

Case below: 115 N.C.App. 567

Motion for temporary stay allowed 11 October 1994 pending receipt and determination of the State's petition for discretionary review.

LANE v. LANE

No. 346P94

Case below: 115 N.C.App. 446

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

LOCKERT v. LOCKERT

No. 476PA94

Case below: 116 N.C.App. 73

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1994 as to plaintiff's issues only; defendant's motion to review other issues denied 2 November 1994. Petition by plaintiff for writ of supersedeas allowed 3 November 1994. Motion by plaintiff for temporary stay dismissed as moot 3 November 1994.

MICKLES v. DUKE POWER CO.

No. 433PA94

Case below: 115 N.C.App. 624

Petition by defendant (Duke Power Company) for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1994.

NICHOLSON v. KILLENS

No. 497P94

Case below: 115 N.C.App. 552

Motion by defendant for temporary stay allowed 11 October 1994 pending receipt and determination of the State petition for discretionary review.

SEXTON v. FLAHERTY

No. 472A94

Case below: 115 N.C.App. 613

Petition by plaintiff 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 2 November 1994.

SPIVEY v. LOWERY

No. 491P94

Case below: 116 N.C.App. 124

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

STATE v. CONNOR

No. 423P94

Case below: 115 N.C.App. 568

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

STATE v. GAHREN

No. 490P94

Case below: 116 N.C.App. 361

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

STATE v. RAMBERT

No. 482PA94

Case below: 116 N.C.App. 89

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1994. Motion by Attorney General to strike or dismiss response to petition for discretionary review denied 2 November 1994. Motion by defendant to withdraw response to petition for discretionary review allowed 2 November 1994.

STATE v. STALLINGS

No. 489P94

Case below: 116 N.C.App. 363

Notice of appeal by defendant (substantial constitutional question) dismissed 2 November 1994. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

STATE v. STYLES

No. 518P94

Case below: 116 N.C.App. 479

Petition by Attorney General for temporary stay allowed 24 October 1994.

STATE v. VASSEY

No. 467P94

Case below: 115 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

STATE v. WOOD

No. 441P94

Case below: 115 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

TIPTON & YOUNG CONSTRUCTION CO. v. BLUE RIDGE STRUCTURE CO.

No. 447PA94

Case below: 116 N.C.App. 115

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 2 November 1994.

WGC PROPERTIES v. HUEY

No. 414P94

Case below: 115 N.C.App. 569

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 2 November 1994.

PETITION TO REHEAR

EMPIRE POWER CO. v. N.C. DEPT. OF E.H.N.R.

No. 570PA93

Case below: 337 N.C. 569

Petition by respondent (N.C. Dept. of Environment, Health and Natural Resources) to rehear pursuant to Rule 31 denied 2 November 1994.

STATE OF NORTH CAROLINA v. JAMES TYRONE ABRAHAM AND PATRICK LAVELL CURETON

No. 478A91

(Filed 9 December 1994)

**1. Homicide § 374 (NCI4th)— first-degree murder—two defendants—acting in concert—evidence sufficient**

The trial court did not err by denying defendant Abraham's motion to dismiss a charge of first-degree felony murder for insufficient evidence where the evidence would permit the jury to find that Foster, Hardin, Steve and Gaddy were walking to Foster's mother's house when they were accosted by defendants Abraham and Cureton on Lander Street; words were exchanged and both Abraham and Cureton began firing handguns; as Hardin and Foster ran away, Hardin's leg was grazed by a bullet; Hardin fell into some nearby bushes and watched Cureton fire in his direction and Abraham fire in Foster's direction; and Gaddy was found dead in the middle of Lander Street after the shooting with fatal gunshot wounds to his head and abdomen and another wound to the sole of his foot. Although defendant Abraham contended that the evidence was not sufficient to show that either he or someone acting in concert with him fired the fatal shots, the jury could reasonably infer that Abraham and Cureton were acting in concert when they accosted the other four men and began firing their weapons, the other four men were unarmed and ran when the shooting began, Cureton shot at and wounded Hardin, Abraham shot at Foster, and bullets fired during one of these assaults fatally wounded Gaddy while Gaddy was running away. Since the evidence supports the guilt of both defendants as to all of the felonious assaults, it makes no difference which of the felonious assaults is the underlying felony or which defendant actually fired the fatal shots or whether defendants intended that Gaddy be killed.

**Am Jur 2d, Homicide § 445.**

**2. Homicide §§ 262, 478 (NCI4th)— assault with a deadly weapon—different victim killed—felony murder**

The trial court did not err by submitting to the jury first-degree murder based on felony murder where defendant was seen shooting at one man and a different person was killed. Although defendant argued that the felonious assaults merged

with the homicide and the only proper theory by which he could be convicted is transferred intent, the felony murder theory upon which the case was submitted was fully supported by the evidence and the failure to submit the case on a transferred intent theory was not detrimental to defendant.

**Am Jur 2d, Homicide §§ 442, 498.**

**3. Criminal Law § 359 (NCI4th)— defense witnesses shackled and in prison uniform—no error**

The trial court did not err in a first-degree murder prosecution by allowing defense witnesses to appear shackled and in prison uniform where defendant never moved that the witnesses be permitted to appear in civilian clothes or unrestrained; defense counsel requested only that the shackled defense witnesses be placed in the witness chair outside the presence of the jury, which the court allowed; and the court's approach appears to have been to permit the parties to the case to appear in street clothes and unshackled but to draw the line at witnesses who were neither victims nor defendants. This decision is left to the judge's discretion. N.C.G.S. § 15A-1031.

**Am Jur 2d, Criminal Law §§ 844-846.**

**Right of accused to have his witnesses free from handcuffs, manacles, shackles, or the like. 75 ALR2d 762.**

**Propriety and prejudicial effect of witness testifying while in prison attire. 16 ALR4th 1356.**

**4. Evidence and Witnesses § 318 (NCI4th)— first-degree murder—evidence of prior shooting—admissible—identity**

The trial court did not err in a first-degree murder prosecution by allowing evidence of a prior shooting involving defendants where the evidence was offered under N.C.G.S. § 8C-1, Rule 404(b) to prove the identity of the assailants in this shooting. Defendant conceded that the two months between the prior act and the current offenses meets the temporal proximity test, but contended that the acts were not sufficiently similar; however, the casings recovered from the shootings matched and witnesses on both occasions identified defendants in a blue Cadillac on a Charlotte Street before they began the respective assaults. The

similarities were sufficient to be probative on the issue of the identity of the assailants in the instant case.

**Am Jur 2d, Evidence § 452; Homicide § 312.**

**5. Criminal Law § 434 (NCI4th)— first-degree murder—prosecutor's argument—defendant's prior conduct**

There was no error in a first-degree murder prosecution where a prior shooting had been admitted for identification purposes and the prosecutor referred to that incident in his closing argument and said "Make him stop." The prosecutor reminded the jury that the evidence surrounding the prior incident was properly admitted for the limited purpose of showing identity and it was not improper for the prosecution to emphasize the similarities between the two incidents or to note that different and unrelated witnesses had testified that defendant Abraham had assaulted them on separate occasions. As for the "Make it stop" argument, the prosecutor may not argue the effect of defendant's conviction on general deterrence, but may argue specific deterrence, that is, the effect of conviction on defendant.

**Am Jur 2d, Trial § 626.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**6. Indictment, Information, and Criminal Pleadings § 54 (NCI4th)— assault—use of victim's false name—amendment—error**

The trial court was without authority to allow an amendment to an indictment to change the name of the victim, and the judgment was arrested and the matter remanded, where one of the victims of a shooting apparently gave a false name to officers, that name was used on the indictment, defendant moved to dismiss the indictment, and the trial court denied that motion and allowed the State to amend the indictment over defendant's objection. A change in the name of the victim substantially alters the charge in the indictment and neither the court nor the prosecution had the authority to amend the indictment's substance. The court should have dismissed the charge and granted the State leave to secure a proper bill of indictment. N.C.G.S. § 15A-923(e).

**Am Jur 2d, Indictments and Informations §§ 129, 171 et seq., 269-273.**

**Power of court to make or permit amendment of indictment with respect to allegations as to name status, or description of persons or organizations. 14 ALR3d 1358.**

**7. Jury § 201 (NCI4th)— first-degree murder—jury selection—desire of juror to hear defendants' version—questions by judge—excusal for cause**

The trial court did not err in a first-degree murder prosecution in its examination of a potential juror, by excusing that potential juror, or by denying defendant the opportunity to rehabilitate the juror where the defendant contended that the court's examination of the juror revealed bias against her, but the trial court's examination was conducted in a manner intended to ensure that only those persons were selected to serve who could render a fair and impartial verdict; the questions were limited in scope to the juror's desire to hear defendants' account of the incident; the prosecutor's challenge of the juror was supported by her responses to questions by both the prosecution and the trial court in which she made clear that the defendants' failure to testify might prejudice them in her deliberation; and nothing in the record indicates that additional proper questioning would have resulted in different responses.

**Am Jur 2d, Jury §§ 279 et seq., 294 et seq.**

**8. Homicide § 583 (NCI4th)— first-degree murder—acting in concert—instructions—no plain error**

There was no plain error in a first-degree murder and assault prosecution where defendant Cureton was convicted of feloniously assaulting with a deadly weapon with intent to kill the victim Hardin, convicted of the same crime against the victim Foster on a theory of acting in concert with defendant Abraham, convicted of first-degree felony murder of the victim Gaddy, and defendant Cureton did not object to the instruction at trial but contended on appeal that the instructions allowed the jury to apply the principle of acting in concert to convict him of felonious assault and first-degree murder without determining whether he, himself, ever formed the requisite intent to kill. Because of the instructions which the jury was given and because the jury convicted Cureton of felonious assault of Hardin with intent to kill, it is inconceivable that the jury would not have

found that Cureton shared with Abraham a common purpose to assault Foster with the specific intent to kill had the jury been clearly instructed that such a finding was required.

**Am Jur 2d, Homicide § 507.**

**9. Indigent Persons § 24 (NCI4th)— first-degree murder—expert on identification—not appointed—no particularized need**

The trial court did not err in a first-degree murder prosecution by denying defendant Cureton's motion for an expert in eyewitness identification where defendant failed to show how an expert would have assisted him materially. This was not a case involving the uncorroborated identification of a single eyewitness, the identification issues for which defendant Cureton sought expert assistance involved matters within the scope of the jury's general capability and understanding, and defendant did not argue at the motion hearing that an expert in eyewitness identification would have afforded him a mechanism for conveying to the jury the unreliability of Hardin's testimony.

**Am Jur 2d, Criminal Law §§ 771, 1006.**

**Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert. 34 ALR3d 1256.**

**10. Evidence and Witnesses § 318 (NCI4th)— first-degree murder—prior shooting—admissible**

The trial court did not err in a murder and assault prosecution where defendant Cureton contended that he was unfairly prejudiced by the amount of time the State devoted to developing a prior shooting incident, but the State questioned only one eyewitness to the prior shooting and the other testimony was to describe the chain of custody and examination of the casings found at the scene. The evidence was admissible for identification and its purpose was not to show defendant Cureton's character.

**Am Jur 2d, Evidence § 452; Homicide § 312.**

**11. Criminal Law § 319 (NCI4th)— first-degree murder and assault—two defendants—motion to sever—denied**

The trial court did not err by denying an assault and murder defendant's motion to sever where defendants were charged with

the same offenses, all of which the evidence tended to show arose out of a common scheme and were part of the same transaction, and their defenses were not antagonistic. Although defendant Cureton argues that evidence of a prior shooting would not have been admitted against him in a separate trial, that evidence would have been admissible against him on the issue of identity.

**Am Jur 2d, Actions § 159.5; Trial §§ 157 et seq.**

**12. Evidence and Witnesses § 2522 (NCI4th)— first-degree murder and assault—mental examination of State's witness—denied**

The trial court did not err in a prosecution for murder and assault by denying defendant Cureton's request to have a State's witness undergo a mental examination. A trial judge does not have the authority to compel a witness to submit to a psychiatric examination.

**Am Jur 2d, Witnesses § 84.**

**13. Evidence and Witnesses § 2986 (NCI4th)— first-degree murder and assault—victim's prior convictions excluded—no error**

The trial court did not err in a prosecution for assault and murder by not allowing the defendant to question one of the victims regarding charges against him which had been the subject of a plea arrangement. Although defense counsel contended that this evidence bore on the witness's lack of character for peacefulness and evidence that he had used the same caliber handgun in an assault as was used in this incident should have been allowed to impeach his credibility after he denied being armed, there was no claim of self-defense in this incident and, even had the impeachment theory been urged at trial, the court would have been well within its discretion in sustaining the objection because the use of the same caliber weapon in the commission of an earlier assault has slight bearing, if any, on whether the victim was armed during this shooting.

**Am Jur 2d, Witnesses §§ 563 et seq.**

**Comment Note.—Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.**

**Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity for which witness**

**was arrested or charged, but not convicted—modern state cases. 28 ALR4th 505.**

**14. Evidence and Witnesses § 3018 (NCI4th)— first-degree murder and assault—State's witnesses—impeachment—dismissed charges and warrants—not allowed**

The trial court did not err in a prosecution for murder and multiple assaults by not allowing defendant to impeach a victim by having him admit that a charge of larceny of an automobile was dismissed pursuant to a plea to a drug offense, by not allowing defendant to question the victim about a pending warrant for his arrest for possession of a firearm without a license, or by sustaining the State's objection when trial counsel asked another State's witness whether there were any charges pending against him when counsel interviewed him.

**Am Jur 2d, Witnesses §§ 587-590.**

**Comment Note.—Impeachment of witness by evidence or inquiry as to arrest, accusation, or prosecution. 20 ALR2d 1421.**

**Right to impeach witness in criminal case by inquiry or evidence as to witness' criminal activity not having resulted in arrest or charge—modern state cases. 24 ALR4th 333.**

**15. Criminal Law § 497 (NCI4th)— first-degree murder and assault—jury deliberations—use of transcripts denied**

The trial court did not abuse its discretion by denying the jury's request for copies of the transcript of trial testimony while allowing the jury's request to view exhibits in the jury room. The jury requested copies of the entire transcript and, while the defense initially objected to the jury's examination of the exhibits, the objection was subsequently withdrawn.

**Am Jur 2d, Trial §§ 1665 et seq.**

**16. Evidence and Witnesses § 761 (NCI4th)— first-degree murder and assault—inadmissible hearsay—not prejudicial**

There was no prejudicial error in a prosecution for murder and multiple assaults where the trial court admitted testimony from one witness that two of the victims had come to her door with one of them saying "Tari has assassinated Tyrone" and testimony from another witness that the same victim had awakened him in the early morning hours and told him that "[H]e was run-

ning away from the scene of the shooting, as he was running away, he could see out of the corner of his eye. [Defendants] was shooting, both of them." Assuming that these out-of-court statements were inadmissible hearsay because they went so far beyond the witness' in-court testimony as not to be corroborative, there was no prejudice because the other evidence established clearly and overwhelmingly that either defendant Cureton or defendant Abraham, acting in concert with the other, shot and killed one victim as he attempted to flee. There is no possibility that a different result would have occurred at trial had the complained-of evidence not been admitted.

**Am Jur 2d, Appeal and Error § 806.**

**17. Criminal Law § 461 (NCI4th)— first-degree murder and assault—prosecutor's argument—matters not in evidence—no gross impropriety**

There was no gross impropriety in a prosecution for first-degree murder and assault from the prosecutor's argument that an officer had identified defendant Cureton from a photograph when the jury had not heard evidence concerning the officer's examination of a photograph. The objection which was sustained at trial concerned the officer's search through police records, which would have revealed a prior police record but no reference to that search was made. Merely stating that the officer identified defendant Cureton from a photograph was an innocuous comment which could not be deemed improper even though there was no evidence at trial concerning a photograph.

**Am Jur 2d, Trial §§ 609 et seq.**

**18. Criminal Law § 928 (NCI4th)— murder and assault—inconsistent verdicts**

The trial court properly declined to accept the original verdict in a prosecution for murder and multiple assaults and properly reinstructed the jury and directed it to retire and deliberate further where the jury first returned guilty verdicts against defendant Cureton for assaulting Hardin with a deadly weapon with intent to kill, of assaulting Foster with a deadly weapon with intent to kill under the theory of acting in concert, of first-degree murder of Gaddy, and of second-degree murder of Gaddy under the theory of acting in concert without premeditation and deliberation. A defend-

ant may be convicted of only one degree of homicide for a single murder.

**Am Jur 2d, Trial §§ 1806 et seq.**

**Inconsistency of criminal verdict as between different counts of indictment or information. 18 ALR3d 259.**

19. **Evidence and Witnesses § 2477 (NCI4th)— murder and assault—sequestration of witnesses—pretrial meeting—no violation of sequestration order**

The trial court did not err by failing to find a violation of its sequestration order based on the prosecutor's alleged joint pretrial conferences with witnesses where the order contemplated nothing more than the sequestration of witnesses during their testimony. Neither N.C.G.S. § 8C-1, Rule 615 nor the trial court's order precluded counsel from interviewing witnesses together in preparation for trial.

**Am Jur 2d, Trial §§ 240 et seq.**

**Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR4th 705.**

20. **Evidence and Witnesses § 1070 (NCI4th)— murder and assault—flight—evidence sufficient to support instruction**

The evidence was sufficient to support an instruction on flight in a prosecution for murder and assault where both defendants were seen by an officer walking away from the scene shortly after the shooting occurred; defendants detoured across a parking lot as the officer approached; defendants denied hearing any shooting and continued to walk away; and defendant Cureton was arrested three weeks later after an officer found him hiding in a closet underneath a pile of clothing. Moreover, the instruction did not express an opinion on the flight issue where the court accurately informed the jury that it was the contention of the State, not the defendants, that defendants had fled.

**Am Jur 2d, Evidence §§ 532 et seq.**

Appeal of right by defendants pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Saunders, J., at the 7 January 1991 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict finding defendants

guilty of first-degree murder. Defendants' motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court on 27 April 1992. Heard in the Supreme Court on 18 March 1993.

*Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Joseph F. Lyles for defendant-appellant Abraham.*

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

EXUM, Chief Justice.

Defendants James Tyrone Abraham and Patrick Lavell Cureton were indicted for the first-degree murder of Tariano Gaddy and for felonious assaults against Darryl Foster and Joice Hardin. They were tried capitally in a joint trial. A jury convicted each defendant of first-degree murder on the theory of felony murder and two counts of assault with a deadly weapon with intent to kill. Upon the jury's recommendation of life imprisonment for both defendants on the first-degree murder convictions, the trial court imposed a life sentence on each defendant and a consecutive three-year sentence on one assault conviction. The trial court arrested judgment on the other assault conviction as to each defendant.

On appeal, defendant Abraham brings forth six assignments of error and defendant Cureton brings forth twelve assignments of error. Because of a fatal variance in the indictments for felonious assault of Joice Hardin, we arrest judgment on defendant Abraham's conviction for assault with a deadly weapon with intent to kill Joice Hardin. We conclude defendants' trial was otherwise free of prejudicial error.

I.

The State's evidence tended to show the following:

In November 1989 Darryl Foster, then age twenty three, lived with his mother and two sisters in Charlotte. Joice ("JJ") Hardin, then age seventeen, lived with the Foster family.

On the evening of 28 November 1989, Foster, Hardin and Tariano Gaddy, the deceased, drank beer at the Hornet's Rest Motel and returned to the Foster house. After Foster gave Gaddy his blue-

hooded coat to wear, the three men proceeded to Dave's Liquor House on Rozzells Ferry Road. A man identified only as "Steve" joined them en route. Upon entering the liquor house, Foster noticed a blue Cadillac he identified as belonging to defendant Cureton parked in front of the building.

Around 1:30 a.m. on 29 November 1989, Sharon Whitley (alias "Sharon Tate") observed defendant Abraham and two or three other men outside the area of the liquor house. Whitley observed Abraham and the others get into a blue Cadillac and drive toward Oregon and Lander streets.

When Whitley saw Foster and Hardin in the liquor house, she informed them that defendant Abraham and some other men had gone down the street. Without responding, Foster and Hardin, along with Gaddy and Steve, left the liquor house and proceeded down Rozzells Ferry Road in the direction of Halsey Street. To reach Halsey Street, the four men headed in the direction of Lander Street and Oregon Street and followed a shortcut on Lander Street. The shortcut took them through a parking lot behind an establishment called the Queens and Kings Lounge.

As they proceeded through the lot, defendants Abraham and Cureton stepped out from behind the lounge. Foster had known Abraham for about three years and Cureton for about seven years. Abraham told the four men that he heard someone had fired shots at his mother's house. When Foster denied Abraham's accusation, Cureton displayed a gun and pointed it toward the four men. At that time, Abraham's hand was inside his trenchcoat pocket. Cureton shot twice in the air, and Foster, Hardin, Steve and Gaddy began to run. Several gunshots ensued. Foster heard about fourteen gunshots. Foster fell into some bushes and then ran across Lander Street. As he did so, he saw defendants walking behind a house on Rozzells Ferry Road. He then got up and ran home where he found Hardin holding a shotgun in the driveway.

Hardin also had run toward the bushes. Hardin had known Abraham for about a year. He saw Cureton shoot in his direction and Abraham shoot toward the right side of the street where Foster had run. At that time, both defendants were standing in the middle of the street. Hardin ran toward Boyd Street and began walking when he reached a path. On the path, Hardin met a man he knew by the name of Rocky and borrowed a shotgun from him. He then proceeded to the

Foster house. Hardin did not see what happened to Gaddy. Hardin's leg was grazed by a bullet as he ran.

While at the Foster house, Foster and Hardin discussed the shooting with Foster's mother. Foster's sister arrived about fifteen minutes later and drove the two men to Westwood where they visited a friend, Herman Meeks. On their way to Meeks' house, Foster and Hardin drove by Lander Street where they saw Gaddy's body in the street surrounded by police. From Meeks' house the two men went to the Knights Inn and registered for a room.

In the early morning of 29 November Joseph Adamo, a patrol officer with the Charlotte Police Department, was parked in the vicinity of Nelson Avenue, located across Rozzells Ferry Road from Lander Street. He heard gunshots coming from the Lakeview neighborhood, which is in the vicinity of Lander and Boyd streets. Adamo proceeded toward the area of the shooting without sirens or blue lights and arrived within a few minutes. He approached Oregon Street and observed two men, later identified as defendants Abraham and Cureton, walking toward his car. As Adamo approached defendants, they detoured across a parking lot. Adamo stopped his car and asked defendants if they had heard any gunshots. Without stopping or slowing down, defendants told Adamo that they had not heard anything. Adamo proceeded toward Lander Street where he found Gaddy's body prone in the middle of the street. Gaddy had blood around his head and showed no signs of a pulse.

An autopsy revealed that Gaddy had received four gunshot wounds. One bullet had entered his head above the right ear and passed through the brain before exiting. A second bullet had entered the neck and then traveled up through the head. A third had entered the right arm, abdomen and liver, and a fourth bullet had entered the sole of the right foot. The cause of death was determined to be gunshot wounds to the head and abdomen. The autopsy further revealed powder particles around the entrance wound to the head, indicating that this wound had been delivered at a range of two to three feet.

Officer C.D. Bryant, Charlotte Police Department crime scene technician, arrived at Lander Street at 2:23 a.m. on 29 November and found Gaddy dead in the street wearing a blue, blood-stained, hooded coat, a Yale University sweatshirt and jeans. Bryant found eight spent casings at the scene. One of the casings was found next to Gaddy's head, and others were strewn up the street to as far as 45 feet from Gaddy's body.

Todd Nordhoff, a firearms and tool examiner with the Charlotte Police Department Crime Laboratory, examined the casings and determined that they were all 9 mm. Luger semi-automatic casings which had been fired from two firearms—five had been fired from one firearm and three from another firearm. Nordhoff determined that two bullets recovered from Gaddy's neck and abdomen were consistent with 9 mm., or .38-caliber, bullets and had been fired from the same weapon. He could not determine, ballistically, whether the bullets had been fired from the same weapon which fired the cartridges.

On 30 November Officer Adamo determined that Abraham was one of the men he had earlier witnessed walking near the scene of the shooting. Upon discussing the incident with Officer Hollingsworth, Adamo identified Cureton as the man he had seen with Abraham.

Cureton presented no evidence. Abraham, however, presented evidence which included the testimony of Willie Beckman and Spencer Hunter. Beckman testified he saw Hardin and Foster after the shooting and that Hardin was carrying a handgun. Hunter testified he lived in Foster's neighborhood at the time of the shooting. When he heard gunfire, he went outside and saw Foster and Hardin running up a path through a neighboring field. Hunter testified that Foster was carrying a long gun, either a rifle or a shotgun.

The jury returned verdicts finding Abraham guilty of the following crimes: assault with a deadly weapon with intent to kill Hardin by acting in concert; assault with a deadly weapon with intent to kill Foster; first-degree felony murder of Gaddy; and second-degree murder of Gaddy by acting with malice but without premeditation and deliberation.

The jury found Cureton guilty of the following crimes: assault with a deadly weapon with intent to kill Foster by acting in concert; assault with a deadly weapon with intent to kill Hardin; first-degree felony murder of Gaddy; and second-degree murder of Gaddy by acting in concert without premeditation and deliberation.

The trial court, apparently believing the verdicts finding defendants guilty of both first- and second-degree murder of Gaddy were inconsistent and mutually exclusive, reinstructed the jury on first-degree murder, felony-murder and second-degree murder and asked the jury to reconsider its verdicts as to those charges. After about three hours, the jury returned verdicts finding both defendants guilty

of first-degree felony murder of Gaddy; not guilty of first-degree murder by premeditation and deliberation and not guilty of second-degree murder.

Each defendant appealed separately and has filed separate briefs. Except for one issue common to both defendants, each defendant has raised different questions on appeal.

Defendant Abraham

II.

**[1]** Abraham first contends the trial court erred in denying his motion to dismiss on the ground that the evidence was insufficient to prove that either Abraham or Cureton fired the fatal bullets. He argues that even though the evidence is sufficient to place him at the scene and to show he discharged a 9 mm. handgun, the evidence is insufficient to show that either he or someone acting in concert with him fired the fatal shots.

We find these contentions without merit. On a motion to dismiss, the trial court must view all the evidence, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it and resolving any contradiction in the evidence in its favor. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984); *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). "The question for the court is whether substantial evidence—direct, circumstantial, or both—supports each element of the offense charged and defendant's perpetration of that offense." *State v. Rannels*, 333 N.C. 644, 659, 430 S.E.2d 254, 262 (1993). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). "If there is substantial evidence of each element of the offense charged, or any lesser included offenses, the trial court must deny the motion to dismiss . . . and submit [the charges] to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury." *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992).

"Under the doctrine of acting in concert, if two or more persons act 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. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *judgment vacated on other*

*grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, — U.S. —, 116 L. Ed. 2d 174 (1991), *quoted in State v. Cook*, 334 N.C. 564, 433 S.E.2d 730 (1993). This is true even where "the other person does all the acts necessary to commit the crime." *State v. Jeffries*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993).

Murder is defined as the unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (1993); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Felony murder is murder "committed in the perpetration or attempted perpetration of any arson, rape or sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C.G.S. § 14-17; *State v. Cook*, 334 N.C. at 570, 433 S.E.2d at 733. Assault with a deadly weapon with intent to kill, N.C.G.S. § 14-32, is a felony involving use of a deadly weapon which would support a conviction of felony murder where the requisite relationship exists between the assault and the homicide. In *State v. Fields*, 315 N.C. 191, 197, 337 S.E.2d 518, 522 (1985), we stated:

> A killing is committed in the perpetration or attempted perpetration of a felony for the purposes of the felony murder rule where there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is part of a series of incidents which form one continuous transaction.

The evidence taken in the light most favorable to the State would permit a jury to find the following facts: Foster, Hardin, Steve and Gaddy were walking back to Foster's mother's house when they were accosted by defendants Abraham and Cureton on Lander Street. Words were exchanged and both Abraham and Cureton began firing handguns. As Hardin and Foster ran away, Hardin's leg was grazed by a bullet. Hardin fell into some nearby bushes and watched Cureton fire in his direction and Abraham fire in Foster's direction. After the shooting, Gaddy was found dead in the middle of Lander Street with fatal gunshot wounds to his head and abdomen and another wound to the sole of his foot.

From this evidence, the jury could reasonably infer as follows: Abraham and Cureton were acting in concert when they accosted the other four men and began firing their weapons; the other four men were unarmed and ran when the shooting began; Cureton shot at and wounded Hardin; Abraham shot at Foster; bullets fired during one of these assaults by either Cureton or Abraham fatally wounded Gaddy

while Gaddy was running away. These inferences would support the first-degree felony murder verdicts against both defendants as returned by the jury on the theory that the bullets which killed Gaddy were fired during the course of one of the felonious assaults so that the assaults and the homicide were part of a continuous transaction. Since the evidence supports the guilt of both defendants as to all of the felonious assaults, it makes no difference which of the felonious assaults is the underlying felony or which defendant actually fired the fatal shots or whether defendants intended that Gaddy be killed. *See State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985); *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649 (1949).

Abraham's reliance on *State v. Bonner*, 330 N.C. 536, 411 S.E.2d 598 (1992) and *State v. Daniels*, 300 N.C. 105, 265 S.E.2d 217 (1980) is misplaced. In *Bonner*, Officer Pruitt, an off-duty police officer who was serving as a security guard at a restaurant, shot and killed two of four armed felons as they attempted to rob the restaurant. The defendants, the two surviving felons, escaped unharmed and later pled guilty to two counts of first-degree felony murder for the deaths of their accomplices, as well as the underlying felony of armed robbery. On appeal the defendants assigned error to the trial court's denial of their motions to withdraw their pleas on the ground that there was no factual basis to support the convictions for felony murder. This Court, agreeing with defendants' position, reversed the convictions, holding that the doctrine of felony murder did not extend to a killing which, although occurring during the commission of a felony, was directly attributable to defendants' adversary who was not acting in concert with them. *Id.* at 544-45, 411 S.E.2d at 603. In the present case, there is no evidence of shooting by anyone other than defendants. Unlike the conviction in *Bonner*, Abraham's conviction is based upon deadly actions committed by Abraham or his accomplice, Cureton, and not by any adversary.

In *Daniels* the evidence showed that the defendant and the deceased, two fleeing felons, were hiding in a wooded area surrounded by numerous armed police officers. After an exchange of gunfire between the felons and the police, the deceased was found dead from a gunshot wound to the head. This Court held that the State had failed to prove whether the deceased was killed by the defendant, the police, or someone else. *Id.* at 114, 265 S.E.2d at 222. Although the State established that many of the officers did not fire their weapons, it did not establish that no officer fired one. *Id.* Defendant and the deceased ran into the woods together; however, the deceased had not

been shot at close range. The Court further noted that the deceased was shot within forty feet of a residence in a thickly settled residential area, thus allowing for the possibility that someone in the residence or in a nearby residence had fired a shot. *Id.* Based on this evidence, the Court in *Daniels* held "the facts and circumstances [did] nothing more than raise a suspicion of defendant's guilt of homicide." *Id.* Unlike *Daniels*, the State's evidence here, as we have shown, permits a reasonable inference that the source of the fatal shots was either defendant Abraham or defendant Cureton, who were acting in concert.

III.

**[2]** By another assignment of error, defendant Abraham contends submission to the jury of first-degree felony murder was error because there is no evidence of an underlying felony that could support such a theory. Defendant argues that the felonious assaults merged with the homicide and the only proper theory by which he could be convicted of murder on the basis of the assaults is that of transferred intent. For the application of the merger doctrine, he relies on *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969), which said that a "felony murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged." *Id.* at 539, 450 P.2d at 590, 75 Cal. Rptr at 198 (1969). *Ireland* applied this principle where the felonious assault and the homicide were committed against the same victim. The Court held that defendant could not be convicted of first-degree murder on the theory that the felonious assault which resulted in death was the underlying felony.

This Court has previously declined to apply *Ireland* in the context of a murder committed when defendant fired into an occupied dwelling; and, relying on earlier precedents, we held the defendant could be convicted of first-degree felony murder when the underlying felony was firing into an occupied dwelling. *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982). The Court said that while discharging a firearm into occupied property appeared to be an integral part of the homicide, the legislature clearly intended to include this type of felony when it revised the homicide statute in 1977 to state, without ambiguity, that felony murder included a killing committed during the

commission or attempted commission of a felony "with the use of a deadly weapon." *Id.* at 614, 286 S.E.2d at 72.

*Wall* controls our resolution of this assignment of error. Because it is a felony committed with use of a deadly weapon, an assault with a deadly weapon with intent to kill will support a conviction of first-degree murder under the felony-murder rule where the victim of the felonious assault and the victim of the homicide are different persons.

Defendant argues that applying the felony murder rule to the facts here undercuts the more appropriate doctrine of transferred intent. The doctrine of transferred intent provides:

> [i]t is an accepted principle of law that where one is engaged in an affray with another and unintentionally kills a bystander or a third person, his act shall be interpreted with reference to his intent and conduct towards his adversary. Criminal liability, if any, and the degree of homicide must be thereby determined. Such a person is guilty or innocent exactly as [if] the fatal act had caused the death of his adversary. It has been aptly stated that "The malice or intent follows the bullet."

*State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (citations omitted). The State concedes that the evidence would have supported an instruction on transferred intent, saying, "[t]here are facts . . . which strongly suggest that the real targets were Foster and Hardin, and that Gaddy, having donned Foster's jacket . . . was killed by mistake." Failure to give such an instruction though, the state argues, was beneficial to defendant. The jury found defendant guilty of two felonious assaults having as an essential element an intent to kill. Had the doctrine of transferred intent been submitted to the jury as a basis for the murder conviction, the jury would have had yet another theory upon which to find defendant guilty of first-degree murder on the basis of a specific intent to kill after premeditation and deliberation.

We agree with the State. While the evidence might have supported a transferred intent instruction, failure to give it could not have been detrimental to defendant. Defendant's argument that presenting the case to the jury on the theory of transferred intent rather than felony murder might have resulted in a verdict of second-degree, rather than first-degree, murder is pure speculation. The felony murder theory upon which the case was submitted was fully supported by the evidence. Failure to submit the case on a transferred intent theory

that might also have been supported by the evidence gives defendant no cause to complain.

IV.

**[3]** By another assignment of error, defendant Abraham contends the trial court erred in denying his motion to have three defense witnesses appear unrestrained in civilian clothing. In support of his contention defendant directs the Court to consider the following colloquy which transpired between the trial court and Ms. Berry, defendant's counsel, outside the presence of the jury:

> COURT: I understand from earlier conversations that some witnesses may be those individual [sic] who are in custody, so they will be brought over in leg irons since the Sheriff has indicated that they are security risks.
>
> MS. BERRY: Well, your honor, we would take the position that they are not—they have been writ'ed here, so they have no choice about being here. They are not here for any purpose but to take the witness stand and say what they know. They are going to have their orange jumpsuit [sic] on, unlike Mr. Hardin who they presented, not only in street clothes but without any kind of shackles whatsoever. So, I would say respectfully to the Court, that if you look at the records of the two individuals that we are talking about, as far as violence and threats to other people they pale in comparison to Mr. Hardin.
>
> COURT: Mr. Hardin is currently serving time for what, common law robbery?
>
> MS. BERRY: He is serving two consecutive ten year sentences for assault with a deadly weapon with intent to kill inflicting serious injury, breaking and entering, and larceny of a residence, and common law robbery which was reduced from armed robbery, plus a common law robbery from this jurisdiction as well, Your Honor.
>
> COURT: Which—who do you intend to call first from the prison, from the jail?
>
> MS. BERRY: Rollins. . .
>
> COURT: Rollins?
>
> MS. BERRY: Rollins Hunter.

COURT: Oh, Rollins Hunter. What is he in custody for?

MS. BERRY: Your Honor, I think he is presently in custody as a habitual felon.

COURT: Habitual felon?

MS. BERRY: Yes. I think he got a fourteen year sentence as a habitual felon.

COURT: He will come in in leg irons. And the other individual who is in jail.

MS. BERRY: He is Willie Beckham, Your Honor. Mr. Butler prosecuted him for the offenses of which he is currently in custody on. My understanding is one is possession of cocaine, that maintaining a dwelling statute, and misdemeanor drug paraphernalia.

COURT: What is his sentence?

MS. BERRY:: I think he got like a five year sentence, Your Honor.

COURT: What is his criminal record?

MR. BUTLER: I don't recall his record, Your Honor. I don't have that with me.

COURT: Sheriff, are you familiar with the record of him—who is the deputy in charge . . . .

BAILIFF: No, sir. We didn't think we would need his record. Anytime that [sic] are charged with a felony, we would like to have the leg irons on them.

COURT: All right.

MS. BERRY: We would just ask the Court to look at this in terms of fairness, and as to what was done for the State as far as their witnesses are concerned.

COURT: Well, of course, the Court has allowed the Defendants to be in here—the defendants are not shackled while they are in the courtroom, and one of them is serving time for an offense of violence. The Court allowed the State's witness, who is also serving time for a crime of violence, to appear in the courtroom with the Deputy sitting right next to him. The Court has allowed the victims to be unshackled while in the courtroom and in street clothes, but I am not going to extend that to anyone else at this time.

MS. BERRY: As a—just from a procedural standpoint, and in terms of fairness, would the Court consider allowing these witnesses to be brought in and placed in the witness chair outside the presence of the jury. They would have to kind of shuffle in with the leg iron shuffle.

COURT: Yes, ma'am. Certainly.

The record thus reveals that Ms. Berry never moved that defense witnesses be permitted to appear in civilian clothes or unrestrained. She requested only that the shackled defense witnesses be placed in the witness chair outside the presence of the jury. The trial court granted this request.

The trial court's approach to the clothing of the various witnesses and parties appears to have been this: It permitted the prosecuting witnesses and the defendants, the parties to the case, to appear in street clothes and unshackled. At the time, both defendants and one of the prosecuting witnesses were incarcerated. It drew the line, however, at witnesses who were neither victims nor defendants out of a legitimate concern for the safety of the courtroom. These kinds of decisions are left to the trial court's discretion. N.C.G.S. § 15A-1031 (1988) (trial court may order witness be subjected to physical restraint in courtroom when judge finds restraint reasonably necessary to provide for safety of persons); *cf. State v. Tolley*, 290 N.C. 349, 226 S.E.2d 353 (1976). There has been no abuse of that discretion shown here.

Defendant argues that the trial court's decision to allow defense witnesses to appear shackled and in prison uniform was tantamount to expressing an opinion from the bench as to the credibility of these witnesses and, as such, amounted to prejudicial error. In support of this contention, defendant relies on *State v. McBryde*, 270 N.C. 776, 155 S.E.2d 266 (1967); *State v. Simpson*, 233 N.C. 438, 64 S.E.2d 658 (1951); and *State v. McNeill*, 231 N.C. 666, 58 S.E.2d 366 (1950). We find these cases to be distinguishable. In all three cases, the Court found prejudicial error where defense witnesses were arrested in court in the presence of the jury. The defense witnesses here were already in the custody of state penal institutions. Though the witnesses were shackled while in the courtroom, they were placed in, and removed from, the witness chair outside the presence of the jury.

Defendant's assignment of error is overruled.

V.

**[4]** By another assignment of error, defendant contends the trial court erred prejudicially in allowing evidence of a prior assault involving defendants on 26 September 1989. This evidence was offered under Evidence Rule 404(b) to prove the identity of Foster's, Hardin's, and Gaddy's assailants.

State's witness William D. Johnson testified that on the evening of 26 September 1989 he was walking down Tuckaseegee Road in Charlotte with another person when a blue Cadillac passed him. The Cadillac turned around and a man whom Johnson identified as Abraham emerged from behind the car and shot Johnson. Johnson identified the driver of the Cadillac as Cureton. Charlotte Police Officer Joseph V. Lombardo testified that on 26 September 1989 he and Officer A.D. Horton went to Tuckaseegee Road in response to the sound of gunshots. Lombardo searched for evidence at the crime scene and uncovered one bullet and two shell casings. Todd Nordhoff, a firearms and tool examiner with the Charlotte Police Department Crime Laboratory, testified that he examined and compared the casings found at the scene of the 26 September shooting and determined that they came from the same gun as three of the casings found at the 29 November 1989 shooting.

Evidence Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). "The use of evidence as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *judgment vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). Insofar as the characteristics of the prior act are unlike those of the offense with which defendant is currently charged, the prior act's probative value is diminished; and when the prior act is similar to the current offense but separated by a long period 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." *Id.*

Defendant concedes that a space of two months between the prior act and the current offenses meets the temporal proximity test. He contends, however, that the prior act and the current offenses were not sufficiently similar.

We disagree. This Court recently addressed a like issue in *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992). In that case the defendant was tried for armed robbery and first-degree murder of Eva Harrelson. The State sought to admit evidence showing the defendant had attempted to murder a taxicab driver three weeks after the murder of Harrelson. Evidence revealed that on both occasions the assailant had used the same gun. The Court found no error in the admission of the evidence, holding that "the evidence concerning the defendant's attempted murder of the taxicab driver three weeks later with the same gun tended to prove the defendant's possession and control of the weapon at a time close in proximity to that of the Harrelson murder." *Id.* at 509, 417 S.E.2d at 512.

In the instant case, several factors are common to the prior assault and the offenses for which defendants were being tried. The casings recovered from the 26 September shooting matched those fired from one of the guns at the 29 November offenses. Thus, there was evidence, as in *Gardner*, tending to show that one of the guns used in both incidents was in the control of defendant Abraham or his confederate. Further, on both occasions witnesses identified defendants Abraham and Cureton in a blue Cadillac on a Charlotte street before they began the respective assaults.

Given the relatively close temporal proximity between the two incidents, we conclude their similarities are sufficient to be probative on the issue of the identity of the assailants in the instant case.

VI.

**[5]** By a related assignment of error, defendant contends that even if this Court were to hold that evidence of the 26 September assault was properly admitted, the manner in which the evidence was used by the prosecution in closing argument was improper and prejudicial to defendant.

In closing argument the prosecution argued:

> Why in the world is everybody picking on Tyrone Abraham and Patrick Cureton? Why? Ladies and gentlemen, they're guilty. They're guilty. I mean, you know, they are guilty. The physical evidence supports it. People that don't know each other says [sic] that Abraham's shooting at them. He's in a blue Cadillac, riding around in the cover of darkness, shooting at people, trying to kill people.
>
> Make him stop, ladies and gentlemen. It's time to make him stop because it ain't right. You don't kill people, unprovoked, maliciously, violently—and that's what he did. He killed him. He shot him in the head. He shot him in the foot; he shot him in the body. He killed him worse than a hunter is allowed to go out and kill his game. You can't go out and kill like that. I'd ask, ladies and gentlemen, that you stop him.

At trial defendant raised no objection to the argument. Defendant now contends, however, that the prosecutor's argument was a "broadside attack" on defendant's character, culminating in an inflammatory plea to the jury to "make him stop."

The law regarding arguments of counsel is well established: Counsel must be allowed wide latitude in arguing hotly contested cases. *State v. Wilson*, 335 N.C. 220, 225, 436 S.E.2d 831, 834 (1993); *State v. Covington*, 317 N.C. 127, 343 S.E.2d 524 (1986); *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985). Counsel may argue the facts in evidence together with all reasonable inferences that may be drawn therefrom in presenting counsel's side of the case. *State v. Gibbs*, 335 N.C. 1, 64, 436 S.E.2d 321, 357 (1993), *cert.* denied, — U.S.—, 129 L. Ed. 2d 881 (1994). Whether counsel has abused this right is a matter ordinarily left to the sound discretion of the trial court. *Wilson*, 335 N.C. at 225, 436 S.E.2d at 834. Where defendant fails to object to an alleged impropriety in the State's argument and so flag the error for the trial court, "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 (1979); *accord State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360 (1994).

We have carefully reviewed the prosecutor's argument, taking heed of those portions to which defendant now assigns error. We conclude there was no error, much less any gross impropriety.

Prior to its comments regarding the 26 September assault, the prosecution advised the jury that the evidence surrounding this incident was properly admitted at trial for the limited purpose of showing identity. Therefore, it was not improper for the prosecution to reference the 26 September shooting in conjunction with the current offense and emphasize the similarities between the two incidents, such as the fact that a blue Cadillac had been identified on both occasions. Nor was it improper for the prosecution to note that different and unrelated witnesses had testified that defendant Abraham had on separate occasions assaulted them with a deadly weapon in order to help the State prove the identity of the assailants who were on trial.

As for the prosecution's request of the jury to "make him stop," this argument was an appeal by the prosecution to convict defendant to deter his assaultive behavior. While the prosecution may not argue the effect of defendant's conviction on others, i.e., general deterrence, the prosecution may argue specific deterrence, that is, the effect of conviction on defendant himself. *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144 (1993) (specific deterrence argument, "the only way to insure he won't kill again is the death penalty," not improper), *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994); *State v. Zuniga*, 320 N.C. 233, 268-69, 357 S.E.2d 898, 920-21 (specific deterrence argument, "Justice is making sure that [defendant] is not ever going to do this again," not improper), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), *denial of post-conviction relief rev'd*, 336 N.C. 508, 444 S.E.2d 443 (1994).

The prosecution's closing argument being without error, defendant's assignment of error to it is overruled.

VII.

**[6]** Defendant next contends the trial court erred in allowing the State to amend the bill of indictment to allege an assault against Joice Hardin rather than Carlose Antoine Latter, as the original indictment charged, on the ground the change in the name fundamentally altered the nature of the charge against defendant, depriving him of the right to be tried only upon a bill of indictment returned by a grand jury. We agree and hold the judgment against defendant for assault with a deadly weapon with intent to kill Joice Hardin must be arrested.

It is well settled that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981). Whether or

not to return a true bill of indictment is within the sole province of the grand jury. *State v. Thomas*, 236 N.C. 454, 73 S.E.2d 283 (1952).

Where an indictment charges the defendant with a crime against someone other than the actual victim, such a variance is fatal. *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967). In *Bell*, the indictment charged defendant with the robbery of Jean Rogers, whereas the evidence showed the correct name of the victim was Susan Rogers. The Court held that the defendant's motion for nonsuit should have been allowed as to the indictment on the ground that the indictment was in variance with the evidence. 270 N.C. at 29, 153 S.E.2d at 745. In *State v. Overman*, 257 N.C. 464, 125 S.E.2d 920 (1962), the indictment charged that Frank E. Nutley, rather than Frank E. Hatley, was victim of a hit-and-run accident. Because the indictment required the State to prove injury to someone other than the true victim, the Court held a fatal variance existed. *Id.* at 468, 125 S.E.2d at 924. *See State v. Harper*, 64 N.C. 129, 131 (1870) ("A variance or omission in the name of the person injured is more serious than a variance in the name of the defendant . . . .")

Here the indictment returned by the grand jury charged defendant with assault with a deadly weapon with intent to kill Carlose Antoine Latter. Hardin apparently gave this false name to law enforcement officials investigating the 29 November incident. Defendant moved to dismiss the indictment, contending it charged an assault against someone other than the actual victim. The trial court denied the motion and, over defendant's objection, allowed the State to amend the indictment to charge that Joice Hardin was the victim of the assault.

A bill of indictment may not be amended. N.C.G.S. § 15A-923(e) (1988); *State v. Haigler*, 14 N.C. App. 501, 188 S.E.2d 586, *cert. denied*, 281 N.C. 625, 190 S.E.2d 468 (1972) (once returned as a true bill by grand jury, neither court nor prosecution has authority to amend indictment's substance). This Court has interpreted prohibited amendments to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984); *compare State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994) (amendment to indictment proper). A change in the name of the victim substantially alters the charge in the indictment. Therefore, the trial court was without authority to allow the amendment.

Where the indictment and the proof are at variance, as is the case here, the trial court should dismiss the charge stemming from the flawed indictment and grant the State leave to secure a proper bill of indictment. *Overman*, 257 N.C. at 468, 125 S.E.2d at 924; *Bell*, 270 N.C. at 29, 153 S.E.2d at 745.

We, therefore, arrest judgment as to defendant Abraham's conviction for assault with a deadly weapon with intent to kill committed against Joice Hardin, 90-CRS-76544,[1] and remand this matter to the trial court for further proceedings consistent with our holdings in *Bell* and *Overman*.

## Defendant Cureton

VIII.

**[7]** Defendant Cureton first contends the trial court committed reversible error by removing potential juror Hinson for cause. Defendant argues the *voir dire* did not reveal that juror Hinson was unfit to serve, the trial court's examination of juror Hinson evidenced a bias against the juror, and defendant should have been permitted to rehabilitate the juror before her removal.

During jury selection, juror Hinson was questioned as to whether she would abide by the law, weigh all the evidence at trial and disregard outside influences. Juror Hinson expressed a willingness to do so. The prosecution then asked her if she would require defendant to present evidence in his behalf. The following transpired:

> MR. BUTLER: Would you require—during the guilt/innocence phase of this hearing, would you require the defendants to put on any evidence before you felt like you could reach a verdict?
>
> MS. HINSON: No.
>
> MR. BUTLER: Would you require the defendants to testify or to put on evidence, put on witnesses?
>
> MS. HINSON: I would like to have the background behind it.
>
> MR. BUTLER: But if they did put on any evidence, do you feel like you could sit and make up your own mind and make a decision in this case?

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1. We note that the conviction against defendant Cureton for assault with a deadly weapon with intent to kill Hardin, 90-CRS-37546, suffers from the same fatal defect as the corresponding conviction against defendant Abraham, 90-CRS-37544. Judgment, however, was arrested by the trial court at sentencing, thereby eliminating any prejudice to defendant Cureton resulting from the flawed indictment.

MS. HINSON: I would wonder—I mean, I know the witnesses would testify, but I would still wonder what made them do it. I would like to hear their side of the story.

MR. BUTLER: So you are telling me that you would require them to testify?

MS. HINSON:: I would like to hear their side of the story.

MR. BUTLER: If Your Honor please, the State would challenge Ms. Hinson for cause.

COURT: In other words, while you would like to hear their side of the story, do you understand that in the guilt/innocence phase they are not required to take the stand?

MS. HINSON: Yes.

COURT: Could you put that out of your mind and not require them to take the stand . . .

MS. HINSON: I would not require it.

COURT: Beg your pardon.

MS. HINSON: I would not require it.

COURT: Well, would your curiosity weigh into the prejudice of the defendants in any fashion while you deliberated on whether or not they were guilty or not guilty?

MS. HINSON: It might.

COURT: The challenge is granted.

MR. BENDER [Defense Counsel]: Your Honor, may I examine this juror?

COURT: No, sir. This juror is excused. Thank you ma'am.

. . . .

MS. BERRY [Defense Counsel]: If the Court will note our objections to the excusal of Ms. Hinson.

COURT: Noted.

The excusal of the juror was proper. N.C.G.S. § 15A-1212(9) of the North Carolina General Statutes provides that, "[a] challenge for cause to an individual juror may be made by any party on the ground that the juror . . . is unable to render a fair and impartial verdict."

N.C.G.S. § 15A-1212(9) (1988). The granting of a challenge for cause where the juror's fitness or unfitness is arguable is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion. *State v. Cunningham*, 333 N.C. 744, 753, 429 S.E.2d 718, 723 (1993); *State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237, 240 (1992); *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). However, " 'in a case . . . in which a juror's answers show that he could not follow the law as given . . . by the judge in his instructions to the jury, it is error not to excuse such a juror.' " *Cunningham*, 333 N.C. at 754, 429 S.E.2d at 723 (quoting *State v. Hightower*, 331 N.C. at 636, 417 S.E.2d at 240).

In *Hightower*, this Court found error in the trial court's denial of a challenge for cause to a juror who stated on *voir dire* that defendant's failure to testify during the trial for first-degree murder would "stick in the back of my mind." *Hightower*, 331 N.C. at 641, 417 S.E.2d at 240. Although the juror ultimately stated he would endeavor to follow the law despite the defendant's failure to testify, the Court concluded that defendant's challenge for cause should have been granted. In so holding, the Court stated: "We can only conclude from the questioning of this juror that he would try to be fair to the defendant but might have trouble doing so if the defendant did not testify." *Id.* In *Cunningham*, we likewise found error in the trial court's denial of a challenge for cause to a juror whose responses on *voir dire* indicated that although she recognized the burden of proof was on the State, she would still expect the defense to prove defendant Cunningham's innocence. *Cunningham*, 333 N.C. at 748, 429 S.E.2d at 720. The Court held the juror's responses demonstrated "either confusion about, or a fundamental misunderstanding of, the principles of the presumption of innocence or a simple reluctance to apply those principles should the defense fail to present evidence of defendant's innocence." *Id.* at 754, 429 S.E.2d at 723. The Court further held that "[w]hether [the juror's] reluctance to give defendant the benefit of the presumption of innocence was caused by confusion regarding the law, a misunderstanding of the law or a reluctance to apply the law as instructed, its effect on her ability to give defendant a fair trial remained the same." *Id.*

Under *Hightower* and *Cunningham* it would likely have been error for the trial court not to have excused juror Hinson for cause. We find, therefore, no error in the excusal.

Even if the excusal had been erroneous, defendant has not demonstrated that it was prejudicial. "A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror." *State v. Wesley Thomas Harris*, 338 N.C. 211, 227, 449 S.E.2d 462, 470 (1994).[2]

Defendant's contention that the trial court's questioning of juror Hinson evidenced a bias against the juror is feckless. "The primary goal of the jury *voir dire* is to ensure that only those persons are selected to serve on the jury who could render a fair and impartial verdict." *State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987). The trial court's examination was conducted in a manner intended to ensure this guaranty. The questions were limited in scope to juror Hinson's desire to hear defendant's account of the incident.

Defendant lastly contends he was wrongfully denied the opportunity to rehabilitate juror Hinson.

> 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 [about the same matter].

*State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981), *quoted in State v. McCollum*, 334 N.C. 208, 234, 433 S.E.2d 144, 158 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994). In this case the prosecution's challenge of juror Hinson was supported by her responses to questions by both the prosecution and the trial court, in which she made it clear the defendants' failure to testify might prejudice them in her deliberation. Nothing in the record indicates that additional proper questioning would have resulted in different responses. *McCollum*, 334 N.C. at 234, 433 S.E.2d at 158. Nor was there any showing by defendant, who did not request to examine the juror until after her excusal, that further questioning by him would likely have produced different answers.

This assignment of error is overruled.

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2. The improper excusal of a single juror for cause may be reversible error per se as to the sentence only where a jury returns a verdict of death and the excusal was improper under the principles of *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). *See State v. Rannels*, 333 N.C. 644, 655, 403 S.E.2d 254, 260 (1993). This rule has its roots in the United States Supreme Court's Eighth Amendment jurisprudence.

IX.

**[8]** Defendant Cureton was convicted of feloniously assaulting with a deadly weapon with intent to kill the victim Hardin. He was convicted of the same crime against the victim Foster on a theory of acting in concert with defendant Abraham as to this assault. Cureton contends the trial court's instruction on acting in concert violated his state and federal constitutional rights by allowing the jury to find him guilty of assaulting Foster with a deadly weapon with intent to kill and, thereby, of first-degree felony murder of Gaddy, without determining whether he, himself, ever formed the requisite specific intent to kill Foster. Cureton contends the instructions allowed the jury to apply the principle of acting in concert to convict him of the felonious assault against Foster solely on the specific intent to kill of defendant Abraham.

Important to our resolution of this issue is that defendant Cureton failed to object at trial to the instruction now complained of. He has, therefore, waived his right to appellate review of the instruction except under the "plain error" standard. N.C. App R. 10(c)(4); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). To order a new trial for instructional error under the plain error standard of review requires that the error be so fundamental that defendant, in light of the evidence, the issues and the instructional error, could not have received a fair trial.

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

*State v. Erlewine*, 328 N.C. 626, 636, 403 S.E.2d 280, 285 (1991) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982))), *modified on other grounds*, *State v. Blankenship*, 337 N.C. 543, 447 S.E.2d 727 (1994).

Under the doctrine of acting in concert, where a single crime is involved, one may be found guilty of committing the crime if he is at the scene acting together with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect commission of the crime. *State v. Blankenship*, 337 N.C. 543, 558, 447 S.E.2d 727, 736 (1994); *State v. Jeffries*, 333 N.C. 501, 512, 428 S.E.2d 150, 156 (1993); *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, — U.S. —, 116 L. Ed. 2d 174 (1991). Under this doctrine, where multiple crimes are involved, when two or more persons act together in pursuit of a common plan, all are guilty only of those crimes included within the common plan committed by any one of the perpetrators. *Blankenship*, 337 N.C. at 558, 447 S.E.2d at 736 (citing *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979)). As a corollary to this latter principle, one may not be criminally responsible as an accomplice under the theory of acting in concert for a crime which requires a specific intent, unless he, himself, is shown to have the requisite specific intent. *Id.* The specific intent may be proved by evidence tending to show that the specific intent crime was a part of the common plan. *Id.* "Although a common plan for all crimes committed may exist at the outset of the criminal enterprise, its scope is not invariable; and it may evolve according to the course of events." *Id.* Thus, where a series of crimes is involved, all being part of the course of criminal conduct, the common plan to commit any one of the crimes may arise at any time during the conduct of the entire criminal enterprise. *Id.* In other words, one may not be found guilty of a crime requiring a specific intent under the acting in concert doctrine unless the crime was part of the common purpose or the specific intent on the part of the one sought to be charged is independently proven.

We have carefully reviewed the trial court's acting in concert instructions as they apply to Cureton's conviction of felonious assault with intent to kill of Foster. We assume, *arguendo*, that the jury might have interpreted these instructions to permit convicting Cureton of this assault on the basis of the specific intent to kill harbored by defendant Abraham and without finding such a specific intent independently on the part of Cureton. We are also cognizant, as defendant Cureton points out, that the instructions allowed him to be convicted of first-degree felony murder of Gaddy on the basis of his participa-

tion in the felonious assault of either Foster or Hardin. We are nevertheless satisfied that no plain error was committed.

First, as to the felonious assault of Foster, the instructions required the jury to find that: Abraham intentionally assaulted Foster by shooting at him; Abraham used a deadly weapon; Abraham had the specific intent to kill Foster; and Cureton acted together with Abraham by being present at the scene and giving active encouragement to Abraham or, by his conduct, making known to Abraham that he was standing by to lend assistance. The instructions did not, however, require that Abraham and Cureton share a common purpose in the assault of Foster.

Second, the jury found Cureton guilty himself of feloniously assaulting Hardin with the specific intent to kill Hardin by shooting at Hardin. Both felonious assaults occurred at the same time with both defendants shooting simultaneously at or in the direction of their victims.

Because of the instructions which the jury was given and because the jury convicted Cureton of felonious assault of Hardin with intent to kill, it is inconceivable that the jury would not have found that Cureton shared with Abraham a common purpose to assault Foster with the specific intent to kill had the jury been clearly instructed that such a finding was required. We are confident that failure to give such an explicit instruction had no effect on the outcome of the trial and the outcome would have been the same had the instruction been given. There has, therefore, been no denial of a fair trial or fundamental right and no fundamental error resulting in a miscarriage of justice by the instructions given and not given in this case. In short, there has been no plain error in the trial court's instructions on acting in concert.

Defendant Cureton's assignment of error on this issue is overruled.

X.

**[9]** Defendant Cureton next contends the trial court erred in denying his motion for an expert on eyewitness identification. In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the United States Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot other-

wise afford one." *Id.* at 74, 84 L. Ed. 2d at 60. *See also Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985). While *Ake* dealt specifically with expert psychiatric assistance in the evaluation of the defendant, its rationale has been extended to other areas of expert assistance. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988) (fingerprint expert); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986) (pathologist); State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986) (medical expert); *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

Pursuant to *Ake*, and subsequent state court decisions under *Ake*, defendant is required to make " 'an ex parte threshold showing' that the matter subject to expert testimony is 'likely to be a significant factor' in the defense." *Moore*, 321 N.C. at 344, 364 S.E.2d at 656-57. Defendant must show that an expert would assist him materially in the preparation of his defense or that the denial of expert assistance would deprive him of a fair trial. *Moore*, 321 N.C. at 344, 364 S.E.2d at 656-57; *Penley*, 318 N.C. at 52, 347 S.E.2d at 795.

We find defendant has failed to show how an expert would have assisted him materially. His pretrial motion was based solely on his perceived need to show the unreliability of the identification of defendants at the 26 September 1989 shooting. Defendant argued an eyewitness identification expert would assist in showing the jury the unreliability of this identification because of factors such as the time of observation, the distance of observation and the age of the eyewitnesses. Defendant noted certain inconsistencies between the accounts of the 26 September incident and the limited opportunity the witness had to view defendants.

This is not a case involving the uncorroborated identification of a single eyewitness. Both defendants had been identified by a number of witnesses who knew them, including the victims Foster and Hardin. Defendants' presence at the scene of the shooting seemed not to be a major issue at trial. Regarding the 26 September incident, identification by the victim William Johnson of defendants was corroborated by his observance of the blue Cadillac common to both incidents and by the ballistics evidence of bullet casings matching casings found at the 29 November crime scene.

Further, the identification issues for which defendant Cureton sought expert assistance involved matters within the scope of the jury's general capability and understanding. *See State v. Jackson*, 320 N.C. 452, 460, 358 S.E.2d 679, 683 (1987) (expert's testimony only admissible where it informs jury about matters not within full under-

standing of lay persons). Defendant had opportunity during cross-examination, which he exercised, to emphasize any inconsistencies in testimony as well as to underscore other factors such as lighting conditions or distance which would have affected the accuracy or credibility of the identifications. The assistance of an expert would have been of marginal additional value as to these points.

Defendant further contends an expert in eyewitness identification would have afforded him a mechanism for conveying to the jury the unreliability of Hardin's testimony. Defendant argues an expert would have provided specialized knowledge necessary to understand and evaluate Hardin's testimony in light of Hardin's use of alcohol, marijuana and cocaine on the evening of the incident, his previous false statements to police and his apparently limited mental capacity. No such argument, however, was presented at the motion hearing.

Based on defendant's showing at trial, we conclude the trial court acted properly in denying defendant's motion for an expert in eyewitness identification. No particularized need for an identification expert was demonstrated. Indeed, to require such an expert in this case would mean entitlement to an identification expert in every case where eyewitness identification evidence is offered no matter how crucial or strongly corroborated the identification.

This assignment of error is overruled.

XI.

**[10]** Defendant Cureton next contends he was unfairly prejudiced because of the substantial amount of time the State devoted to developing the 26 September incident. This contention has no merit.

As we have already stated, evidence concerning this 26 September incident was admissible as evidence of other crimes, wrongs or acts under Rule 404(b) tending to identify both defendants as the assailants at the 29 November 1989 shooting. In developing this evidence the State questioned only one eyewitness—victim William Deone Johnson. The State elicited testimony from various other witnesses solely to describe the chain of custody and later examination of the casings found at the scene of the 26 September shooting. While this evidence was prejudicial to defendant Cureton, it was not unfairly so.

*State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988), relied on by defendant Cureton, does not control this issue. In *Cashwell*, the

defendant was convicted upon two charges of first-degree murder. At trial the State elicited evidence regarding the defendant's prior assault on his girlfriend. The Court found the evidence inadmissible under Rule 404(b) because it was relevant only as to the character of the accused. In the instant case, the purpose of the evidence was not to show defendant Cureton's character.

XII.

**[11]** Defendant Cureton next contends he was deprived of a fair trial by the trial court's denial of his motion to sever his trial from that of defendant Abraham.

N.C.G.S. § 15A-926(b)(2)(a) provides for joinder of defendants where the State seeks to hold the defendants accountable for the same offenses. *State v. Pickens*, 335 N.C. 717, 724, 440 S.E.2d 552, 556 (1994); N.C.G.S. § 15A-926(b)(2)(a) (1988). Objections to joinder and motions to sever are governed by N.C.G.S. § 15A-927(c)(2), which provides,

> (c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.
>
> . . . .
>
> (2) The court, on motion of the prosecutor, or on motion of the defendant other than under subdivision (1) above must deny a joinder for trial or grant a severance of defendants whenever:
>
> (a) If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or
>
> (b) If during trial, upon motion of the defendant whose trial is to be severed, or motion of the prosecutor with the consent of the defendant whose trial is to be severed, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

N.C.G.S. § 15A-927(c)(2) (1988). "[T]he trial court must deny a joinder for trial or grant a severance whenever it is necessary to promote a fair determination of the guilt or innocence of one or more defendants." *Pickens*, 335 N.C. at 724, 440 S.E.2d at 556.

Here the evidence clearly supports consolidation of defendants' trials and the trial court's refusal to grant this defendant's motion to sever. Defendants were charged with the same offenses all of which

the evidence tended to show arose out of a common scheme and were part of the same transaction.

Although defendant argues that in a separate trial evidence of the 26 September shooting could not have been admitted against him, we have already concluded this evidence was admissible under Evidence Rule 404(b) on the issue of identity. Were defendant Cureton to have been tried alone, this evidence would have been admissible against him on this issue. The defenses of Abraham and Cureton were not antagonistic. Severance, therefore, was not required to promote a fair determination of defendant's guilt or innocence. There was no error in the trial court's denial of defendant Cureton's motion to sever.

XIII.

**[12]** Defendant Cureton next contends the trial court erred by precluding him from fully impeaching certain State's witnesses.

He first argues the trial court erroneously denied his pretrial request to have State's witness Joice Hardin undergo mental examination. We do not agree. A trial judge does not have the authority to compel a witness to submit to a psychiatric examination. *State v. Horn*, 337 N.C. 449, 451-52, 446 S.E.2d 52, 53 (1994); *State v. Liles*, 324 N.C. 529, 534, 379 S.E.2d 821, 823 (1989); *State v. Clontz*, 305 N.C. 116, 286 S.E.2d 793 (1982); *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978). In *Looney*, we said:

> [T]he possible benefits to an innocent defendant, flowing from such a court ordered examination of the witness, are outweighed by the resulting invasion of the witness' right to privacy and the danger to the public interest from discouraging victims of crime to report such offenses and other potential witnesses from disclosing their knowledge of them.

*Id.* at 28, 240 S.E.2d at 627.

**[13]** Defendant argues the trial court erroneously prevented him from impeaching Hardin with damaging statements contained in the transcript of plea regarding Hardin's prior convictions. At trial, defense counsel sought to question Hardin regarding charges of breaking or entering, larceny and assault with a deadly weapon inflicting serious bodily injury, all of which had been the subject of a plea arrangement. Counsel sought to question Hardin about five guns he had allegedly stolen during the commission of these offenses. Counsel also sought to question Hardin regarding his plea of guilty to

felonious assault, during which a .25-caliber handgun was used, to show Hardin was in possession of a .25-caliber weapon less than 30 days prior to the 29 November shooting. At trial, counsel contended this evidence bore on Hardin's lack of character for peacefulness and should have been allowed under Evidence Rule 404(a)(2), which provides:

> (a) *Character evidence generally.*—Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (2) *Character of victim.*—Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

N.C.G.S. § 8C-1, Rule 404(a)(2) (1992).

The trial court ruled that inquiry into the details of Hardin's prior charges was inadmissible under Evidence Rule 403, which provides that evidence, although relevant, may be excluded where any "probative value is substantially outweighed by unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (1992). Whether or not to exclude evidence under this rule is a matter within the sound discretion of the trial court, reversible only upon a showing that the ruling was arbitrary and unsupported by reason. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986).

Defendant has the burden on appeal of demonstrating that these rulings were incorrect. *State v. Milby*, 302 N.C. 137, 141, 273 S.E.2d 716, 719 (1981). Defendant has failed to carry this burden. The Official Commentary to Rule 404 states:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to

> punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

N.C. R. Evid. 404 official commentary (quoting Fed. R. Evid. 404 advisory committee's note). Given the issues raised at trial to support the cross-examination at issue, it had little, if any, probative value. There was no claim of self-defense in the instant case. Hence the aggressiveness, if any, of the victims was not really an issue.

On appeal, however, defendant contends that inasmuch as Hardin denied being armed at the 29 November shooting, this cross-examination should have been allowed to impeach his credibility and to establish bias. Even had this theory been urged at trial to sustain the cross-examination, which it was not, we think the trial court would have been well within its discretion to sustain objection under Rule 403. That a .25-caliber weapon may have been used by Hardin in the commission of an earlier felonious assault has slight bearing, if any, on whether he was armed during the 29 November 1989 shooting.

**[14]** Defendant Cureton next argues the trial court impermissibly precluded efforts to question Darryl Foster regarding his prior illegal or bad acts to demonstrate his lack of credibility. Trial counsel attempted to impeach Foster by having him admit that, pursuant to his plea to a drug offense, a charge of larceny of an automobile was dismissed. The trial court sustained the State's objection. The trial court also precluded defense counsel from questioning Foster about a pending warrant for Foster's arrest for possession of a firearm without a license in New Jersey on 3 June 1989. When trial counsel asked State's witness Johnson whether there were any charges pending against him when counsel interviewed Johnson regarding the 26 September 1989 shooting, the trial court sustained the State's objection. All rulings were clearly correct. *State v. Jones*, 329 N.C. 254, 404 S.E.2d 835 (1991) (error to allow cross-examination concerning mere charges of crime); *see also* N.C.G.S. § 8C-1, Rules 608 and 609.

XIV.

**[15]** By his next assignment of error, defendant Cureton contends the trial court abused its discretion by denying the jury's request for copies of the transcript of trial testimony. Defendant argues he was prejudiced by this ruling because the trial court did allow the jury to review in the jury room many pretrial statements which defendant contends were inconsistent with and noncorroborative of the testi-

mony of several key witnesses for the State. We think the trial court ruled correctly.

N.C.G.S. § 15A-1233(a) provides:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C.G.S. § 15A-1233(a) (1988). Here the jury, during deliberation, returned a written request stating, "Can we get copies of the transcripts?" The trial court responded, "It is not possible for you to have transcripts to take into the jury room. You are going to have to rely on your individual, and collective recollection as to what transpired." While N.C.G.S. § 15A-1233(a) gives the trial court the discretion to permit the jury to reexamine writings that have been received into evidence and to rehear specific parts of trial testimony, it does not give the trial court authority, discretionary or otherwise, to provide copies of trial transcripts to jurors.

Defendant relies on three Supreme Court cases for the proposition that it was error for the trial court not to honor the jury's request. *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), *cert. denied*, — U.S. —, 122 L. Ed. 2d 136, *reh'g denied*, — U.S. —, 122 L. Ed. 2d 776 (1993); *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985); *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980). These are distinguishable. In all three cases the juries returned requests to review portions of the transcript. This Court found error in all three cases on the ground that the trial courts violated N.C.G.S. § 15A-1233 by informing the juries that the transcripts were unavailable without exercising discretion in determining whether to have those portions of the testimony *read* to the jury. In the instant case, the jury requested copies of the entire transcript for use during deliberation in the jury room. The trial court properly denied the request.

Simultaneously with the request for copies of the transcript, the jury requested to view exhibits in the jury room. That the trial court allowed this request did not prejudice defendant. N.C.G.S. § 15A-1233(b) provides:

> Upon request by the jury and with the consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

N.C.G.S. § 15A-1233(b). Here while trial counsel initially objected to the jury's examination of the exhibits in the jury room, counsel subsequently informed the court that it had withdrawn its objection. The court then stated, and defense counsel agreed, that "neither the State nor the Defendants have any objections to the jurors examining the exhibits as requested." Thus the trial court granted the jury's request to review the exhibits in the jury room only after both parties consented. Such a ruling was within the sound discretion of the trial court and was in full compliance with N.C.G.S. § 15A-1233(b). This assignment of error is overruled.

XV.

**[16]** By his next assignment of error, defendant Cureton contends the trial court erred by admitting the out-of-court statements of Joice Hardin and Herman Meeks.

At trial Barbara Meeks testified that in the early morning of 29 November 1989 Foster and "Pit" (Hardin's street name) knocked on her door. Ms. Meeks testified that upon answering the door, Foster and Hardin entered and Hardin said, "Tari has been assassinated by Tyrone." Defense counsel objected on the grounds that the statements were hearsay and noncorroborative. The trial court overruled the objection and instructed the jury that the statements were offered for no other purpose than to corroborate what Hardin and Foster said at trial.

Also at trial Herman Meeks testified that he was awakened in the early morning of 29 November by Hardin and Foster and that Hardin told him: "[H]e was running away from the scene of the shooting, as he was running away, he could see out of the corner of his eye. Mr. Abraham and Mr. Cureton was [sic] shooting, both of them." The State offered a prior written statement of Mr. Meeks to corroborate

his testimony. In the statement, Mr. Meeks had written, "Pit also told me that Tyrone and Pat had done the killing." Trial counsel objected on the ground that the statement was noncorroborative hearsay and argued that the statement should be redacted from the written statement. The trial court denied the objection and admitted the statement into evidence. It then reinstructed the jury on the admissibility of corroborating evidence, advising the jury that the statement must not be considered for the truth of what was said at the earlier time.

Assuming arguendo that these out-of-court statements were inadmissible hearsay because they went so far beyond the witness' in-court testimony as not to be corroborative but to add additional hearsay evidence, defendant has not shown this to be prejudicial error. This Court previously has held "[t]he erroneous admission of hearsay, like the erroneous admission of other evidence, is not always so prejudicial as to require a new trial." *State v. Ramey*, 318 N.C. 457, 470, 348 S.E.2d 566, 574 (1986); *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) (every impropriety by trial judge does not necessarily result in prejudicial error). N.C.G.S. § 15A-1443(a) of the North Carolina General Statutes provides:

> 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.

N.C.G.S. § 15A-1443(a) 1988. "Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant." *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248.

Here, the record reveals that the State proffered strong and corroborated testimony of two eyewitnesses that both defendant Cureton and Abraham were armed on 29 November 1989 and that they fired their weapons in the direction of Hardin, Foster and Gaddy. According to the State's evidence, Hardin, Foster and Gaddy were unarmed. Casings recovered from the scene of the shooting were determined to have been fired from two guns, one of which had been identified with the defendants at a prior shooting incident. Following

the shooting, Gaddy was found dead in the street where the defendants had been firing. One of the gunshot wounds was to the sole of his foot. This evidence establishes clearly and overwhelmingly that either Cureton or Abraham, acting in concert with the other, shot and killed Gaddy as he attempted to flee. There is no reasonable possibility that a different result would have occurred at trial had the complained-of evidence not been admitted.

This assignment of error is overruled.

XVI.

**[17]** Defendant Cureton next contends the trial court denied him a fair trial by permitting the prosecutor to argue prejudicial facts not in evidence. He argues the prosecution improperly attempted to bolster its "weak" case against him by arguing additional corroboration of Hardin's identification of defendant.

At trial the prosecutor made the following argument:

> The officer patrols that neighborhood. He knows him when he sees him. At the time he didn't know his name, unlike Officer Klein, who made the arrest a few days later. I believe it was just across the tracks in the same neighborhood that Officer Klein, who patrols that same area, saw him, and he did remember his name. He said, "That's Tyrone Abraham," and he arrested him. Officer Adamo, it wasn't until the next day when he reported for work when the murder was being discussed, and he heard the name Tyrone Abraham, and he said, "That's the man. That's who I saw. I know Tyrone."
>
> The other man was Patrick. I don't know Patrick Cureton. He looked at a photograph, and he said that's Patrick Cureton. That's the man I saw with him.

As noted earlier in our resolution of defendant Abraham's assignment of error regarding the closing argument of the prosecution, section VI of this opinion, it is a matter reserved to the trial court's discretion as to whether counsel has exceeded the wide latitude allowed for arguing hotly contested cases. Where no objection to the argument is made at trial, our review is for gross impropriety.

Defendant Cureton contends the State improperly argued that Adamo determined defendant Cureton was the person he saw in the neighborhood by observing a photograph where the jury had not heard any evidence concerning Adamo's examination of a photo-

graph. Defendant further contends the State improperly argued that Adamo heard defendant's name at work when the trial court previously had sustained an objection to the introduction of the same evidence.

Even if we were to find the State's closing argument improper, we do not believe the claimed error was of such gross impropriety as to warrant intervention by the trial court *ex mero motu.*

"[P]rosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Pinch,* 306 N.C. 1, 24, 292 S.E.2d 203, 221-22, *cert. denied,* 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *overruled on other grounds by State v. Wilson,* 322 N.C. 117, 367 S.E.2d 589 (1988), *and overruled on other grounds by State v. Benson,* 323 N.C. 318, 372 S.E.2d 517 (1988). When the State offered evidence in its case-in-chief regarding the process by which Adamo identified Cureton, the trial court sustained defense counsel's objection. The specific testimony to which the trial court sustained objection concerned Adamo's search through the police records section to identify Cureton. Such evidence, were it to have been admitted, would have revealed that defendant Cureton had a prior police record. The State's argument at closing made no reference to Adamo's search of police records. It merely stated that Adamo identified defendant Cureton from a photograph. While there was no evidence at trial concerning a photograph, we fail to see how such an innocuous comment could be deemed grossly improper. This assignment of error is overruled.

XVII.

**[18]** By another assignment of error, defendant Cureton contends the trial court committed prejudicial error in overruling defendant's objections to further instructions on first-degree murder and allowing further jury deliberations.

When the jury returned to the courtroom following deliberation, the trial court reviewed the jury's verdict forms. The trial court then sent the jury back to the jury room, and informed counsel that it intended to give the jury further instructions and allow the jury to resume deliberation. As to defendant Cureton, the jury had returned verdicts of guilty of assaulting Hardin with a deadly weapon with intent to kill, of assaulting Foster with a deadly weapon with intent to kill under the theory of acting in concert, of first-degree felony mur-

der, and of second-degree murder under the theory of acting in concert without premeditation and deliberation. Defense counsel requested judgment be imposed on second-degree murder and the two assaults and moved for mistrial. The trial court denied the motions and, over defense counsel's objections, accepted the verdicts against defendant Cureton on the assault charges. It then reinstructed the jury on the murder charge, whereupon the jury, following additional deliberation, returned a verdict of guilty of first-degree felony murder.

The law of this State provides:

> A verdict is a substantial right and is not complete until accepted by the court. *State v. Rhinehart*, 267 N.C. 470, 148 S.E.2d 651 (1966). The trial judge's power to accept or reject a verdict is restricted to the exercise of a limited legal discretion. *Davis v. State*, 273 N.C. 533, 160 S.E.2d 697 (1968). In a criminal case, it is only when a verdict is not responsive to the indictment or the verdict is incomplete, insensible or repugnant that the judge may decline to accept the verdict and direct the jury to retire and bring in a proper verdict. Such action should not be taken except by reason of necessity. If the verdict as returned substantially finds the question so as to permit the court to pass judgment according to the manifest intention of the jury, it should be received and recorded. A verdict may be given significance and a proper interpretation by reference to the indictment, the evidence, and the instructions of the court. *State v. Tilley*, 272 N.C. 408, 158 S.E.2d 573 (1968); *State v. Thompson*, 257 N.C. 452, 126 S.E.2d 58 (1962), *cert. denied*, 371 U.S. 921 (1962).

*State v. Hampton*, 294 N.C. 242, 247-48, 239 S.E.2d 835, 839 (1977).

Defendant contends the jury's initial verdicts were not inconsistent in that the verdict signaled that, though the jury considered defendant to have been personally involved, it did not believe defendant possessed the personal intent to kill Gaddy or anyone else. Therefore the trial court should have accepted the jury's verdict of the lesser offense of second-degree murder. The State argues that the verdicts were not confusing, contradictory or incomplete in that they demonstrated that while the jury also found defendant acted with malice but without premeditation and deliberation, thus supporting a conviction of second-degree murder, the jury also found defendant guilty of first-degree felony murder, a crime whose elements are wholly distinct from second-degree murder. Therefore, the State con-

tends the trial court should have entered judgment finding defendant guilty of first-degree felony murder.

The respective positions of the State and defendant amply illustrate the inconsistency and contradictory nature of the verdicts as originally returned. Suffice it to say that a defendant may be convicted of only one degree of homicide for a single murder. He may not be convicted of both first-degree murder and second-degree murder for the same homicide. The trial court properly declined to accept the original verdict and properly reinstructed the jury and directed it to retire and deliberate further. This assignment of error is therefore overruled.

XVIII.

**[19]** By his next assignment of error, defendant Cureton contends the trial court committed reversible error by failing to find a violation of its sequestration order based on the prosecutor's alleged joint pretrial conferences with witnesses.

During pretrial proceedings defense counsel moved that witnesses for the State be sequestered. The State made no objection to the motion but requested that the investigating officer be allowed to remain in the courtroom throughout the trial. Defense counsel asked that the investigating officer be sequestered but that he be permitted to remain in the courtroom after he testified. The trial court ruled as follows: "The motion to sequester the State's witnesses is granted except to this extent: one investigating officer may remain during the course of the trial in the courtroom. All State's witness [sic] are to be sequestered." At a later point in the trial, defense counsel argued the State had violated the sequestration order by meeting with several of the State's witnesses at the same time. The State conceded it had met jointly with witnesses Joice Hardin, Darryl Foster, Sharon Whitley, William Johnson and Robin Boyd. The trial court then overruled defense counsel's objection to the introduction of any testimony by these witnesses.

Evidence Rule 615 states: "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." N.C.G.S. § 8C-1, Rule 615 (1992). In the instant case, the trial court's order, which was in response to defense counsel's motion, contemplated nothing more than the sequestration of witnesses during their testimony. Neither Rule 615 nor the trial court's order precluded

counsel from interviewing witnesses together in preparation for trial. Had this been the intent of the trial court its order would have been more explicit or, we are confident, the trial court would have ruled that the State's actions breached the spirit of the order. It did not do so. This assignment of error is therefore overruled.

XIX.

**[20]** By his final assignment of error, defendant Cureton contends the trial court erred in instructing the jury regarding flight. At the charge conference on 7 February 1991, defense counsel objected to any instruction on flight. The objection was overruled. Thereafter defendant Cureton submitted in writing for the trial court's consideration the North Carolina Pattern Instructions on flight, N.C.P.I.—Crim. 104-35 and 104-36. Pursuant to these pattern instructions, the trial court instructed the jury as follows:

> The State contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient, in itself, to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether a defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

Defendant contends this instruction was error for two reasons: First, it assumed evidence offered by the State showed defendant's flight; and, second, the instruction, as given, expressed an opinion that the State had proven flight.

We find no merit in these arguments. In *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805 (1991) this Court stated:

> "[F]light from a crime shortly after its commission is admissible as evidence of guilt." *State v. Self*, 280 N.C. 665, 672, 187 S.E.2d 93, 97 (1972), and a trial court may properly instruct on flight "[s]o long as there is some evidence in the record reasonably supporting the theory that defendant fled after the commission of the crime charged," *State v. Greene*, 321 N.C. 594, 607, 365 S.E.2d 587, 595, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988) (quoting *State v. Irick*, 291 N.C. [480,] 494, 231 S.E.2d [833,] 842 [(1977)]).

*Id.* at 722, 407 S.E.2d at 813. The Court held in *Tucker* that the trial court's instruction on flight, which was identical to the instruction given in the instant case, was proper when the jury heard evidence "that defendant had shaved off a beard and mustache within two days of the murder, that police began looking for him two months later, and that he was not found until three years after the murder—in Texas." *Id.*

Here, we believe there was evidence in the record supporting flight. Evidence revealed that both defendants were seen by Officer Adamo walking away from the murder scene shortly after the shooting occurred. As Adamo approached defendants, they detoured across a parking lot. Upon Adamo's inquiry, defendants denied hearing any shooting and continued to walk away. Defendant Cureton was arrested three weeks later in Heritage East Apartments after Officer Reed found him hiding in a closet underneath a pile of clothing. This evidence was sufficient to support an instruction on flight.

We also conclude the trial court's instruction did not express an opinion on the flight issue. As stated in *Tucker*, "it was for the jury to decide whether these facts, taken together with other facts and circumstances, supported the State's contention that defendant had fled." *Id.* at 723, 407 S.E.2d at 813. Here, prior to giving the instruction, the trial court appropriately instructed the jury as follows:

> [Y]ou are the judges of the weight of the evidence. You are the judges of the weight to be given any evidence, and if you decide that certain evidence is believable, then you must determine the importance of that evidence in light of all other believable evidence in the case.

The trial court also accurately informed the jury that it was the contention of the State, not the trial court, that defendants fled. While there might have been an explanation for the defendants' attempt to avoid Officer Adamo, as well as for the law enforcement officers' discovery of defendant Cureton underneath a pile of clothing in a closet, this is best left to argument of counsel.

For the foregoing reasons, we arrest judgment in case number 90-CRS-36544 and remand that case for further proceedings. We hold defendants Abraham and Cureton otherwise received a fair trial free from prejudicial error.

90-CRS-37544 (Abraham: assault with a deadly weapon with intent to kill)—JUDGMENT ARRESTED; REMANDED.

89-CRS-085521 (Abraham: first-degree murder)—NO ERROR.

89-CRS-087459 (Cureton: first-degree murder)—NO ERROR.

90-CRS-37547 (Cureton: assault with a deadly weapon with intent to kill)—NO ERROR.

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STATE OF NORTH CAROLINA v. ELTON GUY BELL

No. 421A92

(Filed 9 December 1994)

**1. Criminal Law § 411 (NCI4th)— jury selection—identification of victim's family**

The prosecutor's identification of members of the victim's family during jury selection in a capital trial to determine whether prospective jurors knew them did not require *ex mero motu* intervention by the trial court.

**Am Jur 2d, Trial §§ 490 et seq.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

**2. Jury § 132 (NCI4th)— jury selection—ability to give defendant, victim's family, State a fair trial**

It was not improper for the prosecutor to ask prospective jurors in a capital trial whether they could give defendant, the victim's family, and the State a fair trial.

**Am Jur 2d, Jury §§ 201, 202.**

**3. Criminal Law § 447 (NCI4th)— closing argument—effect of killing upon victim's family—absence of prejudice**

Defendant was not prejudiced by the prosecutor's comments during closing argument about the effect of the killing of the victim upon the victim's family where the trial court sustained defendant's objection or intervened *ex mero motu* each time the prosecutor mentioned any effect of the killing upon the victim's family, and where there was substantial evidence supporting defendant's conviction for first-degree murder.

**Am Jur 2d, Trial §§ 664 et seq.**

**Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.**

**4. Criminal Law § 78 (NCI4th)— pretrial publicity—change of venue denied**

The trial court did not err in denying defendant's motion for a change of venue of his first-degree murder trial based on pretrial publicity where (1) newspaper articles and a videotape of news coverage submitted by defendant in support of his motion were primarily factual accounts of the murder, the arrest of defendant, and a two-day search in a national forest for the codefendant, and (2) although a number of prospective jurors indicated that they had read or heard of the crime, each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based solely upon the evidence presented at trial.

**Am Jur 2d, Criminal Law § 378.**

**Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.**

**5. Jury § 111 (NCI4th)— capital trial—pretrial publicity— denial of individual voir dire**

The trial court did not err by failing to allow defendant to individually question each prospective juror during *voir dire* in a capital trial with respect to pretrial publicity.

**Am Jur 2d, Jury § 197.**

**6. Constitutional Law § 283 (NCI4th)— defendant represented by counsel—no right to personally question jurors**

A criminal defendant represented by counsel was not entitled to personally ask each prospective juror whether the juror would "listen to [his] case and be fair," since a defendant has no right to appear both by himself and by counsel.

**Am Jur 2d, Criminal Law § 767.**

**Right of defendant in criminal case to conduct defense in person, or to participate with counsel. 77 ALR2d 1233.**

**Accused's right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.**

**7. Evidence and Witnesses § 1688 (NCI4th)— murder of undercover officer—photograph of officer in uniform—admission for illustrative purposes**

In a prosecution for the first-degree murder of an undercover officer involved in a drug investigation, a photograph of the victim wearing his police uniform and standing in front of a patrol car was not introduced merely to inflame the passions of the jury but was properly admitted to illustrate a detective's testimony concerning the size and weight of the victim where defendant's defense of self-defense necessitated a showing by the State that a much larger man attacked the victim and knocked him down and defendant then shot and killed him.

**Am Jur 2d, Evidence §§ 971 et seq.**

**Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR4th 877.**

**8. Evidence and Witnesses § 3015 (NCI4th)— prior convictions—scope of cross-examination**

The trial court properly restricted defendant's cross-examination of the State's key witness about his prior convictions for breaking and entering and larceny to the time and place of the convictions and the penalties imposed thereon. N.C.G.S. § 8C-1, Rule 609.

**Am Jur 2d, Witnesses §§ 581 et seq.**

**Propriety, on impeaching credibility of witness in criminal case by showing former conviction, of questions relating to nature and extent of punishment. 67 ALR3d 775.**

**Construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime. 39 ALR Fed 570.**

**9. Evidence and Witnesses §§ 3039, 3054 (NCI4th)— witness's prior acts of misconduct—larceny—possession of marijuana—cross-examination not allowed**

The trial court did not err by refusing to permit defendant to question a State's witness in a murder-robbery trial about several prior unrelated acts of misconduct involving larceny and posses-

sion of marijuana since these acts of misconduct are not necessarily probative of the witness's propensity for truthfulness or untruthfulness, and defendant failed to show that these incidents are relevant to the witness's general veracity. N.C.G.S. § 8C-1, Rule 608(b).

**Am Jur 2d, Witnesses §§ 591-595.**

**Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed 564.**

**10. Evidence and Witnesses § 3032 (NCI4th)— fraud and deceit by witness—cross-examination disallowed—harmless error**

While the trial court should have permitted defendant to cross-examine a State's witness in a murder-robbery trial concerning an attempt by the witness to lure an acquaintance from his home so his accomplices could break into and steal property from the residence in order to show the propensity of the witness to deceive and defraud others because such misrepresentations speak to the veracity of the witness, the exclusion of this testimony was not prejudicial error where the witness admitted during either direct or cross-examination that he had (1) used and sold marijuana, (2) pled guilty to breaking and entering and larceny charges, (3) served time in prison, and (4) became an informant partially to improve his efforts at plea bargaining; the jury had before it sufficient evidence, including proof of bias, to evaluate the witness's credibility; and no reasonable possibility exists that a different result would have been reached had the testimony been allowed.

**Am Jur 2d, Witnesses §§ 591-595.**

**Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed 564.**

**11. Evidence and Witnesses § 664 (NCI4th)— exclusion of testimony—subsequent revision of ruling**

Exceptions to the exclusion of competent testimony showing defendant's motivation for going to the scene of a fatal shooting became immaterial when the trial judge subsequently revised his ruling and admitted the testimony.

**Am Jur 2d, Trial §§ 395 et seq.**

**12. Evidence and Witnesses §§ 2877, 3052 (NCI4th)— drug use by defendant's son—knowledge of wife—relevancy of cross-examination**

In a prosecution for first-degree murder of an undercover police officer, the State's cross-examination of defendant's son concerning his use of marijuana and defendant's wife concerning her knowledge of her son's involvement with illegal drugs was not an attempt to impeach the witnesses' character for truthfulness in violation of N.C.G.S. § 8C-1, Rule 608(b), but was relevant and properly permitted under N.C.G.S. § 8C-1, Rule 611(b) to rebut defendant's contention that he went to the crime scene to confront the State's informant about his attempts to lure defendant's son into using and selling drugs rather than to steal drugs from the victim and the informant.

**Am Jur 2d, Witnesses §§ 484 et seq., 591-595.**

**Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed 564.**

**13. Homicide § 620 (NCI4th)— felony murder—defendant as aggressor—instruction on unavailability of self-defense**

The trial court did not err by instructing the jury that the defense of self-defense was unavailable to defendant if the jury concluded that defendant killed the victim in the perpetration of a felony where the evidence tended to show that defendant was the aggressor in that he and an accomplice went to the crime scene to rob the victim and another person of marijuana, and no evidence was presented to suggest that the dangerous situation had dissipated at the time of the shooting or that defendant made any effort to declare his intent to withdraw.

**Am Jur 2d, Homicide §§ 519 et seq.**

**14. Homicide § 86 (NCI4th)— felony murder—forfeiture of self-defense claim**

A defendant charged with felony murder, as the aggressor in the underlying felony, forfeits his right to claim self-defense as a defense to the felony murder absent (1) a reasonable basis upon which the jury may have disbelieved the prosecution's evidence of the underlying felony, (2) a factual showing that defendant clearly articulated his intent to withdraw from the situation, or

(3) a factual showing that at the time of the violence the dangerous situation no longer existed.

**Am Jur 2d, Homicide §§ 145 et seq.**

**15. Homicide § 257 (NCI4th)— premeditation and deliberation—sufficiency of evidence**

The evidence in a first-degree murder prosecution was sufficient to support the trial court's instruction on premeditation and deliberation where it tended to show that defendant carried a pistol with him to a meeting with the victim, who was an undercover police officer, and another person; defendant intended to rob the victim of marijuana; on the way to the meeting, defendant removed the clip from his pistol, rejected the round from the chamber, replaced the round in the clip, and chambered a live round of ammunition, thus readying the weapon for firing; defendant's own testimony suggested that he harbored ill will toward the victim and the other person; during the meeting, defendant's accomplice struck the victim and knocked him to the ground; the victim reached for his weapon and stated, "Stop or I'll shoot" while attempting to rise from the ground; and defendant replied, "You won't shoot anybody" and shot the victim through the heart.

**Am Jur 2d, Homicide §§ 437 et seq.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

**16. Homicide § 489 (NCI4th)— premeditation and deliberation—circumstances permitting inference—instruction not plain error**

Even if the trial court instructed on several circumstances from which premeditation and deliberation could be inferred which were not supported by the evidence, defendant failed to object to the instruction given, and the instruction was not plain error where the case came down to whether the jury believed defendant's or the State's version of the events; the jury reasonably concluded that defendant killed the victim with premeditation and deliberation and during the commission of an armed robbery; and defendant failed to show that, absent the challenged portions of the instruction, the jury would probably have reached a different verdict.

**Am Jur 2d, Homicide §§ 501.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

**17. Homicide § 625 (NCI4th)— self-defense—withdrawal by aggressor—instruction not required**

The trial court in a first-degree murder case did not err by failing to give defendant's requested self-defense instruction that "[a]s long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any statement indicative of an intent to discontinue the assault" where the evidence in the record does not support a finding that defendant attempted, at any point, to withdraw from the combat or that he ever indicated to the victim that he intended to withdraw from the combat.

**Am Jur 2d, Homicide §§ 520.**

**18. Homicide § 622 (NCI4th)— self-defense—instruction on defendant as aggressor—sufficient evidence**

There was sufficient evidence that defendant was the aggressor to support the trial court's instruction in a first-degree murder case that defendant may not claim self-defense if the jury finds defendant was the aggressor in the encounter leading to the fatal shooting where there was testimony that defendant pulled his weapon on the victim, an undercover police officer, after defendant's accomplice had knocked the officer to the ground and that the officer never actually drew his gun.

**Am Jur 2d, Homicide §§ 431.**

**19. Homicide § 628 (NCI4th)— self-defense—use of excessive force—jury question—propriety of instruction**

The evidence in a prosecution for the first-degree murder of an undercover police officer presented a question for the jury as to whether defendant used excessive force so that the trial court properly instructed the jury that, if it found defendant to have used excessive force in defending himself, he was entitled, at most, to the defense of imperfect self-defense where the testimony of various witnesses differed as to when defendant and the officer drew their weapons and as to the circumstances leading to the fatal shooting.

**Am Jur 2d, Homicide §§ 519 et seq.**

**20. Homicide § 432 (NCI4th)— murder—intentional use of deadly weapon—inferences of unlawfulness and malice**

The trial court properly instructed the jury that it could infer that a killing was unlawful and committed with malice if it found that defendant intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death.

**Am Jur 2d, Homicide §§ 500, 509.**

**21. Homicide § 476 (NCI4th)— premeditation—instruction—formation of intent to kill**

The trial court did not err by instructing the jury that it must find that defendant formed the intent to kill the victim over some period of time, however short, in order to find defendant guilty of first-degree murder based upon premeditation and deliberation.

**Am Jur 2d, Homicide §§ 498.**

**22. Homicide § 497 (NCI4th)— felony murder—underlying felony—attempted armed robbery**

The trial court properly instructed that the jury could consider only an attempted armed robbery charge as the underlying felony for felony murder and did not permit the jury to consider a conspiracy charge as the underlying felony.

**Am Jur 2d, Homicide §§ 498.**

**23. Conspiracy § 33 (NCI4th); Robbery § 84 (NCI4th)— armed robbery conspiracy—attempted armed robbery—sufficiency of evidence**

The evidence was sufficient to support defendant's convictions of conspiracy to commit armed robbery and attempted armed robbery where it tended to show that defendant told his accomplice of his plan to rob an undercover police officer and his companion of marijuana that the officer and his companion proposed to sell to defendant; defendant armed himself with a pistol and chambered the weapon as he and the accomplice drove to a meeting with the officer and his companion; at the scene, defendant's accomplice knocked the officer down as he had been instructed to do by defendant as part of the robbery plan; and defendant shot the officer when the officer attempted to get out his weapon. The conduct of defendant and his accomplice supports an implied understanding between them to use a gun in the commission of the crime, and the failure of the conspirators to

actually take the marijuana did not negate the attempted armed robbery.

**Am Jur 2d, Conspiracy §§ 29, 30; Robbery § 89.**

**24. Homicide § 727 (NCI4th)— first-degree murder—premeditation and deliberation and felony murder—no merger of felony**

Where a defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon.

**Am Jur 2d, Homicide §§ 549 et seq.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Phillips, J., at the 16 March 1992 Criminal Session of Superior Court, Carteret County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgments imposed for attempted robbery with a firearm and felony conspiracy to commit robbery with a deadly weapon was allowed 22 December 1992. Heard in the Supreme Court 15 September 1993.

*Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.*

*Stephen M. Valentine for defendant-appellant.*

PARKER, Justice.

Defendant, upon proper bills of indictment, was tried capitally and convicted of first-degree murder based on premeditation and deliberation and the felony-murder rule. Defendant was also convicted of felony conspiracy to commit robbery with a deadly weapon and attempted robbery with a firearm. Upon the jury's recommendation following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the trial judge sentenced defendant to life imprisonment for the murder conviction and to consecutive sentences of forty years' imprisonment for the attempted armed-robbery conviction and ten years' imprisonment for the conspiracy conviction. For the reasons discussed below, we conclude that defendant's trial was free from prejudicial error.

The State presented evidence at trial tending to show that the victim, Donald Ray Tucker ("Officer Tucker"), a Clinton police officer, was working undercover as part of a drug investigation being conducted in Carteret County by the sheriff's department. To establish his new identity, Officer Tucker grew a beard, wore granny glasses, adopted the name "Sand Man," and professed to being a big time out-of-state drug dealer. As part of his cover, Officer Tucker became associated with Mark Balch ("Balch"), a local resident with a long history of drug offenses who had served time in prison for breaking and entering and larceny. Balch was paid a fee for turning in and assisting with the arrest of individuals involved with drugs. Balch had assisted Officer Tucker in making over seventy-five drug buys resulting in twenty-five successful arrests.

Pursuant to this arrangement, Balch began contacting David Bell ("David"), defendant's fifteen-year-old son whom Balch had seen on occasion with hashish in his possession. During the various communications, David offered to sell Balch some hashish. When Balch called to confirm the deal, David said he was having trouble getting the "stuff." Balch and Officer Tucker went to the Bell residence to complete the transaction but were confronted by defendant. Initially, Balch told defendant he was there only to take David skateboarding but later admitted he hoped to purchase some hashish from David. Defendant informed them the "hash was gone" but said his older son was on a fishing boat and would return with "some good hash" at the end of the week. However, when Balch called back, defendant still had no hashish. On this occasion, Balch offered to sell defendant some marijuana.

The parties met on 12 November 1991 at George's Party Pak to discuss the marijuana sale. Defendant asked Balch and Officer Tucker to follow him out to Salty Shores, a small campground near the marina. Defendant sampled the marijuana and then agreed to pay $5,400 for five pounds. They made plans to meet again on 14 November 1991 to complete the transaction.

At noon on the fourteenth, Balch telephoned defendant and was told to meet him "across the Broad Creek Loop down at the sound." Balch and Officer Tucker, riding in a white Mustang with tinted windows, arrived approximately five minutes prior to defendant. Defendant and his brother-in-law, Joey Lewis ("Lewis"), drove up in a green pickup truck. Balch said, "There's too many people out here, I don't like it here, let's get out of here." Defendant looked at Balch and said

okay. Balch and Officer Tucker then followed defendant and Lewis to Bluewater Banks. Once the vehicles were parked, all four men moved to the rear of the Mustang. Officer Tucker placed the same duffel bag he had used at the earlier meeting on the trunk of the automobile and asked defendant if he had the money. Defendant answered, "We've got the f——— money, where's the pot?" After Officer Tucker opened the bag, Lewis rolled a joint for defendant to test the marijuana.

As defendant smoked the joint and commented on the quality of the seeds and stems, Lewis, standing six feet six inches tall and weighing approximately 350 pounds, suddenly backhanded Officer Tucker, knocking him to the ground. According to Balch's testimony, defendant was silhouetted against the white Mustang as he stood over the officer with a gun pointed at him. The fully extended hammer on the weapon was easily visible and the gun was pointed directly at Officer Tucker. Officer Tucker, attempting to rise from the ground, started to reach for his weapon and yelled, "Stop or I'll shoot." Defendant replied, "You won't shoot anybody" and shot Officer Tucker through the heart.

Following the shooting, Balch ran to a nearby house and called the authorities. Lewis escaped into the Croatan National Forest before turning himself in to the local authorities on the following Saturday. Defendant left the scene of the crime without taking the marijuana or any of Officer Tucker's personal belongings. He returned to the scene within an hour and was identified by Balch as the shooter. Defendant was subsequently arrested.

Lewis testified for the State that on the day of the shooting, he went over to defendant's home. Defendant asked if he was "[r]eady to go to work and make some money." Lewis learned that defendant's plan was to lure Balch and Officer Tucker to the scallop house at the end of the shore road and pretend that the two men were attempting to "rip us off by selling us a bunch of bad marijuana." Lewis was then to hit one of the men while defendant hit the other so they could steal the marijuana. Lewis agreed to participate and at the arranged time, drove defendant to the shore in his truck. On the way, defendant removed a pistol from his waistband, ejected the magazine, ejected a round from the chamber, chambered a round, replaced the magazine, released the hammer, and concealed the weapon in his waistband. When Lewis and defendant arrived at Salty Shores, defendant asked Balch and Officer Tucker to follow them to Bluewater Banks. Defendant then told Lewis that they should also steal "their watches, their

rings, and their wallets." Once they arrived at Bluewater Banks, all four men stood around the white Mustang. While Lewis examined the marijuana, defendant told him to roll a joint. As defendant lit the joint, Lewis backhanded Officer Tucker, knocking him to the ground. He turned and noticed Balch running away from the scene. When he turned back around, Officer Tucker was holding a pistol, aimed directly at him, and saying, "You son of a b——, I will kill you, I'll kill you." Lewis testified that Officer Tucker had turned his gun towards defendant when defendant shot him.

Dr. Charles Garrett, the Carteret County medical examiner, testified that Officer Tucker was shot through the heart with a .45 caliber handgun from a distance of approximately three feet. Dr. Garrett opined that Officer Tucker was beneath the shooter when the gun was fired since the bullet entered his body seventeen inches from the top of his head and came to rest in a position some twenty-seven inches from the top of his head.

On his own behalf, defendant testified that Balch and Officer Tucker were trying to solicit his emotionally disturbed fifteen-year-old son to use and sell drugs. Defendant contends he confronted Balch on numerous occasions telling him to "stay the hell away from my son." Defendant first met with Balch at George's Party Pak "[t]o lay [a] cowboy whipping on his a—" for attempting to get his son in trouble. Even though he was armed with his .45 caliber handgun, he decided not to fight Balch when he saw that "Sand Man" was with him. Defendant then went along with the alleged drug sale in hopes of getting Balch alone at a future meeting. Defendant testified he asked Lewis to accompany him to the meeting on the day of the shooting solely to keep "Sand Man" from interfering while he fought with Balch.

Defendant further testified that while the four men examined the marijuana, he took two puffs of a joint and then tried unsuccessfully to hit Balch. Balch ran away and defendant could not follow him because of his bad back. When he turned back around, Officer Tucker was aiming a gun directly at Lewis and saying, "I am going to kill your d— a——." Defendant removed his gun from his waistband and responded, "I got a gun, too. Don't you shoot him. Please put that gun down. Put the gun down. For God's sake, put that gun down." Officer Tucker responded, "I am going to blow your f——— head off first" and aimed the gun at defendant. At this point, defendant testified he had time to cock his gun; say, "Oh, Lord heaven, help me. . . . Oh, God, help me"; and shoot Officer Tucker without Officer Tucker squeezing off a single round.

When defendant arrived home, he asked his wife to call the rescue squad and the police. He cleaned up, changed clothes, took a Valium, and drove back to the shore, apparently to commit suicide. While in the attic of an old scallop house, defendant changed his mind and threw the pistol away among the debris in the old building. Defendant then returned to the scene of the shooting where he learned from Balch that the man he had shot was a police officer. Defendant turned himself in and was arrested.

David testified that Balch approached him on numerous occasions about selling marijuana and cocaine for him. He claims he refused on each occasion and after a while, even refused to accept his telephone calls. On the occasion that Balch went to the Bell residence looking for David, defendant confronted Balch on David's behalf. Martha Lewis Bell ("Martha"), defendant's wife, testified that Balch called her home looking for David approximately three dozen times during September of 1991. She recalled that her husband became quite upset upon learning that Balch was soliciting David to deal drugs and decided to punish him himself. Defendant went to the meeting on 14 November 1991 intending to "break him from sucking eggs." When he returned from the meeting, defendant told her he had shot a man and asked her to call the authorities. He added, "I have got to go back, Martha, I have shot a man. I have got to go back and face what I have done." About forty-five minutes later, her brother, Lewis, called and said, "Guy shot that man . . . . If Guy hadn't shot him, I would be dead."

Additional facts, when necessary, will be set forth with respect to the various issues.

**[1]** In his first assignment of error, defendant contends the trial court erred in failing to exclude *ex mero motu* certain remarks by the prosecutor concerning the victim's family during *voir dire* and closing arguments. We have carefully reviewed the text of the challenged remarks and find no abuse of the trial court's discretion in failing to intervene absent any objection.

Voir Dire. During selection of the jury, the prosecutor asked the victim's father, brother, stepmother, and grandmother to stand up and then asked the prospective jurors if any of them had "ever seen these folks before today." Later, upon calling another prospective juror, the prosecutor requested only the victim's father to stand and merely pointed out the rest of the victim's family. On one other occasion, the prosecutor asked a prospective juror if she recognized any of Officer

Tucker's family sitting in the courtroom. Defendant did not object to any of these questions. We have held that "[t]he mere identification of family members present in the courtroom at the opening of the proceedings [does] not constitute the use of highly prejudicial and irrelevant evidence as prohibited by *Booth*."[1] *State v. Laws*, 325 N.C. 81, 103, 381 S.E.2d 609, 622 (1989), *death sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, — U.S. —, 116 L. Ed. 2d 174, *reh'g denied*, — U.S. —, 116 L. Ed. 2d 648 (1991). In the present case the identification of the family to determine whether prospective jurors knew them did not require *ex mero motu* intervention by the trial court.

**[2]** Defendant also contends the prosecutor asked one prospective juror if he could give defendant, the victim's family, and the State a fair trial. Our review of the transcript reveals that the question was posed on at least three occasions. On two of these, no objection was raised. On the third occasion, defendant did object to the question and was overruled. We find no impropriety in asking the jury to judge the facts in a manner fair to all parties. *See State v. Artis*, 325 N.C. 278, 330, 384 S.E.2d 470, 499-500 (1989) ("[I]t is not improper to remind the jury, as the prosecutor did here, that its voice is the conscience of the community."), *death sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). The trial court properly overruled defendant's sole objection to this question and declined to intervene *ex mero motu* on the other two occasions.

Closing Argument. Defendant also contends the remarks of the prosecutor during his closing argument were irrelevant and designed solely to inflame the passions of the jury. The district attorney argued:

> MR. MCFADYEN: . . . Every time you celebrate Christmas you think about a family out there that is going to sit back—
>
> MR. NOBLES: Objection.
>
> MR. MCFADYEN: —sit by a Christmas tree—
>
> THE COURT: Sustained.
>
> MR. MCFADYEN: And they are going to think about that man right there.

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1. *Booth v. Maryland*, 482 U.S. 496, 96 L. Ed. 2d 440 (1987), holding victim impact evidence inadmissible, was overruled by *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991), which held that a State may choose to permit admission of victim impact evidence without violating the Eighth Amendment *per se*. *Id.* at 827, 115 L. Ed. 2d at 736.

THE COURT: Sustained.

MR. MCFADYEN: Sir, I would—

THE COURT: I would not—well—

MR. MCFADYEN: I would like certainly to be heard, Judge.

THE COURT: Well, I think your forecast is—come up.

MR. MCFADYEN: I would like to be heard at the bench.

[Discussion at bench with all counsel and the defendant present.]

MR. MCFADYEN: Folks, my comments to you finally will be briefly, you know, I don't know why it is we are not supposed to think and talk about this man, because he is the victim. But I hope that you folks will think about this man (pointing to picture), Donald Ray Tucker, 22-year-old, and think about what effect the acts of the defendant had and what he did to this man and his family on the 14th day of November of last year.

THE COURT: Sustained as to the effect on the family, but you may speak with respect to the decedent.

The trial court sustained the objection or intervened *ex mero motu* each time the prosecutor mentioned any effect of the killing upon the victim's family. Defendant did not request special instructions following the court's rulings and has not shown any gross improprieties which the trial court failed to correct.

Defendant now argues, however, that the district attorney's conduct amounted to prejudicial error since the evidence of defendant's guilt was not overwhelming and since defendant interposed scattered objections to the challenged statements. While we do not condone the prosecutor's continued comments following the court's ruling on defendant's objection, we conclude that the record provides substantial evidence supporting defendant's conviction for first-degree murder. "In the absence of a showing of prejudice, prosecutorial misconduct in the form of improper jury argument does not require reversal." *State v. Boyd*, 311 N.C. 408, 418, 319 S.E.2d 189, 197 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985). This assignment of error is overruled.

**[4]** Defendant next assigns error to the trial court's failure to grant defendant's motion for change of venue. In support of his motion, defendant submitted several newspaper articles and a videotape of

the television coverage which allegedly contain hearsay and an allegation by the sheriff that the victim had been murdered. Defendant argues that this adverse publicity and the fact that the victim was a police officer produced a situation where it was impossible for him to receive a fair trial in Carteret County. In denying the motion, the trial court noted that the news items appeared to be "essentially recitals of alleged facts, some of which are in dispute, some of which are not in dispute."

In reviewing the trial court's decision, we look to several well-established principles.

> The test for determining whether venue should be changed is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pre-trial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed." [*State v. Jerrett*, 309 N.C. 239, 255, 307 S.E.2d 339, 347 (1983).] The burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried rests upon the defendant. *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). "In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial." *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 348. The determination of whether a defendant has carried his burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. *Madric*, 328 N.C. at 226, 400 S.E.2d at 33. The trial court has discretion, however, only in exercising its sound judgment as to the weight and credibility of the information before it, including evidence of such publicity and jurors' averments that they were ignorant of it or could be objective in spite of it. When the trial court concludes, based upon its sound assessment of the information before it, that the defendant has made a sufficient showing of prejudice, it must grant defendant's motion as a matter of law. *See State v. Abbott*, 320 N.C. 475, 478, 358 S.E.2d 365, 368 (1987).

*State v. Yelverton*, 334 N.C. 532, 539-40, 434 S.E.2d 183, 187 (1993).

After reviewing the newspaper articles and the videotape submitted by the defendant, we are satisfied that defendant has failed to meet his burden of proving that the pretrial publicity tainted his chances of receiving a fair and impartial trial. The articles which appeared in local and state newspapers from 15 November 1991 through 20 November 1991, and the short news segments on the videotape are primarily factual accounts of the murder of Officer Tucker, the arrest of defendant, and the two-day search in the Croatan National Forest for Lewis. "This Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Gardner*, 311 N.C. 489, 498, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

We have repeatedly held that "[t]he best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection process." *State v. Madric*, 328 N.C. 223, 228, 400 S.E.2d 31, 34 (1991). While a number of the prospective jurors questioned in this case indicated they had read or heard of the crime, each juror who actually served on the jury stated unequivocally that he or she had formed no opinion about the case, could be fair and impartial, and would decide the issues based solely upon the evidence presented at trial. Therefore, we conclude that the trial court did not err in denying defendant's motion for a change of venue.

**[5]** Defendant further argues that the trial court erred by failing to allow defendant to individually question each prospective juror during *voir dire* with respect to pretrial publicity. Defendant contends the collective *voir dire* served only to educate any prospective juror who remained unaware of the adverse publicity surrounding defendant. However, defendant has made no such showing and this argument amounts to mere speculation. *See State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). Defendant's argument is without merit.

**[6]** In his next assignment of error, defendant contends the trial court erred in denying defense counsel's repeated requests to allow defendant to personally ask each juror, "would they listen to my case and be fair?" Defendant argues that there is no statutory prohibition against a criminal defendant's involvement in *voir dire* and that a juror's response to a specific question asked directly by the defendant could be beneficial in selecting an impartial jury.

Defendant's argument directly contradicts previous holdings of this Court. Relying on *Faretta v. California*, 422 U.S. 806, 45 L. Ed. 2d 562 (1975), this Court has determined "that a defendant in a criminal action has a right to represent himself at the trial and cannot be required to accept the services of court-appointed counsel." *State v. House*, 295 N.C. 189, 204, 244 S.E.2d 654, 662 (1978). "It is, however, equally well settled that '[a] party has the right to appear *in propria persona* or by counsel, but this right is alternative,' so that 'one has no right to appear both by himself and by counsel.' " *Id.* (quoting *State v. Phillip*, 261 N.C. 263, 268, 134 S.E.2d 386, 391, *cert. denied*, 377 U.S. 1003, 12 L. Ed. 2d 1052, *reh'g denied*, 379 U.S. 874, 13 L. Ed. 2d 83 (1964)).

In *House*, defendant requested that, in addition to questioning by his counsel, he personally be permitted to question prospective jurors on *voir dire* and witnesses at the trial. In upholding the trial court's decision denying the request, this Court noted that "while the defendant elected to retain the services of the court-appointed counsel, the court did not err in holding that the interrogation of prospective jurors and of witnesses must be done through his counsel." *House*, 295 N.C. at 204, 244 S.E.2d at 662. Similarly, defendant here was not entitled to ask questions of prospective jurors while represented by counsel. Defendant's assignment of error is without merit.

**[7]** In his next assignment of error, defendant contends the trial court erred in admitting into evidence, over objection by defendant, a photograph taken of the victim prior to his death. In the photograph, Officer Tucker is wearing his police uniform and standing in front of a patrol car. Defendant contends the photograph was introduced solely to inflame the passions of the jury and to support the State's argument that defendant killed a law enforcement officer in the performance of his duty. Defendant argues that the photograph may have been relevant had defendant known that the victim was actually a police officer. However, since defendant believed Officer Tucker to be a drug dealer at the time of the killing, the identity of Officer Tucker, his status as a police officer, and any other facts established by the photograph are irrelevant to the issues presented to the jury in this case. We disagree.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury."

*State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). The single photograph of Officer Tucker is neither gory nor gruesome and it was not used excessively or repetitively during the trial. The introduction of the photograph was not aimed solely at arousing the passions of the jury, but was admitted to establish the victim's size.

During the direct examination of Detective Boyce Floyd, the following question was posed:

> Q. Does that photograph fairly and accurately depict Donald Tucker as to his size and approximate weight at the time of his death?
>
> A. Yes, sir.

Following this exchange, the State moved to introduce the photograph of Officer Tucker into evidence. In overruling the defendant's objection, the court informed the jury that State's Exhibit #5 was "admitted for illustrative purposes, members of the jury. You may consider it for that purpose and that purpose only."

Defendant's defense of self-defense necessitated the State's showing that a much larger man attacked Officer Tucker and knocked him to the ground, following which defendant shot and killed him. Detective Floyd had previously testified that Officer Tucker weighed 190-200 pounds and was approximately five feet ten or eleven inches tall. Under these circumstances, the photograph was properly admitted to illustrate that Officer Tucker actually appeared as described by Detective Floyd. This assignment of error is also without merit.

Defendant next assigns error to the trial court's refusal to allow questioning of Balch, the State's key witness, regarding his prior convictions and several prior acts of misconduct allegedly committed by him.

**[8]** A. Prior Convictions. Rule 609 of the North Carolina Rules of Evidence allows, for purposes of impeachment, the cross-examination of witnesses, including defendant, with respect to prior convictions. *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977). "[W]here, for purposes of impeachment, the witness has admitted a prior conviction, the time and place of the conviction and the punishment imposed may be inquired into upon cross-examination." *Id.* at 141, 235 S.E.2d at 825. "[I]nquiry into prior convictions which exceeds the limitations established in *Finch* is reversible error." *State v. Rathbone*, 78 N.C. App. 58, 64, 336 S.E.2d 702, 705 (1985), *cert. denied*, 316 N.C. 200, 341

S.E.2d 582 (1986). Expressly overruling a line of cases apparently expanding this line of reasoning, the Court recently returned to the *Finch* rationale in holding:

> In the interest of clarity and certainty for the bench and bar, we conclude that we should overrule *Harrison* and *Gibson* and adhere to the rule established in *Garner*, *viz*, that the "*Finch* . . . limitations on inquiries concerning prior convictions are consistent with rule 609(a)."

*State v. Lynch*, 334 N.C. 402, 410, 432 S.E.2d 349, 353 (1993) (quoting *State v. Garner*, 330 N.C. 273, 288-89, 410 S.E.2d 861, 870 (1991)). In light of *Lynch*, we find that the trial court properly restricted defendant's questioning of Balch on his prior convictions for breaking and entering and larceny to the time and place of the convictions and the penalties imposed thereon.

B. Prior Acts of Misconduct. Rule 608(b) of the North Carolina Rules of Evidence governs the admissibility of specific acts of misconduct where (i) the purpose of the inquiry is to show conduct indicative of the actor's character for truthfulness or untruthfulness; (ii) the conduct in question is in fact probative of truthfulness or untruthfulness; (iii) the conduct in question is not too remote in time; (iv) the conduct did not result in a conviction; and (v) the inquiry takes place during cross-examination. *See State v. Morgan*, 315 N.C. 626, 634, 340 S.E.2d 84, 89-90 (1986). "Among the types of conduct most widely accepted as falling into this category are 'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *Id.* at 635, 340 S.E.2d at 90 (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)).

**[9]** Defendant, on cross-examination, proposed to question Balch concerning his involvement in several alleged specific instances of misconduct, *i.e.*, possession with intent to sell marijuana, conspiracy to commit larceny and larceny of a wave runner, conspiracy to commit larceny and larceny of a 1986 Sea Ox boat and trailer, conspiracy to commit larceny and larceny of a 1989 Bayliner boat and trailer, and various conversations with Billy Simmons concerning stealing other property. Defendant has failed to show how these incidents are relevant to the witness' general veracity. These instances of alleged prior and unrelated acts of larceny and possession of marijuana, without more, are not necessarily probative of Balch's propensity for truth-

fulness or untruthfulness under the standard imposed by Rule 608(b). The trial court properly restricted defendant's questioning of Balch's alleged prior acts of misconduct.

**[10]** Defendant further intended to question Balch concerning an attempt by Balch to lure an acquaintance away from his home so his accomplices could break into the residence and steal the property inside. This line of questioning should have been allowed as bearing on the witness' propensity to deceive and defraud others. *See State v. Clark*, 319 N.C. 215, 353 S.E.2d 205 (1987). In *Clark*, defendant propounded questions to the witness which, had he been allowed to answer, would have indicated that:

> after Mr. Givens [witness] had left his employment with a fire extinguisher company he went to customers of the company and represented to them that he was there to inspect the fire extinguishers. When left alone he would steal money if any was in the room.

*Id.* at 218, 353 S.E.2d at 206. The witness deliberately misrepresented himself to his former employer's customers in an effort to defraud them. Similarly, Balch misrepresented himself to his friend while his accomplices stole or attempted to steal his friend's belongings. In each case, these misrepresentations speak to the veracity of the witness. As in *Clark*, the trial court erred in failing to allow defendant to question the witness on this particular alleged specific act of misconduct.

However, the exclusion of this testimony does not constitute prejudicial error. The statutory test for errors not relating to a right under the Constitution of the United States is that "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." N.C.G.S. § 15A-1443(a) (1988). The record establishes that Balch admitted to the jury during either direct or cross-examination that (i) he had previously used and sold marijuana; (ii) he pled guilty to charges of breaking and entering and larceny; (iii) he served time in prison for his convictions; and (iv) he became an informant partially to improve his efforts at plea bargaining. The jury had before it sufficient evidence to evaluate Balch's credibility, including proof of bias. No reasonable possibility exists that a different result would have been reached had the testimony in question been allowed. Hence, the error is harmless.

**[11]** In his next assignment of error, defendant contends the trial court erred in sustaining the State's objection to relevant testimony offered by defendant. During direct examination of defendant, defense counsel attempted to establish defendant's motive in going to the scene of the fatal shooting by having defendant testify concerning statements made to him by his fifteen-year-old son, David, regarding solicitations by Balch. The State entered a hearsay objection. Defendant argued that the testimony was offered only to show his motivation, not to prove the truth of the matter asserted. The trial court sustained the State's objection and disallowed the testimony.

Later, upon reconsideration, the court reversed its ruling and allowed defense counsel, during redirect, to question defendant extensively concerning conversations between his son and Balch. Defendant related to the jury details of encounters and conversations David had with Balch during which Balch attempted to buy, sell, or trade cocaine and hashish with him. Although the testimony was ultimately allowed, defendant contends the original erroneous ruling caused him undue prejudice because he lost "the inherent advantage produced when a witness first speaks to the jury through direct examination by his own counsel." We disagree.

Exceptions to the exclusion of competent testimony become immaterial when it appears that the trial judge subsequently revised his rulings and admitted the testimony. *See Poole v. Gentry*, 229 N.C. 266, 49 S.E.2d 464 (1948). This assignment of error is without merit.

**[12]** Defendant next contends the trial court erroneously failed to exclude *ex mero motu* certain testimony elicited during cross-examination of defendant's son, David, and defendant's wife, Martha. Defendant contended throughout the trial that he went to Bluewater Banks not to buy or steal marijuana from Balch and Officer Tucker but merely to confront Balch concerning Balch's repeated attempts to lure his son, David, into using drugs. To contradict this assertion, the State needed to show that David was already involved in the drug culture of Carteret County and that defendant was aware of his son's involvement. The trial court allowed the prosecutor to question David concerning his use of marijuana and Martha concerning her knowledge of her son's involvement with illegal drugs. Defendant raised no objection during cross-examination of either witness.

Now, on appeal, defendant, relying on *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986), argues it is well settled in North Carolina that questions regarding a witness' prior involvement with or use of

illegal drugs are not proper grounds for impeachment. In *Morgan* this Court in discussing N.C.G.S. § 8C-1, Rule 608(b) stated:

> [E]vidence routinely disapproved as irrelevant to the question of a witness' general veracity (credibility) includes specific instances of conduct relating to "sexual relationships or proclivities, the bearing of illigitimate [sic] children, the use of drugs or alcohol, . . . *or violence against other persons.*"

*Morgan*, 315 N.C. at 635, 340 S.E.2d at 90 (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)). Rule 608(b) generally bars evidence of specific instances of conduct of a witness for the purpose of attacking his credibility. In the case *sub judice*, the State was not attempting to impeach either David or Martha Bell's general reputation for veracity. Rather, the State was trying to rebut their testimony on direct examination. Each witness, during direct examination by defense counsel, testified that David was being lured into the drug culture by Balch. On cross-examination, the State was attempting to show that David was already deeply involved in the drug scene and that defendant was aware of this involvement.

The import of the two lines of questioning was not to demonstrate the witnesses' character for truthfulness or untruthfulness but to shed light on defendant's true intent in meeting Balch and Officer Tucker at Bluewater Banks. The fact that David, with his parents' knowledge, had been using and selling illegal drugs for years casts doubt on defendant's contention that his purpose in going to Bluewater Banks was merely to confront Balch for attempting to lure David into drugs. As such, the testimony was relevant and the cross-examination permissible under N.C.G.S. § 8C-1, Rule 611(b). The trial court did not err in not intervening *ex mero motu* in the cross-examination. This assignment of error is overruled.

**[13]** Next, defendant contends the trial court erred in instructing the jury that if it concluded defendant had killed Officer Tucker in the perpetration of a felony, defendant could not avail himself of the defense of self-defense. Defendant argues that the effect of this instruction was devastating since he relied solely on a theory of self-defense. The challenged instruction provided:

> THE COURT: I charge you further that the defendant has been accused of first-degree murder in the perpetration of a felony, which is the killing of a human being by a person attempting to commit robbery with a firearm.

I instruct you that neither the issue of self-defense or death by accident is available to the defendant, and neither are to be considered by you in connection with the accusation of first-degree murder in perpetration of a felony.

Our legislature has defined capital felony murder as:

> A murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000 . . . .

N.C.G.S. § 14-17 (1993). Premeditation and deliberation are not elements of the crime of felony murder. *State v. Wall*, 304 N.C. 609, 286 S.E.2d 68 (1982). The prosecution need only prove that the killing took place while the accused was perpetrating or attempting to perpetrate one of the enumerated felonies. By not requiring the State to prove the elements of murder, the legislature has, in essence, established a *per se* rule of accountability for deaths occurring during the commission of felonies.

Based on this premise, other jurisdictions have held that an aggressor in a violent confrontation forfeits his right to self-defense.

> When a defendant is charged under this [felony-murder] statute, the defense of self-defense is unavailable to him as a matter of law because he is an aggressor engaged in the perpetration of a felony. *Street v. State*, 26 Md. App. 336, 340, 338 A.2d 72 (1975). This Maryland construction of the felony-murder statute comports with the general rule on the subject of the non-availability of self-defense as a defense to felony-murder.

*Street v. Warden*, 423 F. Supp. 611, 613-14 (Md.), *aff'd*, 549 F.2d 799 (4th Cir. 1976), *cert. denied*, 431 U.S. 906, 52 L. Ed. 2d 390 (1977). In *Gray v. State*, 463 P.2d 897, 909 (Alaska 1970), the court stated:

> [A] person who commits an armed robbery forfeits his right to claim as a defense the necessity to protect himself against the use of excessive force by either the intended victim of the robbery or by any person intervening to prevent the crime or to apprehend the criminal, absent a factual showing that at the time the vio-

> lence occurred, the dangerous situation created by the armed robbery no longer existed.

*See also Rainer v. State*, 342 So. 2d 1348 (Ala. Crim. App. 1977); *State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983); *People v. Loustaunau*, 181 Cal. App. 3d 163, 226 Cal. Rptr. 216 (1986); *Williams v. State*, 256 Ga. 655, 352 S.E.2d 756 (1987); *People v. Abrams*, 109 Ill. App. 3d 901, 441 N.E.2d 352 (1982); *State v. Marks*, 226 Kan. 704, 602 P.2d 1344 (1979); *Street v. State*, 26 Md. App. 336, 338 A.2d 72 (1975); *State v. Gray*, 456 N.W.2d 251 (Minn. 1990), *cert. denied*, 498 U.S. 1030, 112 L. Ed. 2d 678 (1991); *Layne v. State*, 542 So. 2d 237 (Miss. 1989); *People v. Guraj*, 105 Misc. 2d 176, 431 N.Y.S.2d 925 (1980); *Smith v. State*, 209 Tenn. 499, 354 S.W.2d 450 (1961); *Davis v. State*, 597 S.W.2d 358 (Tex. Crim. App.), *cert. denied*, 449 U.S. 976, 66 L. Ed. 2d 238 (1980); *State v. Dennison*, 115 Wash. 2d 609, 801 P.2d 193 (1990).

We previously reviewed this issue in *State v. Maynor*, 331 N.C. 695, 417 S.E.2d 453 (1992). There, "we assume[d] *arguendo* but [did] not decide that in certain circumstances, some instruction on the doctrine of self-defense as a defense to first-degree murder under the felony murder theory may be proper." *Id.* at 699, 417 S.E.2d at 455. In a felony-murder prosecution, a person who is found by the jury to be engaged in an attempted robbery must be considered the initial aggressor; it is immaterial whether the victim of the robbery or the defendant fired first. *Guraj*, 105 Misc. 2d at 178, 431 N.Y.S.2d at 927. " '[T]he accused cannot set up in his own defense a necessity which he brought upon himself.' " *Celaya*, 135 Ariz. at 254, 660 P.2d at 855 (quoting *State v. Jones*, 95 Ariz. 4, 8, 385 P.2d 1019, 1021 (1963)).

**[14]** We now hold that, absent (i) a reasonable basis upon which the jury may have disbelieved the prosecution's evidence of the underlying felony, *Layne*, 542 So. 2d at 244; (ii) a factual showing that defendant clearly articulated his intent to withdraw from the situation; or (iii) a factual showing that at the time of the violence the dangerous situation no longer existed, *Gray*, 463 P.2d at 909, defendant has forfeited his right to claim self-defense as a defense to felony murder. Here, the evidence tends to show and the jury found that defendant and Lewis went to Bluewater Banks for the purpose of robbing the victim and Balch of marijuana. No evidence was presented to suggest that the dangerous situation had dissipated at the time of the shooting or that defendant made any effort to declare his intent to withdraw. This assignment of error is overruled.

**[15]** Defendant next contends the trial court erred in instructing the jury on premeditation and deliberation because the evidence adduced at trial failed to support such a finding. We disagree.

When measuring the sufficiency of the evidence, direct or circumstantial, competent or incompetent, the evidence must be considered in the light most favorable to the State. The State must be given the benefit of every reasonable inference to be drawn from the evidence and any contradictions in the evidence are to be resolved in favor of the State. *State v. Sumpter*, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986).

"Premeditation is defined as thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a 'cool state of blood' in furtherance of a fixed design or to accomplish some unlawful purpose." *State v. Jones*, 303 N.C. 500, 505, 279 S.E.2d 835, 838 (1981). "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." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 823 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *rev'd on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

> Among the circumstances which may be considered as tending to show premeditation and deliberation are: (1) the want of provocation on the part of the victim, (2) the defendant's conduct and statements before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, (5) evidence that the killing was done in a brutal manner. *See State v. Calloway*, [305 N.C. 747, 291 S.E.2d 622 (1982)]; *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978); *State v. Thomas*, 294 N.C. 105, 240 S.E.2d 426 (1978). The nature and number of the victim's wounds is also a circumstance from which an inference of premeditation and deliberation may be drawn, *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 103 S.Ct. 503, 74 L.Ed.2d 642 (1982), as is the number of blows inflicted upon the victim. *State v. Love*, 296 N.C. 194, 250 S.E.2d 220 (1978); *State v. Thomas, supra.*

*State v. Myers*, 309 N.C. 78, 84, 305 S.E.2d 506, 510 (1983).

Viewed in the light most favorable to the State, the evidence was sufficient to support a conclusion that the murder was premeditated

and deliberate. Defendant carried a gun with him during the attempted robbery, indicating he anticipated a violent confrontation and the potential need for deadly force. On the way to the meeting, defendant removed the clip from his semiautomatic pistol, ejected the round from the chamber, replaced the round in the clip, reinserted the clip, and chambered a live round of ammunition, thus readying the weapon for firing. Defendant's own testimony suggests he harbored ill will towards Balch and "Sand Man" (Officer Tucker). Defendant testified he set up the meeting "[t]o lay [a] cowboy whipping on his a—." Finally, at the scene of the confrontation, Balch testified that after Lewis backhanded Officer Tucker, knocking him to the ground, defendant stood over him silhouetted against the white Mustang. The fully extended hammer on the weapon was readily apparent. Officer Tucker, attempting to rise from the ground, reached for his weapon and stated, "Stop or I'll shoot." Defendant replied, "You won't shoot anybody" and shot Officer Tucker through the heart. These facts, among others, support a reasonable inference that there was a lack of provocation on the part of Officer Tucker, that defendant was prepared for an armed confrontation, and that the fatal shooting of Officer Tucker was premeditated and deliberate. We conclude that the trial court did not err in instructing the jury on premeditation and deliberation.

**[16]** Defendant also complains that the instruction, as given, constituted prejudicial error because the trial court instructed on several circumstances from which premeditation and deliberation may be inferred which were not supported by the evidence. The trial court instructed the jury as follows:

> Neither premeditation or deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim; the conduct of the defendant before, during and after the killing; threats and declarations of the defendant, or of the decedent; use of grossly excessive force; and whether or not the defendant inflicted a lethal wound upon the victim when the victim was fell [sic]; and brutal or vicious circumstances of the killing; the manner in which or the means by which the killing was done.

While arguing that none of the enumerated circumstances are present in his case, defendant contends that the evidence specifically does not reveal (i) lack of provocation by the victim; (ii) premeditation and

deliberation on the part of defendant based upon his conduct before, during, and after the shooting; (iii) any threats made against the victim by defendant; (iv) the use of grossly excessive force by defendant; (v) a killing done in a brutal or vicious manner; or (vi) infliction of lethal wounds upon the victim after he was felled.

Although defendant objected to the trial judge's charging the jury on premeditation and deliberation in general, he raised no objection to the instruction as actually given. Therefore, the challenged instruction is reviewable only under plain error analysis. Under this standard of review, defendant must demonstrate that, "absent the alleged error, [the] jury probably would have reached a different verdict." *State v. Robinson*, 330 N.C. 1, 22, 409 S.E.2d 288, 300 (1991). The appellate court must be convinced that the instruction actually "tilted the scales" in favor of conviction. *Id.* Even assuming, *arguendo*, that there was error in the instruction given, defendant has failed to demonstrate that, absent the challenged portions of the instruction, the jury would probably have reached a different verdict.

This case comes down to whether the jury believed defendant's version of the events occurring on 14 November 1991 or the State's version of the events. As we have previously noted, based on the State's evidence, the jury reasonably concluded that defendant killed Officer Tucker with premeditation and deliberation during the commission of an armed robbery. The jury specifically rejected verdicts of second-degree murder and voluntary and involuntary manslaughter. *See State v. Faison*, 330 N.C. 347, 362-63, 411 S.E.2d 143, 152 (1991). We do not believe the instruction as given "tilted the scales" in favor of conviction. Defendant has not met his burden under the plain error rule. This assignment of error is overruled.

**[17]** In his next assignment of error, defendant contends the trial court erred in failing to give his requested instruction to the jury on self-defense. The proposed instruction provided that "[a]s long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any statement indicative of an intent to discontinue the assault." Defendant argues that the requested instruction would have clearly explained the insignificance, from a legal standpoint, of the fact that Officer Tucker, when he had the opportunity to fire his weapon, did not do so. However, defendant has cited this passage out of context and, as a result, his argument misconstrues the law on self-defense.

Defendant's reliance on *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971), is misplaced. The paragraph containing defendant's requested instruction reads as follows:

> ". . . In order that the right of self-defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat. He must also in some manner make known his intention to his adversary; and if the circumstances are such that he cannot notify his adversary, as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat, it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault."

*Id.* at 68-69, 181 S.E.2d at 430 (quoting 40 C.J.S. *Homicide* § 121, at 995 (1991)). When read in context, the passage clearly shows that in order for the aggressor to regain his right of self-defense, he must actively alert his victim to the fact that he intends to cease further aggression. As long as the aggressor keeps his weapon at the ready, the victim is not expected to accept any act or statement as an intent to cease the assault.

As in *Winford*, the evidence in the record does not support a finding that defendant attempted, at any point, to withdraw from the combat or that he ever indicated to Officer Tucker that he intended to withdraw from the combat. The trial court is required to give the substance of a requested charge only if the proposed charge is a correct statement of the law and is supported by the evidence. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982). The trial court properly declined to give the requested instruction.

Defendant next contends the trial court erred in the charge on first-degree murder by instructing the jury that (i) defendant's actions would not be justified as self-defense were the jury to find him to be the aggressor; (ii) if the victim were the aggressor, and defendant responded with excessive force, defendant would at most be justified under the doctrine of imperfect self-defense; (iii) the jury could infer the killing was unlawful and committed with malice; and (iv) the jury must find that defendant formed the intent to kill the victim over some period of time, however short, in order to find the defendant guilty of first-degree murder based upon premeditation and delibera-

tion. Defendant's proposed instruction omitted each of these references because defendant contended no evidence was presented to support an inference that defendant was the aggressor, used excessive force to protect himself, or formed an intent to kill Officer Tucker.

**[18]** Defendant's argument ignores Balch's testimony that defendant pulled his weapon on Officer Tucker after Lewis had knocked the officer to the ground and that Officer Tucker never actually drew his gun. Viewed in the light most favorable to the State, this evidence supports instructing the jury that defendant may not claim self-defense if the jury finds defendant was the aggressor in the encounter leading to the fatal shooting. *See State v. Johnson*, 278 N.C. 252, 258, 179 S.E.2d 429, 432-33 (1971).

**[19]** We also conclude that the instruction, as given, correctly states the law on the use of excessive force in self-defense. Whether defendant in fact used excessive force is a question for the jury to determine based on the evidence. *See State v. Benge*, 272 N.C. 261, 264, 158 S.E.2d 70, 72 (1967). Here, the testimony of various witnesses differed as to when Officer Tucker and defendant drew their weapons and as to the circumstances leading to the fatal shot. The trial court properly instructed the jury that if it found defendant to have used excessive force in defending himself, he is entitled, at most, to the defense of imperfect self-defense. *State v. McAvoy*, 331 N.C. 583, 595-96, 417 S.E.2d 489, 497 (1992).

**[20]** The instruction, furthermore, correctly charged the jury that it could infer the killing was committed with malice. *State v. Maynard*, 311 N.C. 1, 33, 316 S.E.2d 197, 214-15 ("[T]he law implies that a killing was done with malice and unlawfully when the defendant intentionally inflicts a wound upon a victim with a deadly weapon resulting in death."), *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). Relying on the pattern jury instruction, the trial court instructed the jury:

> If the State proves beyond a reasonable doubt that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused the victim's death, you may first infer that the killing was unlawful; and second, that it was done with malice. But you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done

> with malice. And in this regard I instruct you that a firearm, a .45 caliber pistol, is a deadly weapon, as a matter of law.

**[21]** Finally, the instruction properly charged the jury that, to convict defendant of first-degree murder based on premeditation and deliberation, it would have to find that defendant formed the intent to kill the victim over some period of time, however short. We have repeatedly held that premeditation means that the act was thought out beforehand for some length of time. No particular amount of time is necessary for the mental process of premeditation. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). This assignment of error is without merit.

**[22]** In his next assignment of error, defendant contends the trial court erred in failing to give his requested instruction that the conspiracy charge could not be used as the underlying felony for a conviction of first-degree murder based upon felony murder. Our review of the instruction reveals that the trial court properly instructed the jury it could consider only the attempted armed-robbery charge as the underlying felony. This assignment of error is overruled.

**[23]** Defendant next contends the trial court erred in failing to set aside for lack of evidence the verdicts of guilty of attempted armed robbery, conspiracy to commit armed robbery, and first-degree murder. Defendant grounds his argument on the lack of any evidence tending to show that defendant and Lewis planned to use the gun, that the gun was used to threaten Officer Tucker, or that the gun was used during an attempted robbery. However, this argument ignores other relevant testimony presented at trial.

Lewis testified that defendant told Lewis of defendant's plan to rob Officer Tucker and Balch of the marijuana. In preparation, defendant armed himself with his pistol and chambered the weapon as the two men drove to Bluewater Banks for the confrontation. Any contradictions or discrepancies in the evidence are for the jury to resolve. *State v. Smith*, 291 N.C. 505, 513, 231 S.E.2d 663, 669 (1977). While there is no evidence of an express agreement to use the weapon, the conduct of the two men supports an implied understanding between them to use a gun in the commission of the crime. Furthermore, at the scene, Lewis did as he had been instructed when he knocked Officer Tucker down. Hence, the first step in the attempted armed-robbery plan occurred. That things did not go exactly as planned such that the conspirators did not actually take the drugs does not negate the attempted armed robbery. On the record before

us, the evidence is sufficient to support a finding by the jury that defendant was guilty of conspiracy to commit armed robbery and attempted armed robbery. The trial court did not abuse its discretion and properly denied defendant's motion to set aside these verdicts. Furthermore, as discussed more fully earlier in this opinion, the evidence amply supports the submission of first-degree murder based both on premeditation and deliberation and felony murder. The trial court properly denied defendant's motion to set aside the verdicts.

**[24]** Finally, defendant contends the trial court erred by imposing a separate sentence on the attempted armed-robbery charge in addition to the sentence for first-degree murder on the basis that the attempted armed robbery merged into the felony-murder conviction. As we have previously held, where defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon. *State v. Goodman*, 298 N.C. 1, 15, 257 S.E.2d 569, 579 (1979). This assignment of error is, thus, overruled.

We have carefully considered the entire record and find that defendant received a fair trial free from prejudicial error.

NO ERROR.

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STATE OF NORTH CAROLINA v. RUSSELL HOLDEN, JR.

No. 460A91

(Filed 9 December 1994)

**1. Criminal Law § 682 (NCI4th)— capital sentencing—emotional disturbance mitigating circumstance—uncontroverted evidence—refusal to give peremptory instruction—prejudicial error**

The trial court erred by refusing to peremptorily instruct the jury on the statutory mental or emotional disturbance mitigating circumstance in a capital sentencing proceeding where defendant presented the testimony of four expert witnesses in support of this mitigating circumstance and the State presented no evidence that controverted this testimony. Furthermore, this error cannot

be held to be harmless beyond a reasonable doubt, and a defendant sentenced to death is entitled to a new sentencing hearing, where one or more jurors found that this circumstance existed but it is not known how many jurors so found; it is possible that more or all jurors would have found the existence of this circumstance had the peremptory instruction been given; and it is reasonably possible that the number of circumstances found by each juror could have had an effect on the juror's balancing of the mitigating circumstances against the aggravating circumstances, thereby affecting the sentencing recommendation. N.C.G.S. § 15A-2000(f)(2).

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.**

2. **Criminal Law § 1337 (NCI4th)— capital sentencing — felony involving use or threat of violence—attempted second-degree rape—proof by judgment—no non-violent rape or attempted rape in this state**

Evidence of defendant's prior conviction for attempted second-degree rape consisting solely of the judgment against the defendant for that offense satisfies the State's burden of proving the N.C.G.S. § 15A-2000(e)(3) aggravating circumstance that the defendant had previously been convicted of a felony "involving the use or threat of violence to the person." Even if defendant's prior conviction could have been for having sexual intercourse with a person who was mentally defective, mentally incapacitated, or physically helpless as prohibited by N.C.G.S. § 14-27.3(a)(2), additional evidence that violence or a threat of violence accompanied defendant's prior offense was not required because there is no "non-violent" rape or attempted rape under North Carolina law since (1) the force inherent to having sexual intercourse with a mentally defective or incapacitated person who is statutorily deemed incapable of consenting amounts to "violence" as contemplated by this aggravating circumstance, and the attempt to have sexual intercourse with such a person inherently includes a threat of force sufficient to amount to a "threat of violence" within the meaning of this circumstance; and (2) the statute was intended to prohibit having or attempting to have sexual intercourse with a physically handicapped person only when that person does not consent thereto, and such nonconsensual

acts inherently include force or a threat of force sufficient to rise to the level of "the use or threat of violence" contemplated by this aggravating circumstance.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post-*Gregg* cases. 65 ALR4th 838.**

**3. Criminal Law § 1362 (NCI4th)— capital sentencing—defendant's age as mitigating circumstance—proof of low mental age**

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance of the defendant's age at the time of the crime where defendant was thirty-nine years old at the time of the offense, and defendant presented the testimony of a clinical psychologist that defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten-year old than to those of a person in his thirties. N.C.G.S. § 15A-2000(f)(7).

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Comment Note.—Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.**

Justice WHICHARD concurring in the result.

Justice MEYER dissenting.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Bowen, J., at the 30 September 1991 Criminal Session of Superior Court, Duplin County, on a prior jury verdict finding the defendant guilty of first-degree murder. Heard in the Supreme Court on 13 April 1994.

*Michael F. Easley, Attorney General, by William N. Farrell, Jr., Senior Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Marshall Dayan, Assistant Appellate Defender, for the defendant-appellant.*

MITCHELL, Justice.

The defendant was indicted on 1 July 1985 for one count of murder and one count of first-degree rape. In August 1985, he was tried capitally and found guilty of the first-degree murder of and attempted first-degree rape of Vanessa Jones. He was sentenced to death for the murder and to twenty years imprisonment for the attempted rape. We found no error in the trial and sentences in *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) (hereinafter *Holden I*).

In 1989, the defendant filed a Motion for Appropriate Relief in the Superior Court, Duplin County. In December 1990, that court granted partial relief by vacating the defendant's death sentence and ordering a new capital sentencing proceeding based on the opinion of the Supreme Court of the United States in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990). At the second capital sentencing proceeding, which is the subject of this appeal, the jury found three aggravating circumstances: that the defendant previously had been convicted of a felony involving the use of violence to the person; that the murder was committed for the purpose of avoiding a lawful arrest; and that the murder was committed while the defendant was attempting to commit a rape. The jury found as a mitigating circumstance that the defendant was under the influence of a mental or emotional disturbance when he committed the murder. It then found that the mitigating circumstance did not outweigh the aggravating circumstances and recommended a sentence of death. The trial court sentenced the defendant to death in accord with that recommendation.

The evidence presented during the defendant's original trial and capital sentencing proceeding is summarized in *Holden I*, 321 N.C. at 131-32, 362 S.E.2d at 519-20. The issues presented by this appeal relate only to the defendant's second capital sentencing proceeding.

The State presented evidence at the second capital sentencing proceeding tending to show that in the late evening of 15 March 1985 or the early morning of 16 March 1985, the defendant was seen sitting in his car outside a disco near Warsaw, North Carolina. At approximately 3:00 a.m., four acquaintances asked him for a ride home. The defendant asked one of them, Johnnie Lee Williams, to find Vanessa Jones, but Williams could not locate her. Williams' prior testimony during the defendant's 1985 trial was admitted during this sentencing proceeding because Williams had died subsequent to that trial. The

defendant drove Williams and two others to Williams' home, and they all got out of the car. The defendant and Levon Hicks, who was also in the car at the time, then drove away. Williams stated that he had seen the defendant with a .25 caliber pistol in November 1984 and that the defendant had told him that to keep her from talking, he was going to kill the next girl whom he raped.

Levon Hicks testified that he had known the defendant for seven or eight years and that he knew Vanessa Jones. He saw the defendant sitting in his car outside the disco on 15 March 1985. Hicks got in the defendant's car. Later he saw Johnny Pat Barden and Vanessa Jones walking down the street. Barden asked the defendant to take the two of them home. The defendant agreed, and the four left with the defendant and Hicks in the front seat and Barden and Jones in the back seat.

Hicks further testified that the defendant drove past Jones' house and that Jones complained that she wanted to go home. The defendant instead drove to Barden's home. Hicks stated that shortly after they took Barden home, the defendant stopped the car beside the road and told Hicks to get in the back seat. Jones was passed out at this time. Hicks testified that the defendant ordered him to tie some suspenders around Jones' legs, but Hicks refused.

They then drove on a dirt road and through a little path. Hicks stated that the defendant stopped the car, got in the back seat, and began touching Jones' chest. Hicks was outside the car at the time. He testified that the defendant was unzipping Jones' pants and saying he was going to "get some," but was scared she was going to yell. After twenty minutes the defendant got in the front seat and drove back toward the Warsaw Block Plant. Hicks stated that the defendant told him he was taking him home and that the defendant was going to "get some meat." The defendant asked Hicks if he wanted any "meat," and Hicks declined. The defendant stated that after he "got some meat," he would probably have to kill her so she would not talk. After leaving Hicks at his home, the defendant drove off in the direction of a graveyard.

Henry Sutton discovered the body of Vanessa Jones on a dirt path outside Warsaw. A deputy arrived and identified the body. He noticed a laceration and blood on the victim's body. He also noticed that the victim's shirt was not tucked into her pants, that her pants were unbuckled or unzipped, and that one of her shoes was removed. He radioed for the SBI, secured the scene, and covered the body.

Officers executed a search warrant for the house where the defendant lived. They were looking for a knife, but during the search one of the officers saw a pistol behind the bed. The officer did not seize the weapon because at that time it was not known that Jones had been shot.

Later the same day, an SBI special agent who had observed the body executed a search warrant on the residence and seized a knife, a pair of scissors, a pair of wet jeans found in a washing machine, and another knife found in a car parked in the yard. From another car parked in the yard, the agent seized a red suspender similar to one found near Jones' body.

After the autopsy revealed that Jones had been shot in addition to her throat having been cut, the SBI agent returned to the scene of the crime and seized a spent cartridge and two unfired bullets. A deputy returned to the defendant's home to seize the gun, but it was no longer there.

SBI Agent John Payne testified that on 16 March 1985, he saw the defendant in front of his residence. He read the defendant his *Miranda* rights, which the defendant waived. The defendant then said he wanted to speak with Payne about Jones' death. The defendant wrote a statement detailing the events on the night of the murder. The defendant also had an interview with Payne in which he stated that he had been fishing with Williams and the defendant's father on the morning of 16 March 1985 and that upon returning he learned of Jones' death.

A pathologist who performed the autopsy testified that Jones died of a gunshot wound to the throat. He found no semen in her vagina. A forensic witness testified that the shell casings found at the scene matched the defendant's gun, which had been retrieved by officers.

The defendant presented the following evidence pertinent to this appeal:

Dr. George Baroff, a clinical psychology professor at the University of North Carolina at Chapel Hill, was accepted by the trial court as an expert in the field of clinical psychology. He examined the defendant on three occasions and reviewed his school records and a Dorothea Dix Hospital evaluation of the defendant. He administered the Stanford-Binet intelligence test to the defendant, who scored a 56. Such a score falls within the mentally retarded range of intellectual

functioning. In Dr. Baroff's opinion, the defendant was functioning in the mentally retarded range on the date of the offense, even though an I.Q. test showed the defendant's I.Q. to be 70. He testified that a score of 56 was consistent with other scores achieved by the defendant on other intelligence tests. Dr. Baroff further stated that the defendant had a mental age of ten years. He gave the defendant reading material that a seven-year-old could read without difficulty, but the defendant had difficulty reading it. Dr. Baroff also stated that mental retardation adversely affects a person's capacity to think about the consequences of his or her behavior because the person has a difficult time understanding "what might be" as opposed to "what is." Such persons have almost no grasp of the future consequences of actions taken in the present. In Dr. Baroff's opinion, the defendant was under the influence of a mental or emotional disturbance at the time of the offense.

On cross-examination Dr. Baroff stated that the pattern of the defendant's responses on the tests suggested that he was not malingering by performing poorly on purpose. Dr. Baroff also conceded that though the defendant's mental age was nine or ten years, his life experience was greater than that of a ten-year old. He further stated that the defendant was married, operated a vehicle, and had held a job at a poultry factory for ten or twelve years. The defendant had been promoted to assistant manager at the factory. The defendant also had volunteered with a rescue squad but was unable to pass the exam to become a certified Emergency Medical Technician.

Willie Arnette, a friend of the defendant and his co-worker on the rescue squad, testified that the rescue squad is a volunteer organization which met twice a month. He stated that the defendant and he were on the squad for four years.

Dr. Thomas Ryan, a clinical neuropsychologist, was accepted by the trial court as an expert in the field of neuropsychology. He conducted neuropsychological assessments on the defendant on 5 August 1989 for nine hours. Based on tests taken by the defendant and on medical records, Dr. Ryan determined that the defendant suffered from moderate brain damage, which had resulted from a lack of oxygen at the time of the defendant's birth. He found the defendant's intellectual functioning to be in the mentally retarded range, and he also concluded that the defendant was not malingering on the tests. Dr. Ryan further stated that the defendant's scores indicated that he was severely impaired by his brain damage. He testified that the

impairments were present at the time of the offense, and that at the time of the offense the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

Dr. Nancy Earl, a physician, was accepted by the court as an expert in the field of neurology. She testified that she was familiar with the neuropsychological testing performed on the defendant and had reviewed Dr. Ryan's report. She also had reviewed the defendant's birth records as well as his mother's medical records. She stated that the defendant's neurological impairment could have been caused in part by a lack of oxygen to the brain during his birth. She performed a neurologic exam on the defendant on 4 August 1989 for three hours. Dr. Earl found the defendant to be alert and oriented; he knew who he was, he knew the date, and he understood that she was a doctor.

The mental status examination revealed global impairments, which indicated that both the sides and frontal area of the brain were impaired. The physical examination revealed that the defendant had some abnormal features in his eyes and that the muscle tone in his legs was abnormally increased on both sides, which indicated a motor neuron lesion in the brain.

Dr. Earl further found the defendant's reflexes to be abnormally brisk. She stated that the defendant was not malingering; rather, he was trying to cooperate during these tests. She concluded that her findings of brain dysfunction were consistent with mental retardation, poor school performance, and the lack of oxygen to his brain at birth. In her opinion, the defendant was under the influence of a mental or emotional disturbance at the time of the offense. She also opined that at the time of the offense, the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

On cross-examination Dr. Earl testified that she assumed the defendant understood what a gun was and what it meant to pull the trigger of a gun. She also thought the defendant would understand that if he shot a person in the throat with a gun, the person would be hurt. She stated that the defendant probably understood what a knife was and that if he cut a person's throat with a knife, the person would be injured.

Dr. Mark Chandler, an assistant professor and neuropsychiatrist at the University of North Carolina at Chapel Hill, was accepted by the trial court as an expert in the fields of psychiatry, mental retardation, and neuropsychiatry. He had examined the defendant on four different occasions in 1989 and was familiar with the testing performed by Drs. Baroff and Ryan. He concluded that the defendant was mildly mentally retarded and that he did not have any major depressive disorders or psychoses. He further determined that the defendant had organic brain damage and was suffering from a mental or emotional disturbance at the time of the offense. In his opinion, the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time of the offense. On cross-examination Dr. Chandler stated that the defendant knows what a pistol is, how to pull the trigger, and probably understands that if you shoot someone, the person will be injured.

**[1]** The defendant first assigns as error the trial court's refusal to peremptorily instruct the jury on mitigating circumstances. The defendant argues *inter alia* in support of this assignment that the evidence supporting the statutory mitigating circumstance that the defendant suffered a mental or emotional disturbance at the time of the murder was uncontroverted. He contends that the trial court therefore should have instructed peremptorily on that mitigating circumstance. N.C.G.S. § 15A-2000(f)(2) (1988). We agree.

The defendant submitted evidence in support of this statutory mitigating circumstance in the form of expert testimony from Dr. George Baroff, a clinical psychologist, Dr. Thomas Ryan, a neuropsychologist, Dr. Mark Chandler, a neuropsychiatry professor, and Dr. Nancy Earl, a neurology professor. Dr. Baroff stated that the defendant's I.Q. is 56, which is in the mentally retarded range. He further stated that the defendant was under a mental or emotional disturbance at the time of the offense. Dr. Ryan testified that the defendant suffered from moderate organic brain damage. Dr. Chandler testified that the defendant was mildly retarded and had organic brain damage. He further stated that the defendant was under a mental or emotional disturbance at the time of the crime. Dr. Earl testified that the defendant's brain damage was caused by complications at his birth.

The State presented no evidence that controverted the defendant's evidence on this mitigating circumstance and does not argue that any such evidence was presented. We have held that "[w]here

. . . all of the evidence in [a capital prosecution], if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). As the evidence supporting the mitigating circumstance found in N.C.G.S. § 15A-2000(f)(2) was uncontroverted, it was error for the trial court to deny the defendant's request for a peremptory instruction thereon. *Cf. State v. Green*, 336 N.C. 142, 172-74, 443 S.E.2d 14, 32 (1994) (peremptory instructions relating to *nonstatutory* mitigating circumstances differ from those relating to *statutory* mitigating circumstances).

We cannot conclude that this error was harmless beyond a reasonable doubt. One or more of the jurors found that this statutory mitigating circumstance existed; however, we do not know whether all of the jurors did. Assuming, as we must, that not all jurors found this mitigating circumstance existed, it is possible that had the peremptory instruction been given, more or all would have done so. *See State v. Gay*, 334 N.C. 467, 492-94, 434 S.E.2d 840, 855 (1993) (determining that failure to instruct peremptorily on uncontroverted, nonstatutory mitigating circumstances could not be held harmless beyond a reasonable doubt because more or all jurors might have found the circumstance if a peremptory instruction had been given). It is reasonably possible that the number of circumstances found by each juror could have had an effect on the juror's balancing of the mitigating circumstances against the aggravating circumstances, thereby affecting the sentencing recommendation. *See id.* Therefore, the defendant is entitled to a new capital sentencing proceeding.

The defendant has brought forward additional assignments of error. Although we need not address those assignments in light of our holding that the defendant is entitled to a new capital sentencing proceeding, the issues presented in some of those assignments are almost certain to arise again in any new capital sentencing proceeding the defendant is subjected to. For that reason, we elect to discuss the following additional assignments of error.

**[2]** The defendant assigns as error the trial court's submission of the aggravating circumstance that the defendant previously had been convicted of a felony involving the use of violence. N.C.G.S. § 15A-2000(e)(3) (1988). The defendant had been convicted of the felony of attempted second-degree rape against a person other than the victim in the case before us. The court instructed that "attempted

rape is by definition a felony involving the use of violence to the person." The defendant contends that no evidence was presented from which the jury could find beyond a reasonable doubt that the attempted second-degree rape involved violence or the threat of violence. He argues that because the State only offered proof of his conviction for second-degree rape by presenting the judgment, it failed to present evidence sufficient to prove the aggravating circumstance beyond a reasonable doubt. He reasons that the conviction is insufficient to prove the use of or threatened use of violence because second-degree rape may be predicated on sexual intercourse with a person who is mentally defective, mentally incapacitated, or physically helpless. N.C.G.S. § 14-27.3(a)(2) (1993). Thus, according to the defendant, the trial court should not have submitted the circumstance based solely on the judgment entered upon the conviction. We do not agree.

The General Assembly of North Carolina has provided that one aggravating circumstance weighing in favor of a sentence of death is that a 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) (1988). The issue in the present case is whether evidence of a defendant's prior conviction for attempted second-degree rape consisting solely of the judgment against the defendant for that offense satisfies the State's burden of proving this aggravating circumstance. We conclude that it does.

Under N.C.G.S. § 15A-2000(e)(3), the required prior felony

> can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery, *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981), or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission.

*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) (footnote omitted). This Court has concluded that for purposes of N.C.G.S. § 15A-2000(e)(3), rape is a felony which has as an element the use or threat of violence to the person. *State v. Artis*, 325 N.C. 278, 321, 384 S.E.2d 470, 494 (1989) (quoting *McDougall*, 308 N.C. at 18, 301 S.E.2d at 319), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604, *on remand*, 327 N.C. 470, 397 S.E.2d 223 (1990)). We have further reasoned that where rape is deemed to have as an element the use or threat of violence, the "felony of attempt to commit rape is therefore

by nature of the crime a felony which threatens violence." *State v. Green*, 336 N.C. 142, 170, 443 S.E.2d 14, 30 (1994) (interpreting military law). Under N.C.G.S. § 15A-2000(e)(3), "[a]ttempting to commit a crime which inherently involves violence obviously constitutes, at least, a 'threat of violence.' " *Id.* at 169, 443 S.E.2d at 30. Therefore, the judgment showing that the defendant had previously been convicted of attempted second-degree rape was sufficient, standing alone, to require that the trial court submit the aggravating circumstance that the defendant had committed a prior felony involving the use or threat of violence to the person.

For purposes of applying this aggravating circumstance, we reject the notion of any felony which may properly be deemed "non-violent rape." We believe that a more enlightened view of this matter has been expressed in the opinions of military courts which have been cited with approval by this Court.

> Under the Uniform Code of Military Justice, rape is always, and under any circumstances, deemed as a matter of law to be a crime of violence. *United States v. Bell*, 25 M.J. 676 (A.C.M.R. 1987), *rev. denied*, 27 M.J. 161 (C.M.A. 1988); *United States v. Myers*, 22 M.J. 649 (A.C.M.R. 1986), *rev. denied*, 23 M.J. 399 (C.M.A. 1987). As stated in *Myers*, military courts "specifically reject the oxymoronic term of 'non-violent rape.' The more enlightened view is that rape is always a crime of violence, no matter what the circumstances of its commission." *Myers*, 22 M.J. at 650. "Among common misconceptions about rape is that it is a sexual act rather than a crime of violence." *United States v. Hammond*, 17 M.J. 218, 220 n.3 (C.M.A. 1984).

*Green*, 336 N.C. at 169, 443 S.E.2d at 30. We conclude, for similar reasons, that the crime of attempted rape always involves at least a "threat of violence" within the meaning of N.C.G.S. § 15A-2000(e)(3).

It is true that *dicta* in *McDougall* supports the existence of both "non-violent" rape and "non-violent" attempted rape under North Carolina law. *McDougall*, 308 N.C. at 18 n.1, 301 S.E.2d at 319 n.1. More recently, however, we have emphasized the fact that such language in *McDougall* was mere *dicta* when we declined to "consider whether there is a non-violent crime of attempted rape under North Carolina law." *Green*, 336 N.C. at 170, 443 S.E.2d at ——. The defendant suggests that his prior conviction for attempted second-degree rape under N.C.G.S. § 14-27.3 could have been for having sexual intercourse with a person who was mentally defective, mentally incapaci-

tated, or physically helpless. N.C.G.S. § 14-27.3(a)(2) (1993). He would therefore have us conclude that it has not been established that violence or a threat of violence accompanied the defendant's prior offense of attempted second-degree rape. We do not agree.

The acts of having or attempting to have sexual intercourse with another person who is mentally defective or incapacitated and statutorily deemed incapable of consenting—just as with a person who refuses to consent—involve the "use or threat of violence to the person" within the meaning of N.C.G.S. § 15A-2000(e)(3). In this context, the force inherent to having sexual intercourse with a person who is deemed by law to be unable to consent is sufficient to amount to "violence" as contemplated by the General Assembly in this statutory aggravating circumstance. Likewise, the attempt to have sexual intercourse with such a person inherently includes a threat of force sufficient to amount to a "threat of violence" within the meaning of this aggravating circumstance.

Nor do we believe that having or attempting to have sexual intercourse with a "physically helpless" person in violation of N.C.G.S. § 14-27.3(a)(2) may properly be deemed "non-violent" rape or attempted rape. We find no merit in the suggestion that N.C.G.S. § 14-27.3(a)(2) makes it a crime to have *consensual* sexual intercourse with a physically helpless person. For purposes of this discussion only, we accept the questionable proposition that the legislature could, consistent with the Constitution of the United States, make consensual sexual intercourse with a physically helpless person a felony. *But cf. Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140 (rejecting any fundamental right of homosexuals to engage in acts of consensual sodomy, but implying that consensual sex acts between heterosexual adults ordinarily will be viewed as constitutionally protected). Nevertheless, we conclude that the legislature intended no such result and that the statute only prohibits having or attempting to have sexual intercourse with a physically helpless person who does not consent thereto. Such acts of having or attempting to have sexual intercourse with a physically helpless person who does not consent inherently include force or a threat of force sufficient to rise to the level of "the use or threat of violence" contemplated in the aggravating circumstance set forth as N.C.G.S. § 15A-2000(e)(3).

For the foregoing reasons, we conclude that the prior judgment against the defendant for attempted second-degree rape, standing alone, was sufficient evidence to require that the trial court submit

the statutory aggravating circumstance that the defendant previously had been convicted of a felony "involving the use or threat of violence to the person." Therefore, the trial court properly submitted this statutory aggravating circumstance for the jury's consideration during the defendant's capital sentencing proceeding.

**[3]** The defendant also assigns as error the trial court's failure to submit the statutory mitigating circumstance of the defendant's age at the time of the crime. *See* N.C.G.S. § 15A-2000(f)(7). The defendant was thirty-years-old at the time of the offense. He argues that there was substantial evidence to support the circumstance and that the trial court had to submit it, despite his withdrawal of his request that it be submitted. We conclude that the evidence supported the circumstance, and the trial court erred in failing to submit it to the jury.

In support of this mitigating circumstance, the defendant elicited the testimony of Dr. Baroff, who stated that, based on a series of tests, he had formed the opinion that the defendant's mental age was ten years. He further stated that the defendant performed better on easier parts of the tests than he did on the more difficult parts, which is a pattern consistent with valid and honest responses by a test-taker. Dr. Baroff testified that on the date of the offense the defendant's intellectual functioning was in the mentally retarded range, which was consistent with another I.Q. test that the defendant had taken in 1989. On cross-examination Dr. Baroff conceded that the defendant had more life experience than a ten-year-old child, but on redirect he explained that the defendant's problem-solving skills were closer to those of a ten-year-old than to those of a person who was in his thirties.

We have characterized "age" as a "flexible and relative concept." *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986). We also have noted that "the chronological age of a defendant is not the determinative factor under G.S. § 15A-2000(f)(7)." *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). Here, the defendant was thirty-years old at the time of the offense; however, the testimony of Dr. Baroff that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten-year-old was substantial evidence from which a juror or jurors reasonably could find that the defendant's age at the time of the offense was mitigating. Therefore, regardless of the defendant's wishes about the matter, the trial court had an independent duty to submit the statutory mitigating circumstance based on the evidence. *See* N.C.G.S. § 15A-2000(b)

(1988); *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 824-25 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988).

For the reasons stated, the defendant is entitled to a new capital sentencing proceeding.

NEW CAPITAL SENTENCING PROCEEDING.

Justice WHICHARD concurring in the result.

I concur in the holding that defendant must have a new capital sentencing proceeding because he was entitled to a peremptory instruction on the mitigating circumstance that he suffered a mental or emotional disturbance at the time of the murder. I also agree that the trial court should have submitted the mitigating circumstance of defendant's age at the time of the crime. I write separately because I disagree with the conclusion that attempted second-degree rape is an inherently violent crime by definition and that therefore evidence of defendant's prior conviction for attempted second-degree rape consisting solely of the judgment entered thereon satisfies the State's burden of proving the aggravating circumstance of the previous conviction of a felony involving the use or threat of violence to the person.

The opinion for the Court correctly states that in *State v. Artis*, 325 N.C. 278, 321, 384 S.E.2d 470, 494 (1989), this Court concluded that rape has as an element the use or threat of violence to the person; however, the opinion fails to note that in *Artis* the Court was considering N.C.G.S. § 14-27.2, which defines the offense of *first-degree* rape. From this Court's determination that first-degree rape necessarily involves the use or threat of violence, the opinion concludes that *second-degree* rape also always involves violence and that therefore attempted second-degree rape involves at least the threat of violence. In light of the plain language of N.C.G.S. § 14-27.3(a)(1) & (2) and the generally accepted meaning of the word "violent," I am unable to make this leap in logic.

The State may proceed on one of two theories in proving second-degree rape as defined in N.C.G.S. § 14-27.3(a)(1) & (2). It may show that the defendant had vaginal intercourse "[b]y force and against the will" of the victim, or it may show that the intercourse was committed against a victim who is "mentally defective, mentally incapacitat-

ed, or physically helpless" and that the defendant knew or should have known of the victim's condition. N.C.G.S. § 14-27.3(a)(1) & (2) (1993). A mentally defective victim may be one "who suffers from mental retardation, or . . . who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct . . . ." *Id.* § 14-27.1(1). A mentally defective person who is substantially incapable of appraising the nature of his or her conduct nonetheless could be willing to participate in sexual intercourse and able to communicate a willingness to do so. Sexual intercourse with such a person could be entirely non-violent, though deemed criminal by the legislature. A physically helpless victim may be one "who is physically unable to resist an act of vaginal intercourse or a sexual act . . . ." *Id.* § 14-27.1(3). A physically helpless person who is physically unable to resist a sexual act nonetheless may be willing to participate in such an act and capable of verbally communicating his or her willingness to do so. Sexual intercourse with a physically helpless person thus could be non-violent, though deemed criminal by the legislature.

The opinion for the Court accepts the possibility that the legislature could deem consensual sexual intercourse with a physically helpless person criminal but concludes that the legislature did not intend that result here. I cannot join in this conclusion. "[P]enal statutes are construed strictly against the State and liberally in favor of the private citizen with all conflicts and inconsistencies resolved in his favor." *State v. Pinyatello*, 272 N.C. 312, 314, 158 S.E.2d 596, 596 (1968). We thus must construe the statute liberally in defendant's favor. Whether constitutionally allowed or not, the legislature has shown itself capable of deeming consensual sexual intercourse criminal in another context: when it occurs between individuals who are not married to each other. *See* N.C.G.S. § 14-184 (1993) ("If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor . . . ."). Like N.C.G.S. § 14-184, N.C.G.S. § 14-27.3(a)(2) makes no mention of violence. Given the lack of express language denoting violence, it is similarly possible that the legislature intended second-degree rape to encompass non-violent acts of sexual intercourse with mentally defective or physically helpless persons.

To support the "prior violent felony" aggravating circumstance, the State introduced only the judgment, which stated only that defendant had been convicted of attempted second-degree rape. Without more, there was no proof that the offense in fact involved the

use or threat of violence because the State does not need to prove violence to satisfy the essential elements of second-degree rape involving a physically helpless or mentally defective victim. Defendant's conviction could have been for attempted second-degree rape against a victim who was mentally defective by virtue of his or her inability to appraise the nature of his or her conduct or against one who was physically helpless and unable physically to resist a sexual act. Neither act necessarily involves the use of violence. Rape is generally an abhorrent and serious crime, but the language of the statute allows for the possibility that the crime of attempted second-degree rape may be non-violent—indeed, thoroughly consensual.

The opinion for the Court opines that the legislature only intended to prohibit having or attempting to have nonconsensual sexual intercourse with a physically helpless person, and it questions whether any other view would pass constitutional muster. The problem, however, is that with only the judgment before us, we cannot know whether the intercourse involved in the prior felony was consensual or nonconsensual. I do not believe a death sentence based in part on the "prior violent felony" aggravating circumstance can stand without proof in the record that the felony was in fact violent.

I therefore would hold that the trial court erred in submitting this aggravating circumstance without further proof of a factual basis for the conviction showing that the offense in fact involved the use or threat of violence. If the prosecution has such proof, it should offer it at defendant's new capital sentencing proceeding.

Justice MEYER dissenting.

I do not agree that the failure to give a peremptory instruction on the statutory mitigating circumstance that defendant suffered a mental or emotional disturbance at the time of the murder, N.C.G.S. § 15A-2000(f)(2) (1988), which circumstance the jury actually found, constitutes reversible error requiring a new sentencing proceeding.

It is my position that the majority's reliance on *State v. Gay*, 334 N.C. 467, 492-94, 434 S.E.2d 840, 855 (1993), is misplaced. Though I voted for the opinion in *Gay*, I have since concluded that *Gay* was wrongly decided. Moreover, in this case, we are faced with a *statutory* mitigating circumstance not a *nonstatutory* mitigating circumstance, as was the issue in *Gay*.

It is quite clear that we employed the wrong standard of review in *Gay*. In *Gay*, this Court held that it was error to fail to give a peremptory instruction on a nonstatutory mitigating circumstance. We said in *Gay*:

> In regard to the nonstatutory mitigating circumstances which were found by one or more jurors, we have no way of knowing whether or not they were unanimously found. If one was not unanimously found, it is possible that more jurors, or all the jurors, would have found the circumstance to exist and to have mitigating value had a peremptory instruction been given.

*Id.* at 494, 434 S.E.2d at 855. This Court then held that the defendant was entitled to a new sentencing hearing because the Court was "unable to find the error [failure to give a peremptory instruction on uncontroverted nonstatutory mitigating circumstances] harmless beyond a reasonable doubt." *Id.*

While we have held that it is error to fail to give peremptory instructions where the evidence of mitigating circumstances is uncontroverted, the error is not one of constitutional magnitude warranting the "harmless beyond a reasonable doubt" standard.

The United States Supreme Court has stated:

> "Lockett and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all."

*Johnson v. Texas*, — U.S. —, —, 125 L. Ed. 2d 290, 302 (quoting with approval some language from Kennedy, J.'s concurring in judgment opinion in *McKoy v. North Carolina*, 494 U.S. 433, 456, 108 L. Ed. 2d 369, 389 (1990)), *reh'g denied*, — U.S. —, 125 L. Ed. 2d 767 (1993). Whether a mitigating circumstance is charged upon peremptorily is not an issue of constitutional dimension because failure to give a peremptory instruction does not preclude in any manner the presentation of mitigating evidence or limit the jury's consideration of such evidence. Where, as here, and as in *Gay* with regard to several nonstatutory circumstances, the jury considered and actually found the mitigating circumstance in question, it is clear that *Lockett* and its progeny have not been violated and that no error of constitutional dimension has occurred.

Since the failure to give a peremptory instruction is not an issue of constitutional dimension, the appropriate standard for determining whether the trial court's error was prejudicial is whether there is 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). Further, "[t]he burden of showing such prejudice under this subsection is upon the defendant." *Id.* Applying this standard to the case *sub judice*, defendant has failed to demonstrate that he was prejudiced by the trial court's refusal to give a peremptory instruction on the statutory mitigating circumstance at issue.

In sum, I believe that *State v. Gay* was wrongly decided, that the majority's reliance on *State v. Gay* in this case is thus misplaced, and that the majority erroneously applies a "harmless beyond a reasonable doubt" standard to an error that is not of constitutional dimension. For these reasons, I respectfully dissent.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION v. NORTH CAROLINA POWER

No. 230A93

(Filed 9 December 1994)

**1. Utilities § 117 (NCI4th)— cogeneration projects—capacity payments—avoided costs**

The Utilities Commission's disallowance of $1.39 million in expenses for capacity payments for the Ultra Cogen cogeneration projects did not violate the Public Utility Regulatory Policies Act (PURPA) to the extent it only excluded the amount above avoided costs (the incremental costs which the utility would incur if it supplied the power itself or purchased it from another source) where NC Power filed an application with the Commission to increase its rates and charges; the Commission ordered that $1.39 million of the capacity costs paid by NC Power to Ultra Cogen Systems be disallowed in calculating approved retail rates; electric utilities are required to purchase power produced by qualifying cogeneration and small power production facilities and are required to pay their avoided costs unless another rate is negotiated; NC Power rejected an offer from Ultra Cogen to sell it elec-

tricity; Ultra Cogen initiated arbitration proceedings with the Virginia State Corporation Commission; and NC Power was ordered to execute agreements with Ultra Cogen. Under FERC regulations, the purchase price for power sold by cogenerators is exempt from regulation by FERC and the rate is determined under federal rules implemented by each state for utilities subject to their ratemaking authority; however, states cannot impose purchase rates in excess of avoided costs.

**Am Jur 2d, Public Utilities §§ 133 et seq., 173 et seq.**

**2. Utilities § 117 (NCI4th)— cogeneration projects—capacity payments—measure of avoided costs**

It was not unreasonable in a general rate case involving the purchase of power from a cogenerator by NC Power (the North Carolina operation of Virginia Electric and Power Company) for the North Carolina Utilities Commission to use a competitive bidding measure in determining avoided costs where the Commission carefully reviewed the capacity rate set by an arbitrator designated by the Virginia State Corporation Commission and found that he did not properly take into account other potential sources of power, so that he greatly overestimated NC Power's avoided costs.

**Am Jur 2d, Public Utilities §§ 133 et seq., 173 et seq.**

**3. Utilities § 154 (NCI4th)— cogeneration projects—reasonable operating expenses—avoided costs**

The North Carolina Utilities Commission properly disallowed expenses for unreasonably high payments to a cogenerator in accordance with N.C.G.S. § 62-133 where NC Power, the North Carolina operation of Virginia Electric and Power Company, had purchased power from Ultra Cogen, a cogenerator; an arbitrator designated by the Virginia State Corporation Commission had set the capacity rate; and the North Carolina Utilities Commission determined that the arbitrator had not properly taken into account other sources of power, thereby assessing avoided costs unreasonably high. The Commission's exclusion of $1.39 million in expenses for capacity payments was merely the disallowance of the amount by which the contract rate exceeded NC Power's avoided costs.

**Am Jur 2d, Public Utilities §§ 133 et seq., 173 et seq.**

**4. Constitutional Law § 155 (NCI4th)— cogeneration projects—disallowance of excess avoided costs—no violation of Commerce Clause**

The North Carolina Utilities Commission's exclusion of $1.39 million of capacity costs paid by NC Power (the North Carolina operation of Virginia Electric and Power Company) to Ultra Cogen (a cogenerator) did not violate the Commerce Clause of the United States Constitution where the costs had been determined by an arbitrator designated by the Virginia State Corporation Commission. Congress, which has the power to regulate the relationships between cogenerators and electric utilities in order to protect interstate commerce, has specifically required each state to implement federal guidelines for each utility which it regulates. The North Carolina Utilities Commission's disallowance of excess avoided costs is consistent with federal regulation and constitutes lawful ratemaking. While inconsistent determinations of avoided costs by the VSCC and the Commission may burden NC Power, this is a necessary consequence of doing business in more than one state. NC Power argued before the VSCC that another method should have been used in determining avoided costs, but did not appeal, thus accepting the risk that the North Carolina Utilities Commission might not permit it to recover the excess amount from North Carolina consumers.

**Am Jur 2d, Commerce §§ 25 et seq.**

**5. Utilities § 154 (NCI4th)— NC Power rates—officers' salaries—meeting demands of common shareholders**

The Utilities Commission did not err in a general rate making case involving Virginia Electric and Power Company, which operates as North Carolina Power in North Carolina, by excluding $28,000 in officers' salaries where there was substantial evidence to support the Commission's reasoning that the individuals involved were closely linked to meeting the demands of common shareholders. The Supreme Court will not disturb the Commission's findings of fact which are supported by competent, material, and substantial evidence in view of the whole record and are not arbitrary or capricious.

**Am Jur 2d, Public Utilities §§ 133 et seq., 173 et seq.**

Justice MITCHELL dissenting in part.

Justice WEBB joins in this dissenting opinion.

Appeal by North Carolina Power pursuant to N.C.G.S. § 62-90 and N.C.G.S. § 7A-29(b) from the North Carolina Utilities Commission's Order Granting Partial Rate Increase entered on 26 February 1993 in Docket No. E-22, Subs 333 & 335. Heard in the Supreme Court 18 November 1993.

*Public Staff by A.W. Turner, Jr., and Gisele L. Rankin, Staff Attorneys, for appellee Public Staff—North Carolina Utilities Commission.*

*Michael F. Easley, Attorney General, by Margaret A. Force, Associate Attorney General, for appellee Attorney General.*

*Hunton & Williams, by Edward S. Finley, Jr. for appellant North Carolina Power.*

FRYE, Justice.

This is an appeal from an order of the North Carolina Utilities Commission (Commission) in a general rate case involving Virginia Electric and Power Company (VEPCO) which operates as North Carolina Power (NC Power) in North Carolina and Virginia Power in Virginia. NC Power is a public utility operating under the laws of North Carolina and is engaged in the generation, transmission, distribution, and sale of electricity to the public for compensation.

Procedurally this case comes to this Court as follows:

On 31 July 1992, NC Power filed an application with the Commission to adjust and increase its rates and charges for electric service to its North Carolina retail customers effective 30 August 1992. The Commission ordered that $1.39 million of the capacity costs paid by NC Power to Ultra Cogen Systems (Ultra Cogen),[1] a cogenerator, be disallowed in calculating approved North Carolina retail rates. Cogeneration involves the simultaneous production of both thermal energy, such as heat or steam, and electrical power, usually at an industrial site. By making productive use of the excess heat produced in the generation of thermal energy, cogeneration can produce elec-

1. Ultra Cogen Systems has been succeeded in interest by Hadson Power and later by LG&E Development. It will be referred to as Ultra Cogen in this opinion.

tricity at a reduced cost. Pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), regulations of the Federal Energy Regulatory Commission (FERC) promulgated thereunder, and implementation mechanisms of the states, electric utilities are required to purchase power produced by qualifying cogeneration and small power production facilities and are required to pay their "avoided costs" for the power unless another rate is negotiated.

In the spring and summer of 1986, NC Power was inundated with offers from cogenerators, that were Qualifying Facilities pursuant to federal law, to sell it electricity. In response, in December 1986, NC Power instituted a solicitation process and sent letters to potential sellers. One of NC Power's letters was sent to Ultra Cogen.

On 30 January 1987, in response to this solicitation, NC Power received proposals from Ultra Cogen to sell power from nine projects. Based on numerous factors, including cost, NC Power informed Ultra Cogen in March 1987 that it was rejecting the offer. Between 12 November 1987 and 3 December 1987, Ultra Cogen initiated arbitration proceedings with the Virginia State Corporation Commission (VSCC) seeking to arbitrate NC Power's rejection of its offer. Ultra Cogen requested the VSCC to order NC Power to enter into power purchase agreements. NC Power requested dismissal of the petitions on the ground that the VSCC had expressed its general approval of competitive bidding in a final order issued 29 January 1988. On 26 February 1988, the VSCC rejected NC Power's motion to dismiss and designated Commissioner Thomas Harwood, Jr., of the VSCC as final arbitrator of the dispute. On 30 September 1988, Commissioner Harwood ordered NC Power to execute agreements with Ultra Cogen. This order was adopted by the entire VSCC on 18 November 1988. In compliance with the VSCC's orders, NC Power executed contracts with Ultra Cogen. Additional facts will be discussed where pertinent to the issues raised by NC Power.

The questions presented on this appeal are: (1) whether the Commission's disallowance of $1.39 million in expenses for capacity payments for the Ultra Cogen cogeneration projects violates PURPA, N.C.G.S. § 62-133, or the Commerce Clause of the United States Constitution; and (2) whether the Commission's exclusion of $28,000 in officers' salaries violates N.C.G.S. § 62-133. We answer both questions in the negative and affirm the Commission's order.

I.

**[1]** As stated previously, section 210 of PURPA requires electric utilities to purchase power from qualifying cogeneration and small power production facilities. PURPA directs the Federal Energy Regulatory Commission (FERC) to prescribe rules to encourage cogeneration. These rules must insure that rates for such purchases shall be just and reasonable to electric consumers and in the public interest, and shall not discriminate against qualifying cogenerators. 16 U.S.C. § 824a-3(b) (1985). PURPA further requires that no rule prescribed for this purpose shall provide a rate which exceeds the incremental cost to the electric utility of alternative electric energy. *Id.* The "incremental cost of alternative electric energy" means the cost to the electric utility to produce or purchase the electric energy which, but for the purchase from such cogenerator or small power producer, the utility would generate or purchase from another source. *Id.* at § 824a-3(d). PURPA also provides that each state regulatory authority shall implement the FERC rule concerning purchases from cogenerators for each electric utility for which it has ratemaking authority. *Id.* at § 824a-3(f).

FERC regulations concerning the arrangements between electric utilities and cogenerators parallel the statutory provisions by requiring that rates for purchases shall be just and reasonable to consumers and in the public interest, and shall not discriminate against cogenerators. 18 C.F.R. § 292.304(a)(1) (1994). The regulations specifically provide that no utility is required to pay more than the avoided costs for purchases. *Id.* at § 292.304(a)(2). "Avoided costs" means the incremental costs which the utility would incur if it supplied the power itself or purchased it from another source. *Id.* at § 292.101(b)(6). The regulations further provide that they do not limit the ability of parties to negotiate agreements for rates and terms different from those called for in the regulations. *Id.* at § 292.301(b)(1). For example, a rate for cogeneration purchases may be less than the avoided costs if the state regulatory authority determines that a lower rate is consistent with the regulations and is sufficient to encourage cogeneration and small power production. *Id.* at § 292.304(b)(3). However, in April 1988, FERC held that it is impermissible for states to impose rates exceeding the avoided costs on wholesale purchases in interstate commerce. *Re Orange and Rockland Utilities, Inc.*, 92 P.U.R.4th 1, 14-15 (1988).[2]

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2. *Orange and Rockland Utilities* reversed the FERC's earlier position in the preamble to section 210 of PURPA. In the preamble, FERC stated in pertinent part:

The United States Supreme Court has interpreted PURPA and the FERC regulations to mean that a state regulatory authority, in implementing PURPA and the federal regulations, must apply the avoided-cost rule in the absence of a waiver granted by FERC or a specific contractual agreement setting a price that is lower than the avoided cost. *American Paper Inst. v. American Elec. Power*, 461 U.S. 402, 76 L. Ed. 2d 22 (1983). Therefore, in this case, the VSCC was required to apply the avoided-cost rule in determining wholesale rates pursuant to PURPA and FERC regulations. While both parties in this case are in agreement that the avoided-cost rule is the appropriate method for determining wholesale rates pursuant to PURPA and FERC regulations, they disagree as to what these avoided costs should have been. NC Power contends that when the VSCC set the price it had to pay Ultra Cogen for the wholesale power, the VSCC was implementing federal law and making a determination affecting wholesale power in interstate commerce. Furthermore, when the North Carolina Utilities Commission, in setting North Carolina retail rates, refused to allow NC Power to recover the $1.39 million that the VSCC required NC Power to pay Ultra Cogen, it unlawfully interfered with the VSCC's implementation of federal law. We disagree.

NC Power relies on *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 101 L. Ed. 2d 322 (1988), in support of its arguments that North Carolina is preempted by Virginia's decision. Those cases address the preemptive effect of a rate or apportionment set by FERC for a wholesale transaction subject to regulation under the Federal Power Act. Under FERC regulations, the purchase price for power sold by cogenerators is exempt from regulation by FERC under the relevant provisions of the Federal Power Act, 18 C.F.R. § 292.601(c), and the rate is determined under federal rules implemented by each state for utilities subject to their ratemaking authority. 18 C.F.R. §§ 292.304, 292.401(a). However, states cannot impose purchase rates in excess of avoided costs. *Re Orange and Rockland Utilites, Inc.*, 92 P.U.R.4th 1, 14-15. Therefore,

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> If a State program were to provide that electric utilities must purchase power from [qualifying facilities] at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, the higher rates would be based on State authority to establish such rates, and not on [FERC's] rules.

45 Fed. Reg. 12,214, 12,221 (1980).

we conclude that the Commission's disallowance of $1.39 million in expenses for capacity payments for the Ultra Cogen cogeneration projects does not violate PURPA to the extent it only excludes the amount *above* avoided costs.

We must now compare the VSCC's determination of avoided costs with the Commission's determination of avoided costs.

### A. The VSCC's Measure of Avoided Costs

**[2]** On 27 April 1988, Commissioner Harwood ruled that Ultra Cogen was entitled to receive avoided cost payments determined as of 12 November 1987, the date Ultra Cogen began to file arbitration petitions with the VSCC. The Virginia arbitrator further concluded that the avoided cost payments should be based on NC Power's costs of constructing and operating a gas-fired facility called Chesterfield Unit No. 7, which is intended to be the prototype for any new facility built through the mid-1990's.

In an interim order of 27 May 1988, Commissioner Harwood specified various "key terms and conditions that should be included in a power purchase agreement between the parties." These terms and conditions included the determination that the capacity price for each of the Ultra Cogen projects at issue shall be $341.23 per dependable kilowatt for the first fifteen years of operation and $189.70 for years sixteen through twenty-five. In a final order dated 30 September 1988, he ordered NC Power to execute agreements with Ultra Cogen including these terms. This order was adopted by the entire VSCC on 18 November 1988. In compliance with the VSCC's orders, NC Power executed contracts with Ultra Cogen. NC Power did not exercise its right to appeal the VSCC's order and it did not file the contracts with the North Carolina Utilities Commission. During the test year in this case, NC Power paid Ultra Cogen $2.8 million on a North Carolina retail allocation basis for capacity payments under these contracts.

### B. The Commission's Measure of Avoided Costs

On 26 February 1993 the Commission entered an order granting a partial rate increase finding that it was not bound by the actions of the VSCC with regard to the Ultra Cogen contracts and concluding that it was appropriate to reduce operation and maintenance expenses by $1.39 million to reflect the removal of unreasonable capacity costs.

The Commission compared the Ultra Cogen contracts to the results of the 1986 and 1988 competitive bidding solicitations and determined that the rates in the Ultra Cogen contracts exceeded NC Power's avoided costs at the time the arbitration petitions were filed. The 1986 solicitation, which used NC Power's proposed Chesterfield No. 7 as a benchmark, produced average capacity costs of $141 per dependable kilowatt compared to $341 per dependable kilowatt for the Ultra Cogen projects. The evidence showed that the 1986 projects were expected to operate at a 32.2 percent capacity factor compared to 27.1 percent for the Ultra Cogen projects, thus eliminating any justification for the higher capacity costs on the basis of lower energy costs.

The Commission noted that the Virginia arbitrator himself stated in a February 1990 order that payments for the Doswell projects (from the 1986 solicitation) were based on the avoided costs of Chesterfield No. 7 and were reasonable. The Doswell projects and the Ultra Cogen projects came on-line within a few months of one another (Doswell on 3 May and 10 May 1992 and Ultra Cogen on 22 February, 7 March, and 1 July 1992). The capacity cost for the Doswell projects is $146 per dependable kilowatt, while the capacity cost for the Ultra Cogen projects is $341 per dependable kilowatt. Furthermore, the Ultra Cogen projects' average capacity factor, based on economic dispatch, is approximately one-half that of the Doswell projects' average capacity factor, which indicates the Ultra Cogen projects' energy costs are greater.

The seven projects that were selected in the 1988 solicitation and were operational at the time of the hearing, have an average capacity cost of $171 per dependable kilowatt and a combined capacity factor of 35.9 percent. The Commission used the average capacity costs from the 1988 solicitation as a proxy for what the 1986 solicitation results would have been if the 1986 solicitation had occurred at the time the Ultra Cogen contracts were signed. Using the results of the later solicitation did not prejudice NC Power, but rather allowed it to include $30 per dependable kilowatt (or $240,000) more in rates than if the 1986 results were used.

We conclude that it was not unreasonable for the North Carolina Utilities Commission to use the competitive bidding measure in determining avoided costs, thereby rejecting the measure used by the VSCC. In fact, NC Power argued before the VSCC that competitive bidding should be the measure used. The North Carolina Utilities

Commission carefully reviewed the capacity rate set by the Virginia arbitrator's decision and found that he did not properly take into account other potential sources of power. Thus, the Virginia arbitrator greatly overestimated NC Power's avoided costs. The North Carolina Utilities Commission's exclusion of $1.39 million in expenses for capacity payments for the Ultra Cogen cogeneration projects is nothing more than the disallowance of the amount by which the contract rate exceeded NC Power's avoided costs. Therefore, there is no violation of PURPA.

**[3]** Next, we address the question of whether the Commission's disallowance of $1.39 million in expenses for capacity payments violates N.C.G.S. § 62-133. Section 62-133(b)(3) provides that the Commission shall determine a utility's "reasonable operating expenses" when setting rates. NC Power contends that the Commission, contrary to North Carolina law, arbitrarily decided that the rates paid Ultra Cogen were too high. NC Power also argues that the Commission, in deciding the reasonableness of operating expenses, must determine whether management has acted prudently. We disagree.

This Court rejected this argument in *State ex rel. Utilities Comm'n v. Carolina Power & Light Co.*, 320 N.C. 1, 358 S.E.2d 35 (1987), reasoning that:

> [A]lthough management prudence may be an important factor considered by the Commission in a general rate case, management prudence *vel non* does not control the Commission's decision as to whether to adjust test period data to reflect abnormalities having a probable impact on the utility's revenues and expenses during the test period, in order that it may set reasonable rates in compliance with N.C.G.S. § 62-133.

*Id.* at 12, 358 S.E.2d at 41. The conclusion that management imprudence is only one method of demonstrating that a given expense is unreasonable is also consistent with the standard applied in *State ex rel. Utilities Comm'n v. Intervenor Residents,* 305 N.C. 62, 286 S.E.2d 770 (1982). In *Intervenor Residents*, we held that the Commission must always determine that expenses paid to affiliated companies are reasonable. "If there is an absence of data and information from which either the propriety of incurring the expense or the reasonableness of the cost can readily be determined, the Commission may require the utility to prove [its] propriety and reasonableness by affirmative evidence." *Id.* at 75, 286 S.E.2d at 778.

The findings of the Commission, when supported by competent evidence, are conclusive. *State ex. rel. Utilities Comm'n v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989). In this case, the Commission reviewed the capacity rate set by the Virginia arbitrator and determined that he did not properly take into account other potential sources of power. Thus, his assessment of avoided costs was unreasonably high. The Commission's exclusion of $1.39 million in expenses for capacity payments was merely the disallowance of the amount by which the contract rate exceeded NC Power's avoided costs. Therefore, we conclude that the Commission properly disallowed expenses for unreasonably high payments to Ultra Cogen in accordance with N.C.G.S. § 62-133.

**[4]** Another issue raised by NC Power is whether the Commission's disallowance of these expenses violates the Commerce Clause of the United States Constitution. Under Article I, Section 8 of the U.S. Constitution, Congress shall have the power "[t]o regulate Commerce . . . among the several States . . . ." In *FERC v. Mississippi*, 456 U.S. 742, 72 L. Ed. 2d 532, *reh'g denied*, 458 U.S. 1131, 73 L. Ed. 2d 1401 (1982), the Court determined that Congress has the power under the Commerce Clause to regulate the relationships between cogenerators and electric utilities in order to protect interstate commerce. Under PURPA, federal law specifically requires each state to implement federal guidelines for each utility whose rates it regulates. 16 U.S.C. § 824a-3(f). Thus, the Commission is authorized by Congress to act with regard to arrangements between cogenerators and NC Power. The Commission's disallowance of the amount by which the Ultra Cogen contracts exceeded NC Power's avoided costs is consistent with PURPA and the FERC's regulations and constitutes lawful retail ratemaking. The Commission's actions here do not violate the Commerce Clause.

While we recognize that inconsistent determinations of avoided costs by the VSCC and the Commission may burden NC Power, we believe this burden is a necessary consequence of doing business in more than one state. Here, NC Power believed that the capacity rate set by the Virginia arbitrator and ultimately adopted by the VSCC was higher than required by federal law. In fact, NC Power argued before the VSCC that the competitive bidding method should have been used in determining avoided costs. However, instead of appealing the adverse decision of the VSCC to the Virginia courts, NC Power accepted the VSCC decision which required it to pay a rate in excess of avoided costs. NC Power thus accepted the risk that the North

Carolina Utilities Commission might not permit it to recover the excess amount from its North Carolina consumers.

II.

**[5]** Finally, we address the question of whether the Commission's exclusion of $28,000 in officers' salaries violates N.C.G.S. § 62-133. NC Power argues that absent a showing that such salaries are unreasonable or will not actually be incurred, there was no basis for the exclusion of these expenses. We disagree.

One of the critical elements of the ratemaking process is a determination of what expenses are appropriate for inclusion in rates. *State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987), and *State ex rel. Utilities Comm'n v. Public Staff*, 317 N.C. 26, 343 S.E.2d 898 (1986). The Commission argues that it is the policy of the Commission to make executive salary adjustments. *See In re Application of Duke Power Co.*, 75 NCUC Report 298 (1985). In *Application of Duke Power Co.*, the Commission concluded that Duke Power's shareholders should bear fifty percent of the overall compensation of those officers whose functions are most closely linked with meeting the demands of the common shareholders. *Id.* The Commission has reached the same conclusion in subsequent rate cases. *See, e.g., In re Application of Duke Power Co.*, 76 NCUC Report 279 (1986), and *In re Application of Carolina Power & Light Co.*, 77 NCUC Report 272 (1987).

In the present case, the Public Staff proposed to remove fifty percent of the salaries of NC Power's President/Chief Executive Officer, the Chairman of the Board of Directors, and the President/Chief Executive Officer of NC Power's sole common stockholder, Dominion Resources, Inc. The Commission concluded that the Public Staff adjustment to exclude fifty percent of the compensation of the three officers in question was appropriate, explaining its reasons for making the executive salary adjustments:

> Witness Maness testified that these three individuals are closely linked to meeting the demands of the Company's common shareholders. All three serve on the VEPCO Board of Directors, as well as the Dominion Resources, Inc. Board of Directors. The Chairman of the VEPCO Board is also the Chairman of the Dominion Resources, Inc. Board, as well as the boards of Dominion Resources, Inc.'s other subsidiaries, Dominion Capital, Dominion Energy, and Dominion Lands. Witness Maness testified that

this adjustment is especially appropriate for VEPCO given the nature of Dominion Resources, Inc.'s non-regulated business interests. Witness Maness stated that the interests of Dominion Resources, Inc. as they relate to its non-regulated businesses may not always coincide with the interests of VEPCO's retail ratepayers. Witness Maness also testified that the Commission has adopted an adjustment consistent with his approach in each of the seven Duke, CP&L, and VEPCO general rate cases decided since November 1984.

This Court will not disturb the Commission's findings of fact which are supported by competent, material, and substantial evidence in view of the whole record and are not arbitrary or capricious. *State ex rel. Utilities Comm'n v. Thornburg*, 325 N.C. 484, 385 S.E.2d 463 (1989). The authority to regulate the rates of public utilities lies with the Commission and a reviewing court may not modify or reverse its determination merely because the court would have reached a different finding based on the evidence. *State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 358 S.E.2d 339 (1987). After reviewing the entire record, we conclude that there is substantial evidence to support the Commission's salary adjustments in this case.

For the foregoing reasons, the Commission's order of 26 February 1993 is affirmed.

AFFIRMED.

Justice MITCHELL dissenting in part.

It is my belief that when the Virginia State Corporation Commission (VSCC) set the price that North Carolina Power (NC Power) must pay Ultra Cogen Systems (Ultra Cogen) for wholesale power, the VSCC was implementing federal law and entering an order affecting wholesale power in interstate commerce. Accordingly, I conclude that when the North Carolina Utilites Commission (NCUC), while setting North Carolina retail rates, refused to allow NC Power to recover the $1.39 million that the VSCC had ordered NC Power to pay Ultra Cogen, it unlawfully interfered with the VSCC's implementation of federal law. Therefore, I dissent from the decision of the majority to the extent that it affirms the NCUC's refusal to allow NC Power to recover the $1.39 million of costs it actually incurred by complying

with the VSCC's order requiring it to purchase power from Ultra Cogen.

Under procedures established by federal law, Ultra Cogen applied to the VSCC for an order requiring NC Power to purchase wholesale power from Ultra Cogen and setting the price NC Power would pay for that power. Congress has concluded that wholesale power transactions affect interstate commerce and shall be regulated by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act. As a cogenerator qualifying facility selling wholesale power, Ultra Cogen's sales of wholesale power are controlled by the Federal Public Utility Regulatory Policies Act of 1978 (PURPA). 16 U.S.C. § 828a-3 (1985). By enacting PURPA, Congress has delegated to the states, under mandatory guidelines established by the FERC, authority over wholesale transactions involving cogenerators, such as the transaction between Ultra Cogen and NC Power at issue in the present case. As a result, when VSCC set the price NC Power must pay Ultra Cogen for the wholesale power at issue here, the VSCC was implementing federal law and making a determination affecting wholesale power in interstate commerce. The VSCC was making a determination which, but for the provisions of PURPA, would have been made exclusively by FERC; that determination was the functional and legal equivalent of an order by the FERC setting the price. For that reason, when the NCUC refused to allow NC Power to recover the $1.39 million in annual capacity costs it had actually incurred as a result of the VSCC order, the NCUC unlawfully interfered with the VSCC's implementation of federal law. In my view, the NCUC's actions were preempted by federal law and must be reversed by this Court.

The Supremacy Clause of the Constitution of the United States subordinates the legislative and administrative acts of the individual states to those of the United States.

> Pre-emption occurs when Congress, in enacting a Federal statute, expresses a clear intent to pre-empt state law when there is outright or actual conflict between Federal and state law, where compliance with both Federal and state law is in effect physically impossible, where there is implicit in Federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement Federal law, or where the state law stands as an obstacle to the accomplishment and execution of the

> full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a Federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.

*Louisiana Public Service Comm. v. Federal Communications Comm.*, 476 U.S. 355, 368-69, 90 L. Ed. 2d 369, 381-82 (1986) (citations omitted). I believe that the doctrine of preemption embodied in the Supremacy Clause precludes the order entered by the NCUC and affirmed by the majority of this Court in the present case.

PURPA was adopted in 1978 as part of the National Energy Act. *Federal Energy Regulatory Comm. v. Mississippi*, 456 U.S. 743, 745, 72 L. Ed. 2d 532, 537-38 (1982). PURPA represented a response to rapidly fluctuating conditions, including an anticipation of impending shortages of essential non-renewable forms of energy. *Id.* It was intended to advance a national policy of energy conservation. *Id.* Section 210 of Title II of PURPA dealing with cogeneration was part of a broad federal statute that also set standards for retail rates for electric utilities. *Id.* Section 210 was intended to promote the development of qualified cogeneration facilities in order to reduce the demand for traditional fossil fuels. *Id.* at 750, 72 L. Ed. 2d at 541.

PURPA expressly requires the FERC to "prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production." 16 U.S.C. § 824a-3(a) (1985). The FERC is specifically required to promulgate rules requiring electric utilities to "sell electric energy to qualifying cogeneration facilities" and to "purchase electric energy from such facilities." 16 U.S.C. § 824a-3(a)(1)-(2) (1985).

In 1980, pursuant to the requirement of Section 210(a) of PURPA, the FERC issued a series of regulations further defining federal cogeneration law and policy. Section 292.303(a) of the regulations imposes a federal obligation on electric utilities to purchase power from qualifying facilities; "each electric utility shall purchase, in accordance with [18 C.F.R. § 292.304], any energy and capacity which is made available from a qualifying facility: (1) directly to the electric utility . . . ." 18 C.F.R. § 292.303(a) (1992). Acting under PURPA, the FERC provided that a rate for such purchases satisfies the just, reasonable, and public interest requirement for PURPA rates if the rate equals the "avoided costs" of a utility. The FERC required that avoided costs must be derived through a mandatory consideration of

specific factors. These factors include the anticipated reliability of the qualifying facility. 18 C.F.R. § 202.304(b)(2), (b)(4), (e) (1992). The FERC has also provided that such rates may be less than avoided costs "if the State regulatory authority . . . determines that a lower rate is consistent with [the just, reasonable, and public interest requirement] and is sufficient to encourage cogeneration." 18 C.F.R. § 292.304(b)(3) (1992).

The FERC regulations also contain additional provisions for establishing rates to be paid to qualifying facilities. They provide that the cogenerator shall, at its option, provide energy or capacity "pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term." 18 C.F.R. § 292.304(d)(2) (1992). If the qualifying facility so decides, "the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." *Id.*

The profound effect of PURPA on state authority is demonstrated by the FERC's comments to its 1980 regulations. There, the FERC determined that efficient use of fuels allowed cogeneration facilities to "make a significant contribution to the Nation's effort to conserve its energy resources." 45 Fed. Reg. 12,215 (1980). The FERC further concluded that Section 210 was designed to remove former obstacles to the growth of cogeneration, one of which was that utilities were not generally required to purchase the power produced by a cogenerator at an appropriate rate. *Id.* Under Section 210, each electric utility would be required "to offer to purchase available electric energy from cogeneration and small production facilities." *Id.*

The FERC also has determined that PURPA requires cooperation between the federal government and the states. Implementation of PURPA is reserved to state regulatory authorities and non-regulated entities. 45 Fed. Reg. 12,216 (1980). In this context, the FERC has determined that "implementation means enforcing the federal obligation on electric utilities to purchase power at avoided cost rates" which expressly requires a determination of "the rate for purchases at a level . . . appropriate to encourage cogeneration." 45 Fed. Reg. 12,221 (1980). Therefore, "[s]tate laws or regulations which would provide rates lower than the Federal standards would fail to provide the requisite encouragement of these technologies, and must yield to Federal law." *Id.* The states' obligation to follow federal rate law is

also reflected in the FERC's determination that when a facility "shows that it requires rates for purchases based on full avoided costs to remain viable, or to increase its output, the State regulatory authority . . . is required to establish such rates." 45 Fed. Reg. 12,223 (1980).

It was within the context of the foregoing federal statutes and regulations that the VSCC made its determination that NC Power must purchase wholesale power from Ultra Cogen at the prices the VSCC established. No one has questioned the jurisdiction of the VSCC to hear the dispute or to enter its decision. Ultra Cogen went to the VSCC rather than the NCUC because the wholesale sales at issue were to take place in Virginia. Once the VSCC entered its ruling, the obligation of NC Power to purchase wholesale power from Ultra Cogen and the price of that wholesale power were established by federal law. From that point on, neither the NCUC nor any other state agency was free to establish a different price that NC Power must pay Ultra Cogen for the wholesale power, even though it was to be resold in North Carolina. Certainly, NC Power was not required to pay Ultra Cogen different prices for the wholesale power purchased depending on the state in which NC Power resold that power. In my view, the NCUC was without authority to indirectly subvert the VSCC's decision by refusing to permit NC Power to recover the amounts it had been forced to pay involuntarily to Ultra Cogen for the power in question by virtue of VSCC's order. Further, I do not share the apparent view of the majority, as expressed in footnote 2 of its opinion, that the failure of NC Power to devote the time and resources necessary to appealing the decision the VSCC had entered over NC Power's strong objections and contentions somehow amounted to acceptance of that decision by NC Power. NC Power was entitled, in my view, to assume that the NCUC would honor the ruling of the VSCC applying federal law.

In *Federal Energy Regulatory Commission v. Mississippi*, the Supreme Court of the United States recognized the preemptive effect of PURPA and rejected a constitutional challenge to Section 210 of PURPA. The Supreme Court recognized that the statute used "state regulatory machinery to advance federal goals," and therefore presented unusual preemption issues. *Federal Energy Regulatory Comm. v. Mississippi*, 456 U.S. at 759, 72 L. Ed. 2d at 546. The Supreme Court expressly stated in this context that "state courts have a unique role in enforcing the body of federal law," and that "state courts were directed to heed the constitutional command that 'the policy of the [F]ederal Act is the prevailing policy in every state

. . . and should be respected accordingly in the courts of the State.' " *Id.* at 760, 72 L. Ed. 2d at 547 (quoting *Testa v. Katt*, 330 U.S. 386, 392-93, 91 L. Ed. 967, 972 (1947) and *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57, 56 L. Ed. 327, 349 (1912)). The Supreme Court went on to state that:

> Any other conclusion would allow the States to disregard both the pre-eminent position held by Federal law throughout the Nation . . . and the congressional determination that the Federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery. Such an approach, *Testa* emphasized, "flies in the face of the fact that the States of the Union constitute a nation," and "disregards the purpose and effect of Article IV of the Constitution."

*Id.* at 760-61, 72 L. Ed. 2d at 548 (citations omitted).

In my view, the decision of the NCUC and the opinion of the majority here conflict with the decision of the Supreme Court of the United States in *Federal Energy Regulatory Commission v. Mississippi*, to the extent that they conclude that the preemption doctrine does not apply and that the order entered by the NCUC was permissible under PURPA. When a state agency purports to carry out the intent of PURPA, it must follow federal law. When the VSCC entered its order requiring NC Power to buy power from Ultra Cogen and setting the price NC Power had to pay for that power, it was enforcing PURPA, the applicable federal law. When the NCUC disregarded the order entered by the VSCC, it prevented the VSCC's lawful order enforcing the controlling federal law established by PURPA and violated the Supremacy Clause. The NCUC assumed total control over the valuation of costs related to PURPA-mandated purchases of electric power, despite the decision by the VSCC implementing PURPA and despite NC Power's clear federal obligation to pay Ultra Cogen the amount set by the VSCC for the power NC Power was required to purchase over its strenuous objections from Ultra Cogen. The error of the NCUC in entering its order is emphasized by its statement in denying more than $1.39 million in annual costs, that "we recognize our [federal] obligation to encourage [qualified cogeneration facilities], but that is not the issue here." I do not believe that the NCUC can so easily avoid the requirements of PURPA by simply asserting that they do not apply. I believe that the exclusion of recovery for purchased capacity costs such as those at issue here is directly related to the

federal mandate of encouragement of qualifying facilities to produce electric power and conserve the electric resources of this nation.

Because I believe that in determining the amount NC Power must pay Ultra Cogen under PURPA, the VSCC lawfully applied the federal law preempting the field, I believe that the determination of the VSCC had a preemptive effect equivalent to the preemptive effect of FERC orders establishing wholesale rates. That being the case, the VSCC order was binding on the NCUC under the theory of preemption. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 101 L. Ed. 2d 322 (1988) (rates mandated by FERC held preemptive); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986) (same). In my view, the action of the NCUC was preempted by PURPA and by the essentially federal act of the VSCC in establishing the wholesale price that NC Power must pay Ultra Cogen for the power it acquired for resale to its retail consumers. Therefore, I dissent from that part of the decision of the majority holding to the contrary.

Justice WEBB joins in this dissenting opinion.

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CITY OF NEW BERN, A NORTH CAROLINA MUNICIPAL CORPORATION v. THE NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; THE TRUSTEES OF CRAVEN COMMUNITY COLLEGE, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; CRAVEN REGIONAL MEDICAL AUTHORITY, A PUBLIC BODY AND A BODY CORPORATE AND POLITIC WHICH HAS ITS PRINCIPAL OFFICE AND PLACE OF BUSINESS IN THE CITY OF NEW BERN, CRAVEN COUNTY, NORTH CAROLINA; THE COUNTY OF CRAVEN, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF NORTH CAROLINA; AND MICHAEL EASLEY, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 5PA94

(Filed 9 December 1994)

1. **Building Codes and Regulations § 46 (NCI4th); Constitutional Law § 24 (NCI4th)— enforcement of building codes—transfer of responsibility from city to county—local acts relating to health and sanitation—unconstitutionality**

Acts which transferred the responsibility for the administration and enforcement of building codes in New Bern from the City of New Bern to Craven County for all buildings associated with

the New Bern-Craven County Board of Education, the Craven Community College, and the Craven Regional Medical Center were local acts since they are in conflict with N.C.G.S. § 160A-411; there is no rational basis that justifies the separation of New Bern from all other cities in North Carolina for special legislative attention regarding the designation of an appropriate building inspections department; and the acts thus create an unreasonable classification. Furthermore, these local acts violate N.C. Const. art. II, § 24(a) because the shifting of responsibility for inspections pursuant to the State Building Code affects health and sanitation.

**Am Jur 2d, Buildings § 2; Constitutional Law §§ 319-321.**

2. **Constitutional Law § 24 (NCI4th)— building code inspections—unconstitutionality of local acts—prospective application of ruling**

The trial court did not err by applying prospectively only its ruling that acts which transferred responsibility for building code inspections of certain buildings in a city from the city to the county were unconstitutional local acts since there was no evidence of bad faith on the part of defendants, their reliance on the acts was reasonable, and inspections performed by the county cannot be undone at this juncture without the risk of untoward consequences.

**Am Jur 2d, Constitutional Law §§ 319-321.**

3. **Declaratory Judgment Actions § 26 (NCI4th)— declaratory judgment action—statutes held unconstitutional—equal apportionment of costs**

The trial court did not abuse its discretion by apportioning the costs of a declaratory judgment action in which statutes were held to be unconstitutional equally between plaintiff city and each defendant.

**Am Jur 2d, Declaratory Judgments §§ 253-255, 268.**

On appeal of right pursuant to N.C.G.S. 7A-30(1) and on discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 113 N.C. App. 98, 437 S.E.2d 655 (1993), affirming a judgment entered 24 February 1992 by Butterfield, J., in Superior Court, Craven County. Heard in the Supreme Court 12 October 1994.

*Ward, Ward, Willey & Ward, by A.D. Ward, for plaintiff-appellee.*

*Henderson, Baxter & Alford, P.A., by David S. Henderson & Benjamin G. Alford, for defendant-appellant The New Bern-Craven County Board of Education; Sumrell, Sugg, Carmichael & Ashton, P.A., by Fred M. Carmichael and Rudolph A. Ashton, III, for defendant-appellant Craven Regional Medical Authority; Sumrell, Sugg, Carmichael & Ashton, P.A., by James R. Sugg, for defendant-appellant The County of Craven; Ward & Smith, P.A., by Kenneth R. Wooten and Anne D. Edwards, for defendant-appellant The Trustees of Craven Community College.*

WHICHARD, Justice.

On 8 November 1988 plaintiff-appellee, the City of New Bern [hereinafter "the City"], filed a declaratory judgment action in Superior Court, Craven County, seeking to have three statutes governing the inspection of buildings in New Bern declared unconstitutional. On 16 January 1989 the trial court (Reid, J.) entered an order dismissing the action with prejudice, ruling that no justiciable controversy existed that would permit the court to take jurisdiction over the matter. The City appealed to the Court of Appeals. This Court allowed the City's petition for discretionary review prior to determination by the Court of Appeals, reversed the dismissal of the lawsuit, and remanded it to the Superior Court, Craven County, for further proceedings. *City of New Bern v. New Bern-Craven Co. Bd. of Ed.*, 328 N.C. 557, 402 S.E.2d 623 (1991).

On 28 October 1991 the City moved for judgment on the pleadings. At the 4 November 1991 Civil Session of Superior Court, Craven County, Judge G.K. Butterfield, Jr., sitting without a jury, heard the matter. In a judgment filed 24 February 1992, Judge Butterfield ruled that the three statutes were unconstitutional, that the judgment applied prospectively only, and that costs would be apportioned equally between the City and each defendant. The New Bern-Craven County Board of Education, the Trustees of Craven Community College, the Craven Regional Medical Authority, and the County of Craven [hereinafter "defendants" collectively] appealed to the Court of Appeals, which affirmed the trial court. The Attorney General, who was also a defendant, did not appeal. On 25 January 1994 defendants filed a notice of appeal as to constitutional questions and a petition

for discretionary review. On 3 March 1994 this Court denied the City's motion to dismiss the appeal for lack of a substantial constitutional question and allowed defendants' petition for discretionary review.

**[1]** Defendants argue that the three acts are constitutional because they are not local and, if local, they do not relate to health or sanitation and thus are not prohibited by Article II, Section 24 of the North Carolina Constitution. We disagree and accordingly affirm the Court of Appeals on this issue.

The City brings forward two additional issues pursuant to Rule 16(a) of the North Carolina Rules of Appellate Procedure. It argues that the trial court unconstitutionally applied its judgment prospectively only. We disagree and accordingly affirm the Court of Appeals on this issue. The City also argues that the trial court abused its discretion by apportioning costs equally between the City and each defendant. The Court of Appeals did not address this issue expressly but held that there was no merit in the City's argument. We find no abuse of discretion in the trial court's judgment and accordingly affirm the Court of Appeals on this issue.

On 26 June 1986 the legislature enacted "An Act to Provide for Enforcement of Building and Other Codes by the County of Craven as to Property of the New Bern-Craven County Board of Education Rather Than by Cities in that County," which provides in pertinent part:

> Section 1. Craven County shall have the exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements and all other applicable regulations promulgated by the State or any city respecting building, construction, fire and safety codes as the same relate to or are legally applicable to the New Bern-Craven County Board of Education.

1986 N.C. Sess. Laws ch. 805, § 1.

On 12 June 1987 the legislature enacted a similar act regarding the enforcement of the building code as it relates to Craven Community College. The act was entitled "An Act to Provide for Enforcement of Building and Other Codes by the County of Craven as to Property of Craven Community College Rather Than by Cities in that County," and provides in pertinent part:

> Section 1. Craven County shall have exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements, and all other applicable regulations adopted by the State or any city respecting building, construction, fire, and safety codes as the same relate to or are legally applicable to the Board of Trustees of Craven Community College.

1987 N.C. Sess. Laws ch. 341, § 1.

On 23 June 1988 the legislature enacted a similar act with regard to the Craven Regional Medical Center. It was entitled "An Act to Provide for Enforcement of Building and Other Codes by the County of Craven as to Property Owned or Leased by the Craven Regional Medical Center Rather Than by Cities in that County," and provides in pertinent part:

> Section 1. Craven County shall have exclusive jurisdiction as against any city as defined by G.S. 160A-1 for the administration and enforcement of all laws, statutes, code requirements and all other applicable regulations promulgated by the State or any city respecting building, construction, fire and safety codes as the same relate to or are legally applicable to any property owned or leased by the Craven Regional Medical Center.

1987 N.C. Sess. Laws ch. 934, § 1.

As a result of these three acts, the county, rather than the City, performed the inspections of those buildings within the city limits that were associated with the Board of Education, the Craven Regional Medical Center, and Craven Community College. Prior to the acts, the City performed these inspections pursuant to N.C.G.S. § 160A-411.

Defendants argue that these acts are general rather than local and therefore are not prohibited by the North Carolina Constitution. The controlling provision is Article II, Section 24 of the North Carolina Constitution, which states in pertinent part:

> (1) *Prohibited subjects.* The General Assembly shall not enact any local, private, or special act or resolution:
>
> (a) Relating to health, sanitation, and the abatement of nuisances;
>
> . . . .
>
> (2) *Repeals.* Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law;

> but the General Assembly may at any time repeal local, private, or special laws enacted by it.
>
> (3) *Prohibited acts void.* Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.
>
> (4) *General laws.* The General Assembly may enact general laws regulating the matters set out in this Section.

N.C. Const. art. II, § 24. Thus, under this section if the acts are general, they are constitutional, but if they are local and relate to a prohibited subject—such as health, sanitation, or the abatement of nuisances—they are void.

Our first step therefore is to determine whether the acts are local or general. As we review these acts, we are mindful that " '[e]very presumption is in favor of the validity of an act of the Legislature, and all doubts are resolved in support of the act,' " *Lowery v. School Trustees*, 140 N.C. 33, 40, 52 S.E. 267, 269 (1905) (quoting Jabez G. Sutherland, *Statutes and Statutory Construction* § 82 (John Lewis ed., 2d ed. 1904)); however, we have the power and the duty to declare a legislative act unconstitutional when such is " 'plainly and clearly the case.' " *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (quoting *Glenn v. Board of Education*, 210 N.C. 525, 529, 187 S.E. 781, 784 (1936)); *see also Kornegay v. Goldsboro*, 180 N.C. 441, 445-46, 105 S.E. 187, 189 (1920) (discussing scope of judicial review of legislative acts).

Since the adoption of Article II, Section 24 (then Section 29) by the legislature in 1915 and its approval by the voters in the election of 1916, this Court has developed methods of analysis for determining whether an act is local or general. The first method involved the consideration of the number of counties in the state affected by the statute. If a majority were in the class at which the legislation was directed, the law was deemed general. *See, e.g., State v. Dixon*, 215 N.C. 161, 165, 1 S.E.2d 521, 523 (1939) (holding statute that applied to less than half the counties to be local); *In re Harris*, 183 N.C. 633, 636-37, 112 S.E. 425, 426-27 (1922) (holding statute that affected 56 of the 100 counties to be general).

This Court next developed the reasonable classification method of analysis, which was first applied in *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961), and which seeks to determine whether " 'any rational basis reasonably related to the objective of the legisla-

tion can be identified which justifies the separation of units of local government into included and excluded categories.' " *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978) (quoting Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340, 391 (1967)). The act is general if a rational basis exists and it applies uniformly to those in the separated class; if not, it is local. *See id.* at 690-91, 249 S.E.2d at 407.

Our most recent decision involving the general-local law distinction is *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987). In *Emerald Isle* this Court addressed whether an act that established a public pedestrian beach access facility in Bogue Point was a local act. We there applied a general public interest method of analysis, which focuses on "the extent to which the act in question affects the general public interests and concerns." *Id.* at 651, 360 S.E.2d at 763. In discussing our choice of method, we stated:

> We find that the traditional reasonable classification analysis previously applied by this Court in determining what constitutes a "local act" in *Adams* is ill-suited to the question presented in this case, since by definition a particular public pedestrian beach access facility must rest in but one location. Furthermore, assuming the legislature acts within its authority when it establishes such facilities by legislative action, we find it unnecessary to require it to do so by crafting tortured classifications.

*Id.* at 650, 360 S.E.2d at 762. These statements do not suggest that the general public interest method of analysis replaces the reasonable classification method in every case. Rather, we recognized "that no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general." *Id.* (quoting *McIntyre*, 254 N.C. at 517, 119 S.E.2d at 893). In *Emerald Isle* we departed from the reasonable classification method of analysis because the act at issue was site-specific, that is, the act applied to a specific portion of land and to a specific facility that could be located only on that land. In the case before us, the acts shift the responsibility for enforcing the building code from the City to the county. Such a legislated change could be effected as easily in New Bern as in any other city in the state. These acts therefore are not site-specific, and thus the *Emerald Isle* general public interest method of analysis is unsuited to this case.

Under a reasonable classification analysis,

> [a] general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class.

*Adams*, 295 N.C. at 690-91, 249 S.E.2d at 407. Defendants argue that New Bern required special legislative attention because the City and the county were unable to agree on which entity should perform the inspections of the buildings covered by the three acts. This inability to agree, they contend, provides a rational basis for the legislature's objective in enacting these acts, that of designating Craven County to perform the inspections. We disagree.

The legislature by general law has provided which entities are authorized to perform building inspections and how those duties may be assigned. As to cities, the legislature enacted N.C.G.S. § 160A-411, which provides in pertinent part:

> Every city in the State is hereby authorized to create an inspection department, and may appoint one or more inspectors . . . . Every city shall perform the duties and responsibilities set forth in G.S. 160A-412 either by: (i) creating its own inspection department; (ii) creating a joint inspection department in cooperation with one or more other units of local government, pursuant to G.S. 160A-413 or Part 1 of Article 20 of this Chapter; (iii) contracting with another unit of local government for the provision of inspection services pursuant to Part 1 of Article 20 of this Chapter; *or (iv) arranging for the county in which it is located to perform inspection services within the city's jurisdiction as authorized by G.S. 160A-413 and G.S. 160A-360. . . .*
>
> *In the event that any city shall fail to provide inspection services by the date specified above or shall cease to provide such services at any time thereafter, the Commissioner of Insurance shall arrange for the provision of such services, either through personnel employed by his department or through an arrangement with other units of government.*

N.C.G.S. § 160A-411 (1994) (emphasis added); *see also* N.C.G.S. § 153A-351 (1991) (providing similar procedures for county inspections). This statute does not mandate that the City and the county

must agree regarding the provision of inspection services; rather, it provides the options available to the City in determining who shall perform the inspections, one of which is arranging for the county to perform them. Further, if the City fails to provide inspection services via any of the four options, the statute dictates that the Commissioner of Insurance shall arrange for the provision of the services. The legislature does not need to intervene in the process should the county and the City fail to agree; instead, the legislature has provided that the Commissioner of Insurance shall do so should the City fail to follow the requirements of the statute.

Based on this statute, as well as on the facts of this case, we perceive no rational basis that justifies the separation of New Bern from all other cities in North Carolina for special legislative attention regarding the designation of an appropriate inspection department. The acts thus create an unreasonable classification. They therefore are local acts.

Defendants argue that even if the acts are local, they are not prohibited by the North Carolina Constitution because they do not relate to "health, sanitation, and the abatement of nuisances." N.C. Const. art. II, § 24(a). Defendants further contend that because the acts are not prohibited by the Constitution, the legislature acted within its plenary powers to enact local laws pursuant to Article VII, Section 1 of the North Carolina Constitution, which provides in pertinent part:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, *except as otherwise prohibited by this Constitution*, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. Const. art. VII, § 1 (emphasis added). This issue therefore turns on whether the Constitution otherwise prohibits these acts by virtue of Article II, Section 24. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("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."). If so, the legislature's ability to ascribe powers and duties to specific cities and counties does not extend to these acts and they are void. N.C. Const. art. II, § 24(3).

The acts at issue are in conflict with N.C.G.S. § 160A-411 in that under them the City no longer "shall perform the duties and responsibilities [of an inspection department]." Prior to these acts, the City performed the inspections and had the option to request that the board of county commissioners of Craven County "exercise their powers within part or all of the city's jurisdiction, . . . until [the City] officially withdraws its request." N.C.G.S. § 160A-413 (1994). Now the City has no options under the acts and cannot designate an inspection department to perform the inspections. Consequently, our concern is two-fold: first, whether inspections pursuant to the North Carolina State Building Code [hereinafter "the Code"] affect any of the prohibited subjects of health, sanitation, or the abatement of nuisances; and second, whether the shifting of responsibility for those inspections consequently affects health, sanitation, or the abatement of nuisances.

The legislature empowered the Building Code Council to prepare and adopt a North Carolina State Building Code, N.C.G.S. § 143-138(a) (1993), and provided that "[a]ll regulations contained in the North Carolina State Building Code shall have a reasonable and substantial connection with the public health, safety, morals, or general welfare, and their provisions shall be construed liberally to those ends." *Id.*(c) The legislature mandated that the Code should cover specified areas of buildings and their construction, including, among others, location, height, lighting, ventilation, permissible materials, elevators, and plumbing. In addition, the Council may adopt "other reasonable rules pertaining to the construction of buildings and structures and the installation of particular facilities therein as may be found reasonably necessary for the protection of the occupants of the building or structure, its neighbors, and members of the public at large." *Id.*(b). The Code also may regulate activities and conditions "that pose dangers of fire, explosion, or related hazards." *Id.* These fire prevention provisions "shall be considered the minimum standards necessary to preserve and protect public health and safety." *Id.* The importance the legislature places on adherence to and enforcement of the Code is reflected by its criminalization of violations of the Code. *See id.*(h) (code violations are misdemeanors resulting in fines).

The Building Code Council has followed the mandate of the legislature by creating a detailed code that covers all the specified areas. That part of the Code that addresses administration and enforcement states that its purpose is "to provide [for] the public safety, health and general welfare by providing for the administration and enforcement

of the North Carolina State Building Code." IA N.C. State Bldg. Code § 1.2.1 (1993). That part of the Code that addresses fire prevention states that its provisions "shall apply to all buildings, structures, premises and conditions that pose danger of fires, explosions, or related hazards within this jurisdiction." V N.C. State Bldg. Code § 102. That part of the Code addressing plumbing describes its principles as "basic goals in environmental sanitation worthy of accomplishment through properly designed, acceptably installed, and adequately maintained plumbing systems. Some of the details of a plumbing construction must vary, but the basic *sanitary* and safety principles are the same." II N.C. State. Bldg. Code § 301 (emphasis added). Some of the aims informing the plumbing regulations are the provision of "adequate, safe and potable water" and "adequate sanitary facilities" in premises intended for human occupancy. *Id.* §§ 301.1 & 301.3.

Thus, both the legislature's directions for the creation of the Code and the Building Code Council's stated purposes for the different inspections under the Code evince an intent to protect the health of the general public. The Code regulates plumbing in an effort to maintain sanitary conditions in the buildings and structures of this state and thus directly involves sanitation, and consequently the protection of the health of those who use the buildings. The enforcement of the fire regulations protects lives from fire, explosion and health hazards. We find the conclusion that inspections pursuant to the Code affect health and sanitation inescapable.

The acts in question alter the legislative directive of N.C.G.S. § 160A-411 that the City shall determine who will perform the inspections under the Code. Those who perform the inspections have the duty and responsibility:

> to enforce within their territorial jurisdiction State and local laws relating to
>
> (1) The construction of buildings and other structures;
>
> (2) The installation of such facilities as plumbing systems, electrical systems, heating systems, refrigeration systems, and air-conditioning systems;
>
> (3) The maintenance of buildings and other structures in a safe, *sanitary, and healthful* condition;
>
> (4) Other matters that may be specified by the city council.

N.C.G.S. § 160A-412 (1994) (emphasis added). This Court previously has addressed similar local legislation and concluded that the shifting of responsibility for enforcement of laws affecting the health of the public was barred under Article II, Section 29 (now Section 24) of the Constitution. In *Sams v. Comrs. of Madison*, 217 N.C. 284, 7 S.E.2d 540 (1940), this Court considered whether a county physician and quarantine officer who had been elected by the county board of health could sue the Board of County Commissioners of Madison County for payment of his salary. The board of county commissioners denied liability, arguing that the local act creating the Madison County Board of Health was unconstitutional under Article II, Section 29 (now Section 24). The local law, which applied only to Madison County, created a county board of health and named its members. The board of health was to elect a county physician and quarantine officer to inspect the county institutions to see "that each [was] kept in a sanitary condition." *Sams*, 217 N.C. at 285, 7 S.E.2d at 541. The Court determined that the act directly affected health and sanitation and noted that the act was "in conflict with the [s]tate-wide policy as contemplated by the Constitution and established by general laws regulating the composition of county boards of health throughout the State and the election of county physicians." *Id.* at 285-86, 7 S.E.2d at 541; *see also Lamb v. Board of Education*, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952) (holding local statute relating to health and sanitation unconstitutional, noting that it was in conflict with the general law because it limited the spending of a county board of education to provide sanitary conditions in schools through the sewerage system and the water supply); *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313, 315 (1951) (holding local statute relating to health unconstitutional, in part because it conflicted with statewide statutes requiring separate elections of county and city health officers by allowing the board of aldermen and the board of commissioners to create by appointment a joint city-county board of health).

This Court reached a similar conclusion in *Board of Health v. Comrs. of Nash*, 220 N.C. 140, 16 S.E.2d 677 (1941), which involved two local statutes that affected the process of appointment of a health officer for Nash County. The general law provided that the board of health would elect a county health officer. If the board failed to appoint an officer, the secretary of the State Board of Health was to do so. One local statute altered this process by providing that the appointment of the health officer of Nash County would not become effective until the Board of County Commissioners of Nash County

approved the appointment. The other statute provided that if the board of county commissioners disapproved the appointment, the board of health would appoint another, and if the board of county commissioners did not approve the second appointment, the secretary of the State Board of Health then would appoint an officer. The Court declared that "[t]he position that a law affecting the selection of a public health officer intimately charged with the administration of such laws, where contact with the subject is more immediate[,] is not a 'law relating to health,' is not tenable." *Id.* at 143, 16 S.E.2d at 679. The Court held that the statutes were unconstitutional because they related to health, and stated, "This Court is . . . committed to the proposition that a law affecting the selection of officers to whom is given the duty of administering the health laws is a law 'relating to health.' " *Id.*

We remain committed to that proposition. The acts before us, like those in *Sams* and *Board of Health,* are in conflict with the general laws regulating the selection of personnel to enforce the Code, the enforcement of which unquestionably affects health and sanitation. The City no longer can choose who will perform inspections in its jurisdiction. We conclude that the three local acts that alter the selection process of those who will enforce the Code affect health and sanitation. Because the unconstitutionality of these acts is plain and clear, *Emerald Isle,* 320 N.C. at 647, 360 S.E.2d at 761, we hold that they are prohibited by the Constitution, Article II, Section 24. They therefore are void pursuant to subsection (3) of that section. Accordingly, for the reasons stated, we affirm the Court of Appeals on this issue.

**[2]** The City argues that the Court of Appeals should not have affirmed the trial court's ruling that its judgment holding the acts unconstitutional would apply prospectively only. In affirming the trial court, the Court of Appeals relied on *Insurance Co. v. Ingram, Comr. of Insurance,* 301 N.C. 138, 271 S.E.2d 46 (1980), wherein this Court acknowledged that it "has . . . retreated from the absolute rule that an unconstitutional statute is a nullity." *Id.* at 149, 271 S.E.2d at 52. The Court of Appeals applied the test for retroactive application discussed in *Ingram:* "[A] test of reasonableness and good faith is to be applied in determining the effect which a judicial decision that a statute is unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute." *Id.* The City contends that this test has been usurped by the three-pronged retroactivity test announced by the United States Supreme Court in

*Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296 (1971), and adopted by this Court in the subsequently vacated decision of *Swanson v. State of North Carolina*, 329 N.C. 576, 407 S.E.2d 791, *on reh'g*, 330 N.C. 390, 410 S.E.2d 490 (1991), *vacated*, — U.S. —, 125 L. Ed. 2d 713 (1993). We disagree.

*Swanson* involved an action by retired federal employees for refunds of state income taxes. We noted that it was "a federal question as to whether the rule is to be applied retroactively." *Swanson*, 329 N.C. at 581, 407 S.E.2d at 793. The United States Supreme Court vacated our decision in that case and remanded for reconsideration in light of *Harper v. Virginia Dep't of Taxation*,— U.S. —, 125 L. Ed. 2d 74, *cert. granted and judgment vacated, Lewy v. Virginia Dep't of Taxation*, — U.S. —, 125 L. Ed. 2d 713 (1993). *See Swanson v. North Carolina*, — U.S. —, 125 L. Ed. 2d 713 (1993), *on remand*, 335 N.C. 674, 441 S.E.2d 537 (1994). In *Harper* the United States Supreme Court stated:

> The Supremacy Clause . . . does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law.

*Harper*, — U.S. at —, 125 L. Ed. 2d at 88 (citations omitted). Because the case before us involves an issue of state constitutional law, the foregoing from *Harper* is inapplicable, and we continue to apply the test for retroactive application discussed in *Ingram* and relied on by the Court of Appeals.

The Court of Appeals concluded under the *Ingram* test that defendants reasonably relied on the acts and "acted in good faith in carrying out the mandate of the General Assembly." *City of New Bern*, 113 N.C. App. at 106, 437 S.E.2d at 660. We agree. There was no evidence of bad faith on the part of defendants and their reliance on the acts was reasonable. Further: " 'The actual existence of a statute, prior to . . . a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' " *Ingram*, 301 N.C. at 148, 271 S.E.2d at 51 (quoting *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 84 L. Ed. 329, 332-33, *reh'g denied*, 309 U.S. 695, 84 L. Ed. 1035 (1940)). Such is true

here; the county has performed the inspections, and they cannot be undone at this juncture without the risk of untoward consequences.

Based on all of these factors, the trial court did not err in applying its ruling of unconstitutionality prospectively only. Accordingly, we affirm the Court of Appeals on this issue.

**[3]** The City also argues, without citation, that the trial court erred by apportioning the costs of the declaratory judgment action equally between the City and each defendant. It contends that defendants knew, or should have known, that their inspections pursuant to these acts were prohibited by the Constitution; therefore, the City should not be required to share in the costs of the action below.

N.C.G.S. § 1-263 of the Declaratory Judgments Act provides: "In any proceeding under this article the court may make such award of costs as may seem equitable and just." N.C.G.S. § 1-263 (1983). It was within the trial court's discretion under this statute to apportion costs as it deemed equitable. In *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953), this Court upheld a similar apportionment of costs in a declaratory judgment action involving constitutional challenges to statutes. There, we stated, "This proceeding is to declare rights, status and other legal relations of all the parties under a number of local Acts. All were vitally interested. It is equitable and just that the costs should be equally divided between [them]." *Id.* at 195, 74 S.E.2d at 761. The same is true here. The City has not shown that the trial court abused its discretion, and we cannot say that apportioning the costs in this way is "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). We therefore affirm the Court of Appeals on this issue.

Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

McDONALD'S CORPORATION, PLAINTIFF, AND LACY H. THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA, INTERVENOR v. WILLIAM D. DWYER AND WIFE, HESTER T. DWYER; JERONE C. HERRING, TRUSTEE FOR BRANCH BANKING AND TRUST COMPANY; BRANCH BANKING AND TRUST COMPANY; AND JONI-SON ENTERPRISES, INC., DEFENDANTS

No. 355PA93

(Filed 9 December 1994)

**Railroads § 13 (NCI4th)— abandoned railroad easement—presumption of title in adjoining owners—time limitation for contrary claim—unconstitutionality**

The first sentence of N.C.G.S. § 1-44.2(b), which creates a conclusive presumption that the title to land underlying an abandoned railroad easement vested in the adjacent property owner if no contrary claim of good and valid title was filed by another person within the statutory one-year period, is unconstitutional as applied against record title holders in possession because it does not provide sufficient notice, an opportunity to be heard, and just compensation before divesting owners of a valuable property interest.

**Am Jur 2d, Railroads §§ 82-86.**

Chief Justice EXUM dissenting.

Justice MEYER joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals, 111 N.C. App. 127, 432 S.E.2d 165 (1993), reversing an order entered 22 October 1991 by Judge David E. Reid, Jr., in Craven County Superior Court. Heard in the Supreme Court 11 April 1994.

*Ward and Smith, P.A., by Kenneth R. Wooten, for plaintiff-appellant.*

*Michael F. Easley, Attorney General, by James C. Gulick, Special Deputy Attorney General, for intervenor-appellant.*

*Moore & Van Allen, by Denise Smith Cline and A. Bailey Nager, for defendant-appellees William D. Dwyer, Hester T. Dwyer, Jerone C. Herring as Trustee, and Branch Banking and Trust Company.*

FRYE, Justice.

This case involves the ownership of land formerly subject to a railroad right-of-way easement which was abandoned by Seaboard Coastline Railroad prior to 19 June 1987. Defendants William D. Dwyer and wife, Hester T. Dwyer, have record title to the property at issue and have leased it to defendant Joni-Son Enterprises, Inc. Defendant Branch Banking and Trust Company holds a deed of trust on the Dwyers' property. Jerone C. Herring is the Trustee pursuant to the deed of trust. Plaintiff, McDonald's Corporation, is the owner of the property adjacent to the abandoned railroad easement.

Plaintiff does not contend that it has record title to the property at issue. However, plaintiff does contend that defendants lost whatever title they may have had to the property by failing to bring an action in accord with N.C.G.S. § 1-44.2(b) within one year after enactment of the statute and that title is now vested in plaintiff pursuant to the statute.

On 19 June 1987, the North Carolina Legislature enacted North Carolina General Statute section 1-44.2 (the "statute") which is entitled "Presumptive ownership of abandoned railroad easements." The statute provides in pertinent part:

> (a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. . . .
>
> . . . .
>
> (b) Persons claiming ownership contrary to the presumption established in this section shall have a period of one year from the date of enactment of this statute or the abandonment of such easement, whichever later occurs, in which to bring any action to establish their ownership. The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

N.C.G.S. § 1-44.2 (Supp. 1994).

On 19 June 1990, plaintiff filed this action, as an adjacent landowner within the definition of N.C.G.S. § 1-44.2, to quiet title and

eject defendants from the property at issue. Plaintiff alleged that defendants or their predecessors were required by statute to commence an action on or before 19 June 1988 to show good and valid title to the property in order to rebut the statutory presumption of ownership in plaintiff. Plaintiff further alleged that since no such action was filed within the statutory period as required by N.C.G.S. § 1-44.2(b), title to the property is vested in plaintiff.

Defendants countered that plaintiff is not entitled to the property pursuant to N.C.G.S. § 1-44.2 because the statute is unconstitutional, failing to provide notice or a hearing and effecting the taking of land without just compensation.

Plaintiff and defendants filed cross motions for summary judgment on the statute's constitutionality. The Attorney General for the State of North Carolina made a motion to intervene in the action to argue in favor of the statute's constitutionality. This motion was allowed on 3 June 1991. On 22 October 1991, Judge David E. Reid, Jr., granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment, upholding the constitutionality of the statute.

Defendants appealed to the Court of Appeals which reversed Judge Reid's order, finding that N.C.G.S. § 1-44.2 is unconstitutional as applied to fee simple landowners in possession of disputed property. The Court of Appeals reasoned that N.C.G.S. § 1-44.2 fails to provide fee simple landowners with adequate notice, an opportunity to be heard, and just compensation. On appeal, plaintiff-appellants contend that the Court of Appeals erred "when it found that defendant Dwyers are fee simple owners in possession and ignored controlling precedent when it held that as applied N.C.G.S. § 1-44.2 effects an unconstitutional taking without due process."

In analyzing a due process claim, we first need to determine whether a constitutionally protected property interest exists. To demonstrate a property interest under the Fourteenth Amendment, a party must show more than a mere expectation; he must have a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972). The facts in this case clearly indicate that defendants meet this requirement. Defendants are the only holders of record title to the property. Even if there are underlying disputes about the validity of their title, this should have no effect on defendants' standing to challenge the constitutionality of the statute. Defendants are also in open and full possession of the property.

Accordingly, defendants' property interest cannot be seized without their consent or due process of law. *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (1950).

The sole basis for plaintiff-appellants' ejection action against defendants is North Carolina General Statute section 1-44.2. The general rule is " 'that a call for a monument as a boundary line in a deed will convey the title of the land to the center of the monument if it has width.' " *Goss v. Stidhams*, 68 N.C. App. 773, 776, 315 S.E.2d 777, 778 (1984) (quoting J. Webster, *Webster's Real Estate Law In North Carolina* §188 (Rev. Ed. 1981)). Subsection (a) of the statute is consistent with this common law presumption insofar as it applies to abandoned railroad easements. The second sentence of subsection (b) appears to also be consistent with the common law since it provides that the presumption is rebuttable by showing that a party has good and valid title to the land. The parties do not contest these provisions of the statute.

The first sentence of subsection (b) of the statute provides that persons claiming contrary to the presumption in subsection (a) must bring a lawsuit within one year of the enactment of the statute or the abandonment of the easement, whichever later occurs, or lose their right to rebut the presumption. It is this portion of the statute, which turns a rebuttable presumption into a conclusive presumption, that defendants contend violates their due process rights.

Notice and an opportunity to be heard prior to depriving a person of his property are essential elements of due process of law which is guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, section 17, of the North Carolina Constitution. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 873 (1950).

As early as 1877, this Court determined that notice greater than that provided by operation of law in the nature of a statute of limitations is required prior to divestment of a vested property interest. *See Trustees of the Univ. of North Carolina v. North Carolina R.R. Co.*, 76 N.C. 103 (1877). *Trustees* involved a North Carolina statute which required corporations to pay unclaimed corporate dividends to the Trustees of the University of North Carolina after five years and for-

feit them completely after ten years. The Court, under the United States Constitution and the law of the land clause of the North Carolina Constitution, rejected the argument that a statute of limitations could deprive persons of their vested property rights. The Court stated:

> 'We know of no case in which a legislative Act to transfer the property from A to B without his consent has ever been a constitutional exercise of the legislative power in any State in the Union.' (Citations omitted).
>
> . . . [T]he Act under review, not only bars the [dividend holder] of his right of recovery, but takes from him his property, transfers it to another and enables that other to recover and own it. The [dividend holder] not only loses his property, but by the magic of this Act and without consideration received, it is vested absolutely in another . . . .

*Id.* at 107.

Similar to the statute in *Trustees*, N.C.G.S. § 1-44.2 not only bars a right of recovery by operation of a statute of limitations, but by operation of a presumption, "transfers [property] to another and enables that other to recover and own it. The [holder] not only loses his property, but by the magic of this [statute] and without consideration received, it is vested absolutely in another." *Id.* The statute turns a rebuttable presumption into a conclusive presumption which effectively takes defendants' property without affording notice, an opportunity to be heard and just compensation.

This Court has found due process violations in several other statutes which, without prior notice, purport to effect a forfeiture of property rights. *See Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977) (statute permitting a judgment on a tax lien and sale without notice held unconstitutional); *Eason v. Spence*, 232 N.C. 579, 61 S.E.2d 717 (requiring that remaindermen receive notice of foreclosure sale of a life estate and opportunity to be heard); *Price v. Slagle*, 189 N.C. 757, 128 S.E. 161 (1925) (requiring that defaulting taxpayers receive notice before their land is foreclosed).

Plaintiff-appellants rely on this Court's decision in *Sheets v. Walsh*, 217 N.C. 32, 6 S.E.2d 817 (1940), for the proposition that a self-executing statute that requires the owner to file suit and prove his claim does not cause vested property rights to be reduced to a mere

cause of action and such statute provides notice and opportunity to be heard in compliance with due process and the law of the land.

In *Sheets*, the plaintiffs' land was included on two recorded plats and no one ever possessed the platted land. The platted streets were never built and were unnecessary for ingress and egress to lots sold within the parcel. In 1939, the plaintiffs withdrew the land dedicated for streets from public use pursuant to a newly enacted statute which created a presumption of revocation of a dedication of streets by plat if the streets were not opened for twenty years. The defendants, who wanted to purchase the land, challenged the constitutionality of the statute on due process grounds, arguing that purchasers of lots within the plats were deprived of their vested rights to enforce the easements shown on the plats. The Court held that no vested property right was destroyed by the statute, but merely that the remedy by which those rights could be enforced had changed. The Court further held that the grantees of deeds in which references to maps were made had constructive notice of and a reasonable time in which to challenge the statute. *Id.* at 39-40, 6 S.E.2d at 821.

We find that *Sheets* is distinguishable and inapplicable to the facts in this case. First, *Sheets* only applies where dedicated easements are revoked before they are accepted and used. The statute in *Sheets* provided that the land would be conclusively abandoned by the public if it "shall not have been actually opened and used by the public within twenty years from and after the dedication thereof." *Id.* at 36, 6 S.E.2d at 819. Here by contrast, there has been no allegation that defendants abandoned the property. In fact, defendants have been in actual possession and enjoyment of the land. Moreover, *Sheets* only affects the status of easements in a platted subdivision. It does not affect the title to the underlying fee as the statute in this case purports to do.

Plaintiff-appellants also argue that *Texaco, Inc. v. Short*, 454 U.S. 516, 70 L. Ed. 2d 738 (1982), is controlling. That case, like *Sheets*, involved non-possessory property interests. In *Texaco*, a divided United States Supreme Court determined that an Indiana statute, providing for lapse of subsurface mineral rights after twenty years of nonuse, was constitutional. The statute contained a two-year grace period after its enactment to prevent mineral interests subject to lapse from being extinguished. In addition, the statute required notice prior to divestment to owners of ten or more interests. *Id.*

*Texaco* is distinguishable from the instant case. The Supreme Court in *Texaco* held that the statute fulfilled due process require-

ments because "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right . . . ." *Id.* at 530, 70 L. Ed. 2d at 752. Unlike *Texaco*, here it is only the State's action that causes the lapse. No neglect, failure to use, or abandonment is attributable to defendants. Prior to and after N.C.G.S. § 1-44.2 was enacted, defendants and their predecessors paid for the property, took record title, paid property taxes, maintained and improved the property, operated a business on the property, and successfully defended earlier challenges to their title.

In this case, the statute requires defendants to bring suit within one year or forfeit property to which they have record title and of which they are in open possession. "The right to commence and prosecute an action may be lost by delay, but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never." *Pinkham v. Pinkham*, 61 Neb. 336, 338, 85 N.W. 285, 285 (1901). Therefore, we conclude that the first sentence of subsection (b) of North Carolina General Statute section 1-44.2 is unconstitutional because it does not provide sufficient notice, an opportunity to be heard, and just compensation before divesting owners of a valuable property interest. The remaining portions of N.C.G.S. § 1-44.2 are not challenged in this case and remain in full force and effect.

For the reasons stated herein, the decision of the Court of Appeals, which reversed summary judgment for plaintiffs, is affirmed.

AFFIRMED.

Chief Justice EXUM dissenting.

The majority interprets N.C.G.S. § 1-44.2 as creating a conclusive presumption of title in the land underlying a railroad easement after the lapse of the statutory one-year period and automatically transferring title from whoever might own the property to the adjoining landowner. I do not so interpret the statute and am of the view that the majority reads more into the statute than the legislature intended.

In the first place, the statute clearly provides that the presumption which it establishes is not conclusive but "is rebuttable by showing that a party has good and valid title to the land." Second, by the statute's clear language, only those who claim ownership contrary to the presumption must bring an action to establish ownership within

the one-year statutory period. Persons claiming ownership in accordance with the presumption are not so limited in the time within which they may bring their claim.

The statute, in my view, operates as follows: When a railroad abandons its easement, the statute establishes a rebuttable presumption that title to the land underlying the easement resides in the owner of land adjacent to the easement, and the title extends to the centerline of the abandoned easement. One claiming ownership contrary to this presumption has the statutory period of one year to bring an action to establish ownership. The presumption operates against such a claimant, but the claimant may rebut the presumption by showing "good and valid title to the land." Presumably this means title which is superior to that the adjoining landowner would have but for the presumption. If such a claim of superior title is not brought within the statutory period, it is procedurally barred and may not be thereafter asserted against the adjacent owner, either offensively or defensively. The title of the adjacent landowner is then secure and that of the challenging claimant lost not because the statutory presumption is conclusive or because title is transferred but because the statutory period of limitations for challenging the adjacent landowner's title has expired. The statute does not abrogate vested rights or transfer title from one person to another. It merely establishes the procedure by which title under the limited circumstances defined by the statute must be claimed. Failure to claim title in accordance with this procedure bars the right to claim title thereafter.

As applied to the case before us, the statute works as follows: Plaintiff McDonald's Corporation (McDonald's) is claiming ownership to the land underlying the abandoned easement in accord with the statutory presumption. McDonald's is entitled to the benefit of the presumption. Not having challenged, or sought to rebut, this presumption by a claim filed within the one-year statutory period of limitations, defendants are barred from doing so now. Defendants are not barred because the statutory presumption is conclusive or because the statute transfers title from them to McDonald's. Whether, leaving aside the statutory presumption, they have better title than McDonald's, has never been determined in a way which binds McDonald's. Defendants are barred from *claiming* they have title superior to McDonald's because they "slept on their rights" and did not assert their claims against McDonald's within the time prescribed by the statute.

The majority gets off track in this case by assuming that but for the statutory presumption defendants have record title to the property superior to that of McDonald's. The majority states, "Plaintiff does not contend that it has record title to the property at issue." This, I believe, is not the case. Both McDonald's and defendants claim to have superior record title. According to the forecast of evidence at the summary judgment hearing, the property was at one time owned by the Pepsi Cola Company (Pepsi). Pepsi filed bankruptcy in 1923 at which time Craven Holding Corporation (Craven) was incorporated in Virginia for the purpose of holding and making disposition of property owned by Pepsi. At this time the railroad had an active railroad easement over the property. Craven conveyed the property in question in 1923 and dissolved in 1931. McDonald's claims record title through mesne conveyances from Craven.[1] Defendants claim record title through quitclaim deeds from the heirs of deceased shareholders of Craven."[2]

Surely, in the interest of fairly settling titles, the constitution permits the state to establish a reasonable time within which one who claims title to land underlying an abandoned railroad easement must assert the claim against one who owns the land adjoining the easement or otherwise lose the right to do so. One year for the assertion of such claims is a reasonable time. The one-year period of limitations being reasonable, I see no constitutional infirmity in the statute.

My position is supported by *Sheets v. Walsh*, 217 N.C. 32, 34, 6 S.E.2d 817 (1940) and *Texaco v. Short*, 454 U.S. 516, 70 L. Ed. 2d 738 (1982).

In *Sheets*, an action seeking specific performance of a contract to convey realty, the plaintiff promisee had record title to certain prop-

1. McDonald's states in its brief, "Plaintiff owns the property at issue. There is no evidence that Craven intended to retain ownership of the fee underneath the railroad easement when it conveyed all of the property adjacent to the railroad. . . . Plaintiff is the successor to the adjacent landowner to whom Craven conveyed the property."

2. Defendants claim that the description of the property in McDonald's record title does not include the property underlying the easement and that this issue was settled in *Matter of Craven Holding Corporation*, No. 88CVS713, Superior Court, Craven County, by order dated 3 November 1989, from which no appeal was taken. I do not read the order as settling this issue. The order simply extinguishes Craven's interest in the property and concludes that this interest, whatever it was, had been transferred to defendants successor in title. In any event, to the extent this order might purport to resolve the issue of record title as between defendants and McDonald's, McDonald's is not bound by the order since it was not a party to the litigation.

erty, portions of which had previously been dedicated for public use as roads. The dedicated land had not, however, been developed as roads for more than twenty years and no one had brought suit to enforce any easement rights. Plaintiff asserted that it had ownership of the land under the following statutory provision:

> [E]very strip, piece, or parcel of land which shall have been at any time dedicated to public use . . . which shall not have been actually opened and used by the public within twenty years from and after the dedication thereof, shall be thereby conclusively presumed to have been abandoned by the public for the purposes for which same shall have been dedicated; and no person shall have any right, or cause of action thereafter, to enforce any public or private easement therein, unless such right shall have been asserted within two years from and after the passage of this act.

*Id.* at 36, 6 S.E.2d at 819. Defendant promisor, seeking to avoid the contract on the ground plaintiff did not have good title, contended this statute was not effective in that it constituted an unconstitutional taking since "the dedicators, predecessors in title of the plaintiffs, sold and conveyed lots to others by reference to the maps filed and recorded by them, the grantees in the deeds for such lots, and those claiming under them, were thereby vested with easements over all the streets shown on said maps." *Id.* at 38-39, 6 S.E.2d at 821.

The plaintiff and defendant in *Sheets* took positions comparable to those taken by plaintiff McDonald's and defendants here. The statute in *Sheets*, just as the statute here, required those seeking to claim their easement rights do so within two years or forever lose their right to make the claim. Concluding that the statute was constitutional, the Court reasoned:

> Any rights to enforce any easements which the grantees in the deeds made with reference to the maps, and of those claiming under them, may have had was clearly preserved for two years after its passage by the act itself. No vested right was destroyed by the act, only the remedy by which such rights might be enforced was changed, and when this was done these grantees, and those claiming under them, were left with a remedy reasonably adequate to afford relief, namely, two years after the passage of the act in which to assert their rights.

*Id.* at 39, 6 S.E.2d at 821. The Court found this result fair since "[t]he grantees . . . were fixed by law with notice of the statutes, and it was

incumbent upon them within the two years allowed by the statute (a reasonable time) to take themselves out of the bar put upon them by asserting their right of easements over the streets involved." *Id.* at 39-40, 6 S.E.2d at 821.

The majority attempts to distinguish *Sheets* on the basis that it involved land which was not used by the parties asserting title contrary to the statutory presumption. *Sheets*, however, was not decided upon whether these parties possessed or used the land, but upon the fact that they were by law on notice of their statutory duty to assert their rights within a reasonable time. I think *Sheets* controls the instant case.

*Texaco* likewise supports the constitutionality of our statute. In *Texaco* the Supreme Court upheld an Indiana statute barring mineral rights claims which were not asserted within a certain statutory period. The statute provided that a severed mineral interest which is not used for twenty years reverts to the current surface owner of the property unless the mineral owner filed a claim to his rights within two years. *Id.* at 518, 538, 70 L. Ed. at 743-44, 756. Not having filed its claim within the statutory period, the mineral rights claimant lost its right to make the claim. The Supreme Court found no constitutional infirmity in the procedural bar of the statute.

The majority attempts to distinguish *Texaco* on the ground it also involved rights which were unused. Nowhere in *Texaco*, however, is there an indication that the decision was based upon the mineral rights claimant's failure to use the right in question. The Court's decision was instead based on the principle that "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Id.* at 532, 70 L. Ed. 2d at 752. The Court concluded that the constitution did not require more notice than that provided by the statute. *Id.* at 537, 70 L. Ed. 2d at 756.

Other states have upheld similar statutes which require persons to assert their rights within certain time periods or else forsake them. In *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232, 235, *cert. denied*, 423 U.S. 830, 46 L. Ed. 2d 48 (1975), for example, the Supreme Court of Iowa faced a statute which provided that those with reversionary interests in land who did not file a claim for that interest within the latter of twenty years of the deed creating that interest or one year after enactment of the statute would be barred from maintaining an action to claim their interest. The Court upheld the statute, rea-

soning that the statute "does not abolish or alter any vested right. Rather, it modifies the procedure for effectuation of the remedy by conditionally limiting the time for enforcement of the right." *Id.* at 242. The Court also found that the statute itself provided adequate notice of the time limitation for filing claims. *Id.* The Court reached its conclusions after examining several cases from other jurisdictions and "the numerous commentators who persuasively argue that statutes premised on the theory the legislature may require periodic filing in order to preserve rights do not run afoul of constitutional limitations." *Id.* at 241.

The majority relies on *University v. North Carolina Railroad Company,* 76 N.C 103 (1877). This case is readily distinguishable. The University sued the railroad claiming it was entitled to certain unpaid stock dividends still held by the railroad. The statute under which the University claimed provided that declared stock dividends which were unclaimed for five years shall be paid by the issuing corporation to the University. The question in the case, as stated by the Court, was "whether the provisions of the Act are warranted by Art. IX, § 6, of the Constitution . . . ." *Id.* at 105. The constitutional provision in question provided, in pertinent part, "that all . . . unclaimed dividends, or distributive shares of the estates of deceased persons, shall be apportioned to the use of the University." The Court held that this constitutional provision was directed to the estates of deceased persons and did not authorize the legislature to transfer unclaimed dividends of living persons from the issuing corporation to the University. The first point is that this case involved stock dividends, not real property. Second, the dispute was not between the shareholder and the University; it was between the University and the issuing corporation. Third, the case involved an attempt by the plaintiff University to have personal property, the entitlement to stock dividends, transferred from the shareholders to it by the issuing corporation. Since the case did not involve shareholders who themselves were trying to assert their rights, no issue as to whether they could be procedurally barred from doing so arose. The Court noted this, essentially distinguishing the issue in that case from the issue now before us, saying:

> The counsel for the plaintiff endeavored to support their case, by drawing an analogy between the operation of the statute of limitations and the Act under which they claim. The analogy fails them. The statute of limitations bars the remedy only, and the debtor retains the possession of his property. But the Act under review, not only bars the creditor of his right of recovery,

> but takes from him his property, transfers it to another and enables that other to recover and own it. The creditor not only loses his property, but by the magic of this Act and without consideration received, it is vested absolutely in another—it matters not whether that other is the State or its appointee.

*Id.* at 107.

As I have tried to demonstrate, the statute under consideration here does not transfer property from one party to another. The question of which party has better title is not reached. The statute simply creates a procedural bar to a claim of title contrary to the statutory presumption.

The trial court properly entered summary judgment for plaintiffs. I vote, therefore, to reverse the Court of Appeals, which reversed the trial court, and to reinstate the judgment of the trial court.

Justice Meyer joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. RANDY DALE PERRY

No. 553A93

(Filed 9 December 1994)

**1. Homicide § 495 (NCI4th)— murder—evidence of anger—instruction on second-degree murder not given—no error**

The trial court did not err in a first-degree murder prosecution by not instructing on second-degree murder where defendant contended that the evidence tended to show that he acted in extreme anger and that his actions were provoked by the acts of the victim and his companions. Although the evidence cited by the defendant would support the inference that he was angry when he shot the victim, it would not support a reasonable finding that his faculties or ability to reason were disturbed to the point of negating his ability to premeditate or deliberate. Uncontroverted evidence tended to show that he rationally proceeded towards revenge, exacted his revenge, and fled the scene fully aware of what he had done.

**Am Jur 2d, Homicide § 501.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

2. **Homicide § 520 (NCI4th)— murder—intent to frighten victim—instruction given—no error**

The trial court did not err in a first-degree murder prosecution by not instructing on second-degree murder where defendant argued that the jury could have found from evidence of bullet marks at the scene that he only intended to frighten the victim, who was killed by ricocheting bullets. The evidence did not support a reasonable finding that defendant only intended to frighten the victim, particularly in light of the fact that three of the shots the defendant fired hit the victim, two other men on the porch were not hit, and defendant unambiguously stated that he intended to shoot the victim.

**Am Jur 2d, Homicide § 500.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

3. **Homicide § 555 (NCI4th)— murder—defendant's mental illness—no instruction on second-degree murder**

The trial court did not err in a first-degree murder prosecution by not giving an instruction on second-degree murder where defendant argued that he lacked the mental capacity to form a premeditated and deliberate specific intent to kill due to his mental illness. Although a nurse at the jail testified that defendant appeared agitated, somewhat tearful, and delusional when she saw him, and the nurse and a psychiatrist at Dorothea Dix testified that he was manic-depressive, there was no evidence to support a reasonable finding that the defendant's mental condition impaired his ability to premeditate and deliberate or to form a specific intent to kill on the night of the murder. Being agitated and tearful upon arriving at the jail would not be unusual for someone charged with first-degree murder. The psychiatrist testified that defendant's disorder was episodic in nature and the episode in which the doctor found him may or may not have existed prior to or during the murder. The jury would have been required to engage in mere speculation had it been instructed on second-degree murder.

**Am Jur 2d, Homicide § 501.**

**4. Homicide § 588 (NCI4th)— first-degree murder—imperfect self-defense—instruction on voluntary manslaughter not given**

The trial court did not err in a first-degree murder prosecution by not instructing on voluntary manslaughter based on imperfect defense of another where the evidence at trial tended to support two alternate versions of events surrounding the killing; the evidence supporting the first version did not support the requested instructions because it would only support a finding that the threat to the defendant's brother had passed and would not support a rational finding that the defendant in fact believed it necessary to kill the deceased to save his brother or that any such belief was reasonable at the time the defendant shot the victim; and, under the second version, defendant's brother would have been justified in using deadly force to repel the attack and an instruction on imperfect self-defense would not be justified.

**Am Jur 2d, Homicide §§ 519 et seq.**

**5. Homicide § 583 (NCI4th)— first-degree murder—instructions—acting in concert**

The trial court did not err in a first-degree murder prosecution by instructing the jury on acting in concert where defendant's brother testified that when he was threatened the defendant and Scottie Thompson appeared on the scene and began to shoot at his assailants in a concerted effort to protect him; either the defendant or Scottie Thompson fired the fatal bullets; and evidence that Thompson disposed of the defendant's weapon after the killing also tended to show that the defendant was acting in concert with Thompson. Defendant's contention that some evidence tended to show that he and Thompson were lawfully acting in defense of his brother was not determinative of the issue.

**Am Jur 2d, Homicide § 507.**

**6. Homicide § 252 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation where the evidence supported two alternative versions of the events on the night the victim was killed but the

defendant's statements to the effect that he shot the victim to retaliate for the victim's earlier threats to the defendant's brother were clearly sufficient evidence from which the jury reasonably could have inferred that the defendant intentionally killed the victim after premeditation and deliberation.

**Am Jur 2d, Homicide §§ 437 et seq.**

**Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.**

**7. Evidence and Witnesses § 761 (NCI4th)— first-degree murder—testimony concerning bullet mark and direction from which shot fired—excluded—no prejudice**

There was no prejudice in a first-degree murder prosecution from the court's exclusion of testimony concerning a bullet mark on the porch of the apartment where the killing occurred and the direction from which the bullet came where there was other testimony to the same effect and there was nothing particularly significant about the direction from which the shots were fired.

**Am Jur 2d, Appeal and Error § 806.**

**8. Evidence and Witnesses § 1298 (NCI4th)— first-degree murder—defendant's statement to officer—waiver of rights—mental condition**

The trial court did not err in a first-degree murder prosecution by not suppressing defendant's statement to an officer where a psychiatrist testified concerning defendant's history of manic episodes but could not give an opinion as to whether defendant understood his rights at the time he gave his inculpatory statement to the officer, and a nurse who saw defendant several hours after he was arrested testified that he was upset, tense, and nervous and in her opinion delusional and could not have understood his rights, but also testified that he was able to understand the questions asked of him and that he responded in a reasonable manner to those questions. There was substantial competent evidence to support the trial court's finding that the defendant understood his constitutional rights at the time he waived them.

**Am Jur 2d, Evidence § 744.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Helms, J., on 9 September 1993 in Superior Court, Union County, upon a jury verdict finding the defendant guilty of murder in the first degree. Heard in the Supreme Court on 15 September 1994.

*Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Charlesena Elliot Walker, Assistant Appellate Defender, for the defendant-appellant.*

MITCHELL, Justice.

The defendant, Randy Dale Perry, was indicted for murder and tried noncapitally at the 7 September 1993 Criminal Session of Superior Court, Union County. The jury returned a verdict on 9 September 1993 finding the defendant guilty of murder in the first degree. The trial court imposed a mandatory life sentence. The defendant appealed to this Court as a matter of right.

The evidence admitted at trial tended to show, *inter alia*, that on 5 July 1992, the victim, Merced Xaltipa Vergara, visited relatives and friends at an apartment on Kerr Street in Monroe, North Carolina. Benjamin Rodricuz was also at the apartment that evening. Rodricuz testified that he was standing on the porch of the apartment at approximately 9:00 p.m. with the victim and two other men. A group of men walked by and said something to them. Rodricuz then stepped into the apartment and his wife called for the other men to come inside. Shortly after she called to the men, shots were fired and the victim exclaimed that he had been shot. The victim soon died from three gunshot wounds.

Between 10:00 p.m. and 11:00 p.m. that same evening, Paulette Bolden was in the area of the shooting to visit her brother. When she saw police cars and an ambulance she walked over to find out what was going on. As she was leaving the area, she saw the defendant come out from behind "the apartments where the Mexicans stayed." The defendant said he wanted her to get him out of the area "[b]ecause I done shot the M.F. and I'll shoot him again . . . because he was F—ing with my brother." Ms. Bolden then took the defendant to a friend's house. The next morning the police contacted Ms. Bolden and she gave a statement recounting the previous night's events.

Following further investigation, Monroe Police Department Lieutenant Frank Benton went to the defendant's home on 7 July 1992. After being summoned by his father, the defendant walked up to Lieutenant Benton and said, "I've been waiting for you all since yesterday." Lieutenant Benton and the defendant then left for the police station where the defendant gave a statement after being read his rights. In the statement the defendant said that he was visiting a friend on the night of the murder when his brother arrived. The defendant's brother, William Perry, told him that a Mexican had put a shotgun to his head and threatened his life. The defendant was already angry because another brother had been shot the day before by a bondsman who had also beaten up the defendant. The defendant went home and got his .22 caliber rifle and then went to the area where the Mexicans lived. He stated that when he saw the victim on a porch holding a shotgun, he took aim and fired at the victim four or five times. After shooting at the victim, he fled the scene. He saw Paulette Bolden and got a ride with her to a friend's home nearby. Additional evidence is discussed in this opinion as necessary to resolve the issues raised here by the defendant.

**[1]** In the defendant's first assignment of error, he contends that the trial court erred by failing to instruct on murder in the second degree. Premeditated murder in the first degree is defined as "the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Hamlet*, 312 N.C. 162, 169, 321 S.E.2d 837, 842 (1984). The defendant does not challenge the trial court's instructions on murder in the first degree. The lesser included offense of murder in the second degree is defined as the unlawful killing of another with malice, but without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 562, 251 S.E.2d 430, 432 (1979). In determining the propriety of giving an instruction on a lesser included offense, "[t]he 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. Thomas*, 325 N.C. 583, 594, 386 S.E.2d 555, 561 (1989) (quoting *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981)).

The defendant's first argument in support of this assignment relates to circumstantial evidence tending to show his mental state. On this point the defendant argues that evidence tended to show that at the time of the killing he was angered by the beating he had received the previous day and by the earlier shooting of his younger

brother. When he learned of the threat made with the shotgun upon his other brother on the day of the murder, his anger only increased. He contends that this evidence showed that he acted in extreme anger and that his actions were provoked by the acts of the victim and his companions. Additionally, the defendant says that marks left by bullets on the porch's concrete pad and a porch post indicate that he fired the gun to frighten the victim, not to hit him, and that the deadly shots ricocheted into the victim. The defendant would have us conclude that the foregoing evidence would permit the jury to infer that anger and provocation overcame his ability to reason and consequently warranted an instruction on murder in the second degree.

Anger and emotion frequently coincide with murder, but a court should instruct on murder in the second degree only when the evidence would permit a reasonable finding that the defendant's anger and emotion were strong enough to disturb the defendant's ability to reason. *See State v. Thomas*, 332 N.C. 544, 560-61, 423 S.E.2d 75, 84 (1992). Although the evidence cited by the defendant would support the inference that he was angry when he shot the victim, it would not support a reasonable finding that his faculties or ability to reason were disturbed to the point of negating his ability to premeditate or deliberate.

The remaining circumstantial evidence all tended to show that the defendant's faculties and ability to reason were undisturbed throughout the course of his actions on the night of the murder. Such evidence tended to show that upon learning of the threat to his brother, he got a gun, concealed himself with a view of the porch, fired several rounds at the victim from his hidden vantage point, disposed of the gun and then hid until he could safely flee the area. Additionally, he told Paulette Bolden that he shot the victim, why he shot the victim, and that he would do it again if he had the opportunity. While the evidence cited by the defendant tended to show that he felt provoked and angry, uncontroverted evidence tended to show that he rationally proceeded towards revenge, exacted his revenge and fled the scene fully aware of what he had done. The evidence would not have supported a reasonable finding that his ability to reason was overcome.

**[2]** The defendant also argues in support of this assignment that the jury could have found that the defendant only intended to frighten the victim and, based on that finding, could have concluded that he acted without premeditation and deliberation. In support of this assertion

he points to evidence of two bullet marks on the apartment's porch. The defendant contends that this evidence supported the inference that the victim was killed by ricocheting bullets and, thus, the further inference that the defendant did not intend to hit him but only to scare him. We conclude that such evidence would not support a reasonable finding that the defendant only intended to frighten the victim, particularly in light of the fact that three of the shots the defendant fired hit the victim and the two other men on the porch were not hit. Additionally, in his statements to the police and Paulette Bolden—the only direct evidence of his intentions—he unambiguously stated that he intended to shoot the victim. A jury could not reasonably find from the evidence of two stray bullets that the defendant only intended to frighten the victim.

**[3]** The defendant further argues in support of this assignment of error that evidence tended to show that, due to his mental illness, he lacked the mental capacity to form a premeditated and deliberate specific intent to kill. Flora Kimbrell, a nurse at the Union County Jail saw the defendant when he was brought into the jail on 7 July 1992, more than 36 hours after the murder. She testified that he appeared "agitated, somewhat tearful" and "delusional" when she saw him. She indicated that she had experience with the defendant in the past and knew he was manic-depressive. She also indicated that she obtained approval to administer drugs and administered those drugs to alleviate his problems. Although she testified that she did not believe he possessed sufficient awareness to voluntarily consent to give a statement, her testimony did not tend to show that he did not possess the mental capacity to enable him to form a premeditated and deliberate specific intent to kill on the night of the killing. On 15 July 1992, Dr. Patricio P. Lara began a psychiatric evaluation of the defendant after the defendant was admitted to Dorothea Dix hospital. Dr. Lara testified that the defendant is manic-depressive. However, Dr. Lara stated that he did not have a sufficient basis to form an opinion as to whether the defendant was having a manic episode on the day of the murder.

In *State v. Clark*, 324 N.C 146, 377 S.E.2d 54 (1989), this Court addressed the very argument raised here by the defendant when we stated:

> '[E]vidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to

> the jury.' That 'such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters,' is particularly pertinent when evidence of defendant's mental condition at the time of the killing is implicated.
>
> [W]hen a defendant requests the trial court to instruct the jury that it may consider the mental condition of the defendant in deciding whether she formed a premeditated and deliberate specific intent to kill the victim, there must be sufficient evidence 'reasonably to warrant inference of the fact at issue.' The proper test is whether the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent to kill the victim at the time of the killing.

*Id.* at 162-63, 377 S.E.2d at 64 (citations omitted).

In the case *sub judice*, there was no evidence to support a reasonable finding that the defendant's mental condition impaired his ability to premeditate and deliberate or to form a specific intent to kill on the night of the murder. Dr. Lara could not form an opinion as to the defendant's mental state on that night. Nurse Kimbrell testified that the defendant was agitated and tearful when he arrived at the jail over thirty-six hours after the murder, however, both she and Dr. Lara testified that such a reaction would not be unusual for someone charged with first-degree murder. Additionally, Dr. Lara testified that the defendant's disorder was episodic in nature—the episode in which the doctor found him may or may not have existed prior to or during the murder. Had the jury been instructed on second-degree murder based upon such evidence concerning the defendant's mental capacity, it would have been required to engage in mere speculation when reaching its conclusion on that issue. As *Clark* precludes such speculation, the evidence was insufficient to support a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of premeditation, deliberation or a specific intent to kill. We conclude that this assignment of error is without merit. The trial court did not err in refusing to charge the jury on murder in the second degree.

**[4]** The defendant next assigns error to the trial court's failure to instruct on voluntary manslaughter based on the theory that the defendant acted in the imperfect defense of another. "A person has a right to kill not only in his own self-defense but also in defense of

another." *State v. McKoy*, 332 N.C. 639, 643, 422 S.E.2d 713, 716 (1992) (citing *State v. Carter*, 254 N.C. 475, 119 S.E.2d 461 (1961)).

The elements which establish perfect self-defense are:

> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

*State v. McAvoy*, 331 N.C. 583, 595, 417 S.E.2d 489, 497 (1992) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). The elements of perfect defense of another are essentially the same as those for perfect self-defense. In general one may kill in defense of another if one believes it to be necessary to prevent death or great bodily harm to the other "and has a reasonable ground for such belief, the reasonableness of this belief or apprehension to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing." *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994). "[T]he right to kill in defense of another cannot exceed such other's right to kill in his own defense as that other's right reasonably appeared to the defendant." *Id.*

The trial court instructed the jury on the theory of perfect defense of another, but refused to instruct on imperfect defense of another. The defendant contends that the evidence also required an instruction on the theory that the defendant's imperfect defense of another reduced the killing to voluntary manslaughter. We disagree.

In order to establish either perfect or imperfect defense of another, the evidence must show that it appeared to the defendant and he believed it necessary to kill the deceased in order to save another from death or great bodily harm. *McKoy*, 332 N.C. at 644, 422 S.E.2d

at 716. It must also appear that the defendant's belief was reasonable in that the circumstances as they appeared to him at that time were sufficient to create such a belief in the mind of a person of ordinary firmness. *Id.* The relevant distinction between the two defenses is that imperfect defense of another arises when the first two elements are present but either the third or the fourth element is absent. *McAvoy*, 331 N.C. at 596, 417 S.E.2d at 497. The distinction is pertinent in the present case because the defendant contends that the jury could have found the absence of the fourth element, i.e., that he used excessive force.

The evidence adduced at trial tended to support two alternative versions of the events surrounding the killing of the victim Vergara. The first version was supported by the defendant's statement. It indicated that after the attack on the defendant's brother, the defendant went home and got his gun. Then, seeking revenge against his brother's attackers, he went to the apartment where he shot the victim. If there is no evidence from which a jury reasonably could find that the defendant in fact believed that it was necessary to kill to protect another from death or great bodily harm, the defendant is not entitled to have the jury instructed on either perfect or imperfect defense of another. *See State v. Bush*, 307 N.C. 152, 160, 297 S.E.2d 563, 569 (1982) (involving self-defense). This evidence did not support the requested instructions because it would only support a finding that the threat to the defendant's brother had passed and would not support a rational finding that the defendant in fact believed it necessary to kill the deceased to save his brother or that any such belief was reasonable at the time the defendant shot the victim.

The second version of the events surrounding the victim's death was supported by the testimony of the defendant's brother, William Perry. William testified that he was confronted by five or six Mexicans as he walked down Kerr Street. He said that several of the Mexicans threatened him with switchblade knives and another pointed a shotgun at his chest. William testified that during the confrontation, the defendant and Scottie Thompson appeared and began shooting at the victim and the other Mexicans in an effort to protect William. It was this second version of events, taken in the light most favorable to the defendant, which prompted the trial court to instruct the jury on the theory of perfect defense of another.

The defendant argues that this second version of events required that the trial court also give an instruction on imperfect defense of

another. He contends in this regard that the jury reasonably could have found that his use of deadly force was excessive under these facts, thereby negating perfect defense of another but allowing the jury to find that he acted in the imperfect defense of another. We conclude, under the evidence supporting this version of the events, that the defendant's contention is incorrect as a matter of law.

While one may use no more force in defense of another than the other could use in his own defense, one may use the same amount of force the other could have used on his own behalf. *State v. McLawhorn*, 270 N.C. 622, 629, 155 S.E.2d 198, 204 (1967). The defendant's brother would have been justified in using deadly force to repel the attack because, under this version of the events, his brother's life was threatened. As a matter of law, the use of deadly force under such circumstances would not be excessive. Therefore, this version of the evidence did not support an instruction on the imperfect defense of another, and the trial court did not err by denying the defendant's requested instruction.

**[5]** In another assignment of error, the defendant contends that the trial court erred by instructing the jury on acting in concert as a possible theory supporting a first-degree murder conviction in this case. He argues in support of this contention that the evidence did not show that he and Scottie Thompson shared a common plan or purpose to commit murder.

Under the theory of acting in concert, "one may be found guilty of committing the crime if he is at the scene with another with whom he shares a common plan to commit the crime, although the other person does all the acts necessary to effect the commission of the crime." *State v. Blankenship*, 337 N.C. 543, 557-58, 447 S.E.2d 727, 736 (1994). We conclude that there was sufficient evidence in the present case from which the jury could have inferred that the defendant and Scottie Thompson acted pursuant to a common purpose. First, the defendant's brother testified that when he was threatened, the defendant and Scottie Thompson appeared on the scene and began to shoot at his assailants in a concerted effort to protect him; either the defendant or Scottie Thompson fired the fatal bullets. Second, evidence that Thompson disposed of the defendant's weapon after the killing also tended to show that the defendant was acting in concert with Thompson. The defendant's contention that such evidence did not support an acting in concert instruction rests upon his argument that some evidence tended to show that he and Thompson did not act

to commit murder, but were in fact lawfully acting in defense of his brother. This is not determinative of the issue before us. Although evidence adduced at trial would support a jury finding that the defendant acted in perfect defense of another, it also would support a finding that the defendant and Thompson acted in concert to commit first-degree murder. As the evidence supported the acting in concert theory, the trial court properly gave an instruction on that theory.

**[6]** The defendant next contends that the trial court erred by denying his motion to dismiss the charge of first-degree murder due to insufficient evidence tending to show that the defendant premeditated, deliberated and formed the intent to kill. "In ruling on a motion to dismiss, the evidence must be considered 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. Sweatt*, 333 N.C. 407, 414, 427 S.E.2d 112, 116 (1993) (citations omitted). As noted previously in this opinion, the evidence supported two alternative versions of the events on the night the victim was killed. However, the existence of contradictory evidence does not warrant a dismissal; the resolution of such contradictions is the province of the jury. *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980). The trial court's function in considering motions to dismiss is to determine whether a reasonable inference of the defendant's guilt of the crime charged may be drawn from the evidence. *Id.* In the case *sub judice*, notwithstanding the conflicting evidence, a reasonable inference that the defendant acted with the intent to kill after premeditation and deliberation could be drawn from the defendant's statements to the police and Paulette Bolden. The defendant's statements to the effect that he shot the victim to retaliate for the victim's earlier threats to the defendant's brother were clearly sufficient evidence from which the jury reasonably could have inferred that the defendant intentionally killed the victim after premeditation and deliberation. Therefore, this assignment of error is without merit.

**[7]** In another assignment of error, the defendant contends that the trial court erred by failing to sustain two objections he made during the testimony of Benjamin Rodricuz. Rodricuz testified at trial through an interpreter. The first objection raised by the defendant concerned a line of questions by the prosecutor which sought to elicit from Rodricuz testimony concerning the location of a bullet mark on the porch of the apartment where the killing occurred and the direction from which the bullet had been fired. The defendant based this objection on the contention that the witness could not have had per-

sonal knowledge as to the direction from which the shots were fired, since he was inside the apartment when he heard those shots. The second objection concerned the same subject matter, but the objection was to a statement made by the interpreter, on his own initiative, after the witness indicated the location of the bullet mark on the porch post by pointing to a photograph. The defendant argues that when the trial court overruled the objection to the interpreter's statement, it impermissibly allowed the interpreter to testify as a witness even though he had not been sworn as a witness and he had no personal knowledge of the events surrounding the shooting.

Assuming *arguendo* that the trial court erred by overruling these objections, we conclude that the errors were harmless. Other testimony in this case was to the same effect as the inference which the witness and the interpreter drew—that the location of the bullet mark indicated that shots had been fired from the right side of the apartment. Furthermore, there was nothing particularly significant about the direction from which the shots were fired. Such evidence could be viewed as corroborating the evidence tending to support either of the two versions of the events on the night of the killing. Considering the redundant nature of this evidence and its insignificance, we are compelled to conclude that there was no reasonable possibility that a different result would have been reached had the alleged errors not been committed. Thus, no prejudicial error occurred. N.C.G.S. § 15A-1443(a) (1994). This assignment of error is overruled.

**[8]** In his final assignment of error, the defendant contends that the trial court erred by failing to suppress the statement he made to Officer Benton when the officer took him to the police station for questioning two days after the murder. He argues that the trial court erred by concluding that he knowingly and voluntarily waived his constitutional rights before making the statement and that it should have been excluded. In the instant case the trial court held a *voir dire* hearing to determine the admissibility of the defendant's statement. The trial court's findings of fact after such a hearing are conclusive and binding on this Court if they are supported by competent evidence. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985) (citations omitted). This is true even though the evidence is conflicting. *Id.* We conclude that the evidence presented at the *voir dire* hearing supported the trial court's findings of fact and that none of the trial court's conclusions of law based on those findings were erroneous.

The evidence adduced in support of the trial court's findings showed that the defendant did not appear intoxicated or confused during the time when he was read his rights or when he was interviewed subsequently. Officer Benton testified that the defendant's eyes were clear, his speech was coherent, and that he did not raise his voice, get excited or appear to be nervous during the interview. The defendant indicated that he understood his rights and signed a written waiver of those rights as well as each page of the statement he gave to Officer Benton.

Two witnesses testified on the defendant's behalf during the *voir dire* hearing. Dr. Patricio Lara's initial testimony concerned the defendant's history of manic episodes. He also testified that the defendant was experiencing a manic episode when he first examined him approximately one week after the defendant's arrest. However, Dr. Lara could not give an opinion regarding whether the defendant understood his rights at the time he gave his inculpatory statement to Officer Benton. Nurse Flora Kimbrell testified that she saw the defendant several hours after he was arrested on 7 July 1992. She stated that the defendant was upset, tense and nervous at that time. Although she testified that in her opinion the defendant was delusional and could not have understood his rights, she also testified that he was able to understand the questions asked of him and that he responded in a reasonable manner to those questions.

Notwithstanding the evidence to the contrary, we conclude that there was substantial competent evidence to support the trial court's finding that the defendant understood his constitutional rights at the time he waived them. The facts found provide ample support for the trial court's conclusion that the defendant gave his statement voluntarily after a knowing and intelligent waiver of his rights. Therefore, we find no error in the trial court's denial of the defendant's motion to suppress his statement.

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error.

No Error.

FULTON CORPORATION v. BETSY Y. JUSTUS, SECRETARY OF REVENUE

No. 305A93

(Filed 9 December 1994)

**Taxation § 92 (NCI4th)— intangibles tax on corporate stock— no violation of Commerce Clause**

The North Carolina intangibles tax levied on corporate stock pursuant to N.C.G.S. § 105-203 does not violate the Commerce Clause of the U.S. Constitution because the statute taxes more heavily stock of corporations doing business outside North Carolina since the amount of the intangibles tax is directly and inversely proportional to the income of the issuing corporation which is taxed in North Carolina; the effect is to reduce the intangibles tax liability for stock held in a corporation to the extent the corporation's income is taxed in this state and to increase the intangibles tax liability on stock held in a corporation to the extent the corporation's income is not taxed in North Carolina; a reduction in the intangibles tax to the shareholder is thus offset in a direct proportional way by an income tax to the corporation; and this "compensating tax" scheme provides for substantial equality which satisfies the Commerce Clause.

**Am Jur 2d, State and Local Taxation §§ 170 et seq., 244 et seq.**

Appeal by plaintiff and defendant as of right pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision by the Court of Appeals, 110 N.C. App. 493, 430 S.E.2d 494 (1993), reversing summary judgment for defendant, entered by Brooks, J., on 8 November 1991 in Superior Court, Wake County. This Court also allowed plaintiff's petition for discretionary review of additional issues pursuant to N.C.G.S. § 7A-31.[1] Heard in the Supreme Court 2 February 1994.

*Womble Carlyle Sandridge & Rice, by Jasper L. Cummings, Jr., for plaintiff-appellant and -appellee.*

*Michael F. Easley, Attorney General, by Marilyn R. Mudge, Assistant Attorney General, for defendant-appellant and -appellee.*

1. Because of our resolution of the Commerce Clause issue against plaintiff's position, the additional issues raised in plaintiff's petition need not be addressed.

EXUM, Chief Justice.

Plaintiff, Fulton Corporation, is a North Carolina corporation with its principle place of business in North Carolina. Plaintiff owns stock in other corporations and pays an "intangibles" tax on that stock to this State pursuant to N.C.G.S. § 105-203. On 1 May 1991 plaintiff filed suit challenging the constitutionality of North Carolina's intangibles tax levied on ownership of corporate stock. Plaintiff alleged that the provisions of North Carolina's general statutes controlling the taxation of stock, particularly N.C.G.S. § 105-203, violate the Commerce Clause of the United States Constitution because the statute taxes more heavily stock of corporations not doing business in North Carolina. Plaintiff also alleged that the taxing scheme violates plaintiff's due process and equal protection rights under the North Carolina and United States Constitutions. Plaintiff requested that N.C.G.S. § 105-203 be declared null and void and that defendant be ordered to pay plaintiff a refund for the intangibles taxes paid by plaintiff for the 1990 tax year. Plaintiff and defendant both filed motions for summary judgment. The Superior Court allowed defendant's motion and denied plaintiff's motion on 15 November 1991.

Plaintiff appealed to the Court of Appeals. The Court of Appeals reversed the superior court's ruling, holding the intangibles tax at issue violative of the Commerce Clause. The Court of Appeals, however, found that the unconstitutional provisions of the taxing scheme are severable and struck the portion of N.C.G.S. § 105-203 which reduces intangibles tax based on the extent of business done in North Carolina by the issuing corporation. Thus, the intangibles tax on plaintiff's stock remained and plaintiff was denied a refund. Plaintiff appealed the decision of the Court of Appeals, arguing that the Court of Appeals correctly determined that the taxing scheme was unconstitutional, but that it erred in excising the deduction in N.C.G.S. § 105-203 rather than making the deduction applicable to the stock of all corporations. Defendant also appealed from the Court of Appeals' decision, arguing that N.C.G.S. § 105-203 does not violate the Commerce Clause.

We begin with an overview of North Carolina's intangibles tax on corporate stock and other related tax statutes.[2] Pursuant to N.C.G.S.

2. Several sections in Chapter 105 were amended in the 1991 and 1992 sessions of the General Assembly. None of the amendments affect the resolution of the issues presented in this case. All references are to the most recent version of the statutes.

§§ 105-130 to 105-130.41, North Carolina imposes an income tax of 7.75%[3] on the net income of corporations doing business in North Carolina. N.C.G.S. § 105-130.3 (1992). If a corporation does business in North Carolina and other states, then only that percentage of its business income which is apportionable to North Carolina is taxable here. N.C.G.S. § 105-130.4(b) (1992). A corporation's business income is apportioned on the basis of three factors: (1) the value of the corporation's property owned, rented or used in North Carolina during the income year divided by the value of all the corporation's property owned, rented or used during the income year; (2) the total amount paid by the corporation in North Carolina during the income year as payroll divided by the total amount paid by the corporation everywhere during the income year; and (3) the corporation's total sales in North Carolina divided by the corporation's total sales everywhere during the income year. N.C.G.S. § 105-130.4(j)(1), (k)(1), (l)(1) (1992). The first factor, sales, is double-weighted in the apportionment formula. N.C.G.S. § 105-130.4(i) (1992). A multi-state corporation's nonbusiness income, such as rents, royalties, and dividends are taxed depending on whether and to what extent the income has some connection to the state. N.C.G.S. § 105-130.4(c) (1992). For example, if the property from which rents and royalties are gained is located in North Carolina, then that nonbusiness income is taxable in North Carolina. N.C.G.S. § 105-130.4(d)(1) (1992).

A corporation, such as plaintiff here, whose commercial domicile is in North Carolina must pay income tax on dividends received on stock which it owns. N.C.G.S. § 105-130.4(f) (1992). N.C.G.S. § 105-130.7(1) provides for a deduction in the dividends on which the corporation pays tax; it states:

> [T]he Secretary of Revenue shall determine from the corporate income tax return filed during the year ending September 30 by each corporation required to file a return during that period the proportion of the entire net income or loss of the corporation allocable to this State under the provisions of G.S. 105-130.4, except as provided herein. . . . A corporation which is a stockholder in any such corporation shall be allowed to deduct the same proportion of the dividends received by it from such corporation during its income year ending on or after September 30.

The amount of deductible dividends is capped at $15,000. N.C.G.S. § 105-130.8(6). Thus, the amount of dividends a corporate sharehold-

3. Prior to 1991 the tax rate was 7%.

er may deduct is based on the percentage of the issuing corporation's net income that is allocable to and taxable in this state. The greater percentage of corporate income allocated to and taxed in this State, the more dividend income the shareholder is allowed to deduct.

N.C.G.S. § 105-203 sets forth the intangible property tax to be levied against North Carolina residents for stock owned. It states:

> All shares of stock . . . owned by residents of this State . . . shall be subject to an annual tax, which is hereby levied, of twenty-five cents (25¢) on every one hundred dollars ($100.00) of the total fair market value of the stock on December 31 of each year less the proportion of the value that is equal to:
>
> (1) In the case of a taxpayer that is a corporation, the proportion of the dividends upon the stock deductible by the taxpayer in computing its income tax liability under G.S. 105-130.7 without regard to the fifteen thousand dollar ($15,000) limitation under G.S. 105-130.7 . . . .

Thus the intangibles tax on stock is computed in the following manner: the greater the percentage of the issuing corporation's total income which is allocated to and taxed in this state the more dividend income from that corporation a corporate shareholder is allowed to deduct and the less intangibles tax the shareholder pays. The amount by which the intangibles tax against the shareholder is reduced, therefore, is directly related to the amount of the issuing corporation's income which is allocated to and taxed in this state. If 70% of the issuing corporation's income is allocated to North Carolina, then 70% of the dividends on that corporation's stock are deductible by the corporate shareholder as income, the stock's value for intangibles tax purposes is reduced by 70%, and the intangibles tax thereby decreased by 70%.

We now turn to the issue before us, which is whether North Carolina's intangibles tax on stock violates the Commerce Clause.

The United States Constitution grants Congress the authority to "regulate Commerce . . . among the several states." U.S. Const. art. II, § 8, cl. 3. It is well established that "[t]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States." *Freeman v. Hewit*, 329 U.S. 249, 252, 91 L. Ed. 265, 271 (1946), *reh'g denied*, 329 U.S. 832, 91 L. Ed. 705 (1947). Pursuant to the Commerce

Clause no state may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local businesses." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 3 L. Ed. 2d 421, 427 (1959). It is the Court's " 'duty to determine whether the statute under attack, whatever its name may be, will, in its practical operation work discrimination against interstate commerce.' " *Maryland v. Louisiana*, 451 U.S. 725, 756, 68 L. Ed. 2d 576, 601 (1981) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 85 L. Ed. 275, 277 (1940)).

Even a discriminatory tax, however, will be upheld where it is "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Indus. of Missouri v. Lohman*, 511 U.S. __, __, 128 L. Ed. 2d 639, 647 (1994). "Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce does not offend the . . . Commerce Clause." *Oregon Waste Sys., Inc. v. Department of Environmental Quality*, 511 U.S. __, __, 128 L. Ed. 2d 13, 23 (1994). "The common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." *Maryland v. Louisiana*, 451 U.S. at 759, 68 L. Ed. 2d at 603.

Plaintiff argues that the intangibles tax on stock is facially discriminatory against corporations doing business outside North Carolina. Plaintiff asserts that due to the greater taxation of stock of corporations doing business outside North Carolina, those corporations will have more difficulty raising capital through the sale of stock in North Carolina than will corporations doing business in North Carolina only. Plaintiff also asserts that the current tax scheme encourages corporations to conduct business in North Carolina since that will reduce the intangibles tax liability to its North Carolina shareholders thereby enhancing the marketability of its shares in North Carolina.

Defendant argues that there is no evidence in the record showing that the tax scheme will actually affect interstate commerce. Defendant also argues that this case is controlled by *Darnell v. Indiana*, 226 U.S. 390, 57 L. Ed. 267 (1912), and that any discrimination in the tax scheme can be justified as a compensatory tax.

After carefully reviewing the Supreme Court's jurisprudence in this area of law, which the Court itself has characterized as a "quagmire," *American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 280, 97

L. Ed. 2d 226, 241 (1987), we conclude that the tax in question is permissible based on the Court's holding in *Darnell.*

In *Darnell* the plaintiff, a resident of Indiana, owned stock in a Tennessee corporation which paid no property taxes in Indiana. Indiana taxed all shares in foreign corporations owned by inhabitants of the state, and "all shares in domestic corporations when the property of the corporations . . . is not taxable to the corporation itself. If the value of the stock exceeds that of the tangible taxable property that excess also is taxed." *Darnell* at 397, 57 L. Ed. at 272. The plaintiff challenged the Indiana intangibles tax on the ground that it violated the Commerce Clause and the Fourteenth Amendment. The Court upheld the tax in an opinion by Justice Holmes, who reasoned:

> The only difference of treatment disclosed by the record that concerns the defendants, is that the State taxes the property of domestic corporations and the stock of foreign ones in similar cases. That this is consistent with substantial equality notwithstanding the technical differences was decided in *Kidd v. Alabama*, 188 U.S. 730, 732, 47 L. ed. 669, 672, 23 Sup. Ct Rep. 401.[4]

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4. In *Kidd v. Alabama*, 188 U.S. 730, 47 L. Ed. 669 (1903), an Alabama tax on the stock of foreign railroads was challenged because there was no corresponding tax on the stock of domestic railroads. The Court upheld the tax against a challenge that the tax violated the Fourteenth Amendment, stating:

> We see nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the state must tax the stock held within the state if it is to tax anything and we are now assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock, it may take into account that the property and franchise of the corporation are untaxed on the same ground that it might do the same thing with a domestic corporation. There is no rule that the state cannot look behind the present net value of different stocks.

The Court reasoned similarly in *Klein v. Board of Tax Supervisors of Jefferson County, Ky.*, 282 U.S. 19, 75 L. Ed. 140 (1930). In Klein the plaintiff raised a Fourteenth Amendment challenge to a Kentucky tax on stock which exempted stock in corporations which had 75% of their total property in Kentucky and paid Kentucky property taxes on that property. The Court affirmed the tax, stating:

> If the corporation having all its property in the state had paid taxes upon the whole, usually it would be just not to tax the stockholder in respect of values derived from what has already borne its share.

*Id.* at 23, 75 L. Ed. at 142-43.

We find our case controlled by *Darnell*. In *Darnell* the Supreme Court found substantial equality, sufficient to satisfy the Commerce Clause, in taxing the stock of foreign corporations not paying property taxes and taxing the property of domestic corporations.[5] In the instant case the state imposes an intangibles tax on the shares of stock of corporations the amount of which is directly and inversely proportional to the income of the issuing corporation which is taxed in North Carolina. The effect is to reduce the intangibles tax liability for stock held in a corporation to the extent the corporation's income is taxed in this state and to increase the intangibles tax liability on stock held in a corporation to the extent the corporation's income is not taxed in North Carolina. This is the very kind of "compensating" tax scheme the Supreme Court upheld in *Darnell*.

Plaintiff attempts to distinguish *Darnell* on the ground that "[u]nlike the instant case *Darnell* dealt with a property tax on the shareholder that was directly offset by a property tax on the corporation." We agree with plaintiff that the instant case does not involve an intangibles tax to the shareholder which is offset by a *property* tax to the corporation, but we find that difference immaterial. This case involves a reduction in the intangibles tax to the shareholder which is offset in a direct proportional way by an *income* tax to the corporation.

Where a corporation does business inside and outside North Carolina, it pays income tax to North Carolina on only that portion of its income allocable to North Carolina under N.C.G.S. § 105-130.4. A corporation doing business solely in North Carolina pays an income tax on all of its income. The North Carolina income tax paid by a corporation doing business solely in North Carolina will therefore be greater than the North Carolina income tax of a similar corporation doing some business outside North Carolina. This excess income tax

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While *Kidd* and *Klein* involved challenges to taxes based upon the Fourteenth Amendment, which makes those cases distinguishable from the challenge before us based on the Commerce Clause, they are nevertheless persuasive authority for the proposition that a state may tax the shares of certain corporations, such as a corporation doing business outside North Carolina, and with respect to other corporations, such as corporations operating exclusively in the state, tax the corporation itself, whether it be a property tax or an income tax.

5. The Indiana statute actually taxed all foreign corporations regardless of whether they actually paid property taxes in Indiana. The plaintiffs in *Darnell*, however, did not establish that their corporations paid Indiana property taxes and the Supreme Court limited its holding to situations where the corporation in question paid no property tax in Indiana. *Darnell*, 226 U.S. at 398, 57 L. Ed. at 272.

paid by the North Carolina corporation offsets, or balances, the intangible property tax on stock of the corporation doing some business outside North Carolina in the same manner that the property tax paid by domestic corporations in *Darnell* offset the intangible property tax on shares of stock of foreign corporations which did not pay property taxes in Indiana.

Plaintiff further attempts to distinguish *Darnell* on the ground that while there might be a relationship between the value of a corporation's stock and the value of its property, the "relationship between the stock-issuing corporation's North Carolina income tax and the shareholders' North Carolina intangible property tax" is "vague." We disagree.

Corporate income tax, which is directly proportional to corporate income, affects the amount of corporate income available for distribution as dividends to shareholders, and dividends paid are a major component of the valuation of the corporation's stock. Hence, we think it a sound generalization that corporate income, and income tax paid, are strongly related to the value of the corporation's stock. The strength of this relationship is aptly demonstrated by the fact that economists and investors frequently make use of the "price-earnings" ratio, or P/E ratio, which essentially represents the relationship of the value of a corporation's stock to its earnings. *See, e.g.*, 3 The New Palgrave Dictionary of Money & Finance 176 (1992).[6]

Plaintiff also asserts that even if a corporation's income bears a relationship to the value of its stock, taxation of corporate income and taxation of corporate shares do not necessarily result in equal treatment. Plaintiff provides the following hypothetical situation:

> Corp. X, operating solely in North Carolina, earns $100 income from unproductive real estate worth $1 million. It pays about $7 North Carolina income tax and its shareholders pay zero intangible tax. Corp. Y, an identical corporation operating solely in Virginia, pays no North Carolina income tax and its shareholders pay $2,500 intangible tax on $1 million in stock value.

We agree that in this hypothetical situation the intangibles tax on shares of a foreign corporation greatly exceeds the income tax to a similar corporation operating solely in North Carolina. Only in excep-

6. The P/E ratio usually refers to price per share relative to earnings per share, but that ratio is the same as the value of all corporate stock, which is price per share times number of shares outstanding, to the corporations' earnings, which is earnings per share times number of shares outstanding.

tional and extreme cases, such as the one suggested by plaintiff, would North Carolina's tax against shares of corporations doing business in other states exceed the tax against the income of similar corporations doing business in North Carolina.

North Carolina taxes corporate income at 7.75 percent and taxes ownership of stock at .25 percent of the taxable value of the stock. Given these tax rates, a North Carolina corporation need only have a P/E ratio less than 31 (7.75/.25) in order to have the tax against its income exceed the intangibles tax against the stockholders of a comparable corporation doing business only in Virginia and having all its shareholders in North Carolina.[7] Since P/E ratios are only rarely greater than 31,[8] most out-of-state corporations will in fact be paying less taxes to North Carolina, directly in the form of an income tax and indirectly in the form of an intangibles tax against shares, than a similar North Carolina corporation. The result reached in plaintiff's hypothetical situation above seems to unfairly tax out-of-state corporations, but that hypothetical involves the unrealistic situation of a corporation with a P/E ratio of 10,000. The absurdity of plaintiff's hypothetical demonstrates that under ordinary circumstances there will be no greater taxation of out-of-state corporations and their shareholders than there will be of in-state corporations and their shareholders.

While there are some differences between the tax at issue here and the one in *Darnell*, we find these differences not material and we believe that North Carolina's intangibles tax on corporate stock, when considered with its corporate income tax, provides for "substantial equality" as was found in *Darnell*.

We also feel it necessary briefly to address the continued validity of *Darnell*. While plaintiff's principle argument regarding *Darnell* is that it is distinguishable, which we have rejected, it also argues to a lesser degree that *Darnell* has been implicitly overruled or modified by more recent cases. The principal modern cases discussing the compensating tax and cited by plaintiff are *Armco v. Hardesty*, 467

7. With a P/E ratio of 31, stock valued at $3100 earns $100 of income to the corporation. If the corporation conducted no business in North Carolina, the intangibles tax against the shareholders would be .0025 x $3100, or $7.75; if the corporation conducted all its business in North Carolina, the income tax against the corporation would be .0775 x $100, or $7.75.

8. *See, e.g.*, 3 The New Palgrave Dictionary of Money & Finance at 177 (showing Standard & Poor's Composite Index for P/E ratio from 1926 to 1991; P/E ratio mainly between 10 and 20, never greater than 25).

U.S. 638, 81 L. Ed. 2d 540, *reh'g denied*, 467 U.S. 638, 81 L. Ed. 2d 540 (1984) and *Maryland v. Louisiana*, 451 U.S. 725, 68 L. Ed. 2d 576 (1981).

In *Armco* West Virginia imposed a gross receipts tax on wholesale sales of tangible property; local manufacturers, however, were exempt from this tax. 467 U.S. at 640, 81 L. Ed. 2d at 5-6. The plaintiff, an Ohio corporation selling steel products wholesale in West Virginia, challenged the wholesale tax. *Id.* The Court first determined that the tax was facially discriminatory against interstate commerce and then proceeded to examine whether the tax could be saved as a compensating tax. 467 U.S. at 642, 81 L. Ed. 2d at 545. West Virginia argued that the wholesale tax exempting local manufacturers was designed to offset a sales tax imposed against local manufacturers only. The Court rejected that argument, reasoning that manufacturing and wholesaling are not "substantially equivalent events" and that certain aspects of the West Virginia sales tax on manufacturers indicated that the tax was aimed at manufacturing and not wholesaling.[9] *Id.* at 643, 81 L. Ed. 2d at 545-46.

In *Maryland v. Louisiana* the Court faced a Louisiana tax on the "first use" of gas; the tax, however, did not apply to gas extracted from Louisiana, which was subject to a "severance tax" equal to the first use tax, and did not apply to gas sold in Louisiana for certain purposes. 451 U.S. at 731, 68 L. Ed. 2d at 586. The Court first determined that the tax "discriminate[d] against interstate commerce in favor of local interests." *Id.* at 756, 68 L. Ed. 2d at 602. The Court then dealt with Louisiana's argument that the first use tax was equalized by the severance tax which affected only local producers of gas. The Court rejected the argument, finding that the rationale behind the severance tax, which is a tax on the privilege of severing resources from the soil, does not exist with respect to gas not extracted from Louisiana. *Id.* at 759, 68 L. Ed. 2d at 603.

After reviewing these cases, we believe we should not conclude that *Darnell* has been implicitly overruled. First, we generally are loath to conclude that a Supreme Court decision has been implicitly overruled, especially when the Court has emphasized that issues

9. The aspects of the West Virginia taxing scheme the Court looked to were that West Virginia did not reduce the manufacturing tax when the goods were sold outside West Virginia and that the manufacturing tax was decreased when part of the manufacturing occurred outside the state. *Armco*, 467 U.S. at 643, 81 L. Ed. 2d 546.

involved here must be decided on a case-by-case basis. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329, 50 L. Ed. 2d 514, 524 (1977) (whether law violates Commerce Clause "turns on the unique characteristics of the statute at issue and the particular circumstances in each case"). The Supreme Court of Indiana unanimously reached the same conclusion in *Indiana Department of State Revenue v. Felix*, 571 N.E.2d 287, 292 (1991), *cert. dismissed*, — U.S. —, 117 L. Ed. 2d 278 (1992) (after thorough analysis, court could not "conclude that *Darnell* has been implicitly overruled by the United States Supreme Court").

We are also reluctant to conclude *that Darnell* has been overruled by *Armco* and *Maryland v. Louisiana* because the taxes at issue in those cases are readily distinguishable. *Armco* and *Maryland v. Louisiana* dealt with taxes on the interstate exchange of goods, namely steel products and gas; this case, however, concerns a tax which allegedly discriminates against the interstate ownership of corporate shares. Since a corporation's continued existence and success depend most heavily on its ability to market its goods, a discriminatory tax levied upon a corporation's trade may well come under closer Commerce Clause scrutiny than a tax on the stock it issues. The latter has no effect on the corporation's trade and, we think, a negligible effect on a multi-state corporation's ability to raise capital.

Thus, as this case is controlled by *Darnell*, which has not been overruled, we rule in favor of defendant and conclude that the tax is valid. Finding the tax valid, we do not reach plaintiff's questions regarding a refund and attorney's fees.

Plaintiff also argues in its brief that the tax is unconstitutional under other provisions of the state and federal constitutions. No reference was made to bringing this argument before the Supreme Court in plaintiff's notice of appeal, petition for discretionary review or response to defendant's notice of appeal. Plaintiff has not discussed those arguments in its new brief filed with us. Therefore, we conclude that this issue is not properly before this Court. N.C.R. App. P. 16(a) & 28(a).

The decision of the Court of Appeals is, therefore, reversed and the judgment of the Superior Court reinstated.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ROBERT EARL BUNNING, A/K/A ROBERT EARL GARRIS

No. 403A92

(Filed 9 December 1994)

**1. Criminal Law § 762 (NCI4th)—first-degree murder—instructions—reasonable doubt—moral certainty—no error**

The trial court did not err in a first-degree murder prosecution by giving an instruction on reasonable doubt which included moral certainty. *State v. Bryant*, 334 N.C. 333, was reversed on remand from the U.S. Supreme Court, and, pursuant to the second *State v. Bryant*, 337 N.C. 298, the charge in this case was not in error.

**Am Jur 2d, Trial § 1385.**

**2. Criminal Law § 439 (NCI4th)— first-degree murder—prosecutor's argument—credibility of prosecutor and State's witnesses**

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* to stop a prosecution argument which defendant contended concerned his credibility and that of the State's witnesses. The statements by the prosecuting attorney were more in the nature of giving reasons for the jury to believe the State's evidence than vouching for his own credibility or that of his witnesses.

**Am Jur 2d, Trial §§ 681, 682, 692 et seq.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.**

**Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.**

**3. Criminal Law § 438 (NCI4th)— first-degree murder—prosecutor's argument—defendant not truthful**

The trial court did not err in a first-degree murder prosecution by not intervening *ex mero motu* to stop a prosecution argument in which defendant contended that the prosecutor called

him a liar. The prosecutor did not call defendant a liar, but asked the jury to conclude that defendant was lying because he had not told the truth on several occasions, and there was evidence from which the jury could find that defendant had not told the truth at trial.

**Am Jur 2d, Trial §§ 681, 682.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88ALR4th 8.**

4. **Criminal Law § 442 (NCI4th)— first-degree murder—prosecutor's argument—biblical reference—improper but not prejudicial**

A prosecutor's argument in a first-degree murder prosecution that the jurors would be blessed by God if they found defendant guilty was not approved, but was not so egregious that the court should have intervened *ex mero motu.*

**Am Jur 2d, Trial § 567.**

**Supreme Court's views as to what courtroom statements made by prosecuting attorney during criminal trial violate due process or constitute denial of fair trial. 40 L. Ed. 2d 886.**

5. **Jury § 127 (NCI4th)— first-degree murder—jury selection—classes in psychology and psychiatry**

The trial court did not err during jury selection for a first-degree murder prosecution by sustaining an objection to defendant's question as to whether any of the jurors had taken classes in psychology and psychiatry. The court indicated that it would not allow the answer based on what the prospective juror had learned in college; this should have allowed defendant to question the prospective juror about his feelings in regard to psychiatrists and psychologists without reference to college courses.

**Am Jur 2d, Jury §§ 201, 202.**

6. **Jury § 148 (NCI4th)— first-degree murder—jury selection—question regarding death penalty forbidden—no prejudice**

There was no prejudicial error in a first-degree murder prosecution where the trial court forbade defendant from asking a

prospective juror whether he or she could think of circumstances under which he or she would not impose the death penalty. Not allowing the question was error, but was not prejudical because defendant peremptorily challenged the prospective jurors to whom the question was addressed and was allowed to ask the other jurors whether they would automatically vote for the death penalty and whether they would vote for life if they felt the evidence did not warrant death.

**Am Jur 2d, Jury §§ 201, 202.**

**7. Jury § 145 (NCI4th)— first-degree murder—jury selection—death penalty--statement by court**

The trial court did not err in a first-degree murder prosecution by making statements which defendant says diminished the responsibility of each individual member of the jury to make an individual decision but the court was correcting an impression which could have been left by defendant's question that a prospective juror alone had to determine defendant's fate.

**Am Jur 2d, Trial §§ 276 et seq.**

**8. Evidence and Witnesses § 760 (NCI4th)— first-degree murder—effect of deceased's alcohol level excluded—no prejudicial error**

There was no prejudicial error in a first-degree murder prosecution where a psychologist was not allowed to testify that a person with the deceased's blood alcohol level would be more irritable and more prone to act on emotions where there was testimony that the deceased was a violent man and wild when drinking. Defendant was able to present stronger evidence of the deceased's violent nature than the testimony of the psychologist.

**Am Jur 2d, Appeal and Error § 806.**

**9. Homicide § 612 (NCI4th)— first-degree murder—self-defense—instructions—deceased's hands as deadly weapons**

The trial court did not err in a first-degree murder prosecution by not instructing the jury that they could find that decedent's hands were a deadly weapon. It may be assumed that the jury knew that a person could kill by choking another person and could have properly determined under the charge given whether

the defendant was under such assault as would justify taking the life of decedent.

**Am Jur 2d, Homicide § 498.**

**10. Criminal Law § 1336 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—prior capital felony**

The trial court erred during a first-degree murder sentencing hearing by submitting to the jury the aggravating circumstance that defendant had previously been convicted of another capital felony when defendant had pleaded guilty to first-degree murder in Virginia in 1973 and Virginia's death penalty had been held unconstitutional in 1972. The North Carolina General Assembly, when it defined death penalty, meant a crime for which defendant could have received the death penalty. Defendant could not have received the death penalty for the crime to which he pled guilty in Virginia. N.C.G.S. § 15A-2000(e)(2).

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Rousseau, J., at the 19 October 1992 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 12 April 1994.

The defendant was tried for the first-degree murder of Maurice Rupert Brooks. The State's evidence, including the testimony of an eyewitness, showed that after the conclusion of a card game the defendant, without provocation, shot and killed Mr. Brooks with a single shot from a .25 caliber pistol. A blood test revealed that Mr. Brooks had a blood alcohol level of .35 at the time of his death.

The defendant testified in his own behalf that during an argument between him and Mr. Brooks, Mr. Brooks grabbed him by the throat and choked him. He felt threatened and shot Mr. Brooks. The defendant testified on cross-examination that his legal name was Robert Earl Garris.

The jury found the defendant guilty of first-degree murder. After a sentencing hearing, the jury found one aggravating circumstance,

that the defendant had previously been convicted of another capital felony. The jury found six mitigating circumstances. The jury found that the mitigating circumstances did not outweigh the single aggravating circumstance and that the aggravating circumstance considered with the mitigating circumstances was sufficiently substantial to call for the imposition of the death penalty. The jury recommended the death penalty and this sentence was imposed.

The defendant appealed.

*Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.*

WEBB, Justice.

**[1]** The defendant's first assignment of error deals with the charge. The court charged the jury on reasonable doubt as follows:

> Now, a reasonable doubt is not a vain, imaginary or fanciful doubt, but it's a sane and rational doubt. It's a doubt based on common sense. When it's said that you, the jury, must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that you must be fully satisfied or completely satisfied or satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing the evidence or lack of evidence, the minds of the jury are left in such condition that you cannot say that you have an abiding faith to a moral certainty in the defendant's guilt, then you have a reasonable doubt. Otherwise not.

The defendant says this charge is indistinguishable from the charge given in *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), *judgment vacated*, 114 U.S. 1365, 128 L. Ed. 2d 42, *on remand*, 337 N.C. 298, 446 S.E.2d 71 (1994), which we found violated the defendant's right to due process of law under *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1991). After our decision in *Bryant*, the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. ---, 127 L. Ed. 2d 583 (1994), held that if words which we found offensive in *Bryant* were used in conjunction with other words which showed the court did not lessen the burden of proof beyond a reasonable doubt, the charge is not erroneous. On remand from the United States Supreme Court, we reversed *Bryant* and held that the charge was not erroneous. *See also State v. Moseley*, 336 N.C. 710, 445 S.E.2d 906

(1994) and *State v. Jones*, 336 N.C. 490, 445 S.E.2d 23 (1994). We hold, pursuant to our second opinion in *Bryant*, that the charge in this case was not in error.

This assignment of error is overruled.

**[2]** The defendant next contends it was error for the court not to intervene *ex mero motu* to stop certain parts of the argument the prosecuting attorney made to the jury. The defendant did not object to any of these arguments and unless they were so grossly improper that they denied the defendant due process of law, we cannot hold they were erroneous. *State v. Brown*, 320 N.C. 179, 358 S.E.2d 1, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987).

The defendant first says that the prosecuting attorney improperly vouched for his own credibility and the credibility of the State's witnesses. *See State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975) and *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). The defendant argues that the following excerpts from the prosecuting attorney's argument demonstrate this error:

> And if you believe that I have misled you, or that I'm going to mislead you, or that these detectives, Detective Whitt and Detective Rooker, put words in David Jones' mouth, if you believe any of those things, that the State has tried to mislead you, just go ahead and turn this gun-toting killer loose, who happens to have this loaded handgun in his rear pocket.
>
> . . . .
>
> And I contend to you, ladies and gentlemen, that I'm not going to . . . mislead you about anything. . . . [I]f you think that we've misled you . . . then turn him loose.
>
> . . . .
>
> If I was going to mislead you, I wouldn't put up every single officer that was involved in the case, all the SBI agents. You wouldn't have heard from them.
>
> . . . .
>
> But I say and contend to you that this fine detective, this professional law-enforcement officer, isn't going to make up some statement for David Michael Jones, just to convict Robert Bunning.
>
> . . . .

> Either this statement was David Michael Jones' statement . . . or this police detective with his 19 years and one month of experience . . . made it up. . . . And I contend to you that Detective J. Whitt isn't going to put his reputation and his career on the line. . . .

These statements by the prosecuting attorney were more in the nature of giving reason why the jury should believe the State's evidence than that the prosecuting attorney was vouching for the credibility of the State's witnesses or for his own credibility. At its worst, the prosecuting attorney's argument was not so egregious as to require the court to intervene *ex mero motu*.

**[3]** The defendant next says the prosecuting attorney called him a liar. He bases this argument on the following portions of the prosecuting attorney's argument:

> You know, I contend to you . . . that a man that'll lie about his name and lie about as many things as he has, and given as many names as he has, will lie about anything.
>
> . . . .
>
> And I contend to you that a person that'll lie about their name will lie about anything.

A prosecuting attorney in his argument to the jury should not call a defendant a liar. *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967). In this case, the prosecuting attorney did not call the defendant a liar. He asked the jury to conclude the defendant was lying because he had lied about his name and other things. There was evidence that the defendant had used several aliases and had used his dead brother's social security card to obtain food stamps. This was evidence from which the prosecuting attorney could argue that the defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial.

**[4]** The defendant next argues that the prosecuting attorney made an improper argument in quoting from the Bible. The prosecuting attorney said:

> I want to quote to you from Proverbs, because the Lord tells us in Proverbs that "[i]t will go well with those who convict the guilty, and great blessing come upon them."

While we have said that Biblical references should not be used in arguments to the jury, we have allowed considerable latitude in such arguments without holding it to be reversible error. *State v. Artis*, 325 N.C. 278, 331, 384 S.E.2d 470, 500 (1989). We have said it is particularly egregious to argue that the law is divinely inspired. *State v. Oliver*, 309 N.C. 326, 359, 307 S.E.2d 304, 326 (1983), or that law officers are ordained by God. *State v. Moose*, 310 N.C. 482, 501, 313 S.E.2d 507, 519 (1984). The Biblical quotation used by the prosecuting attorney implied to the jurors that if the defendant was guilty and they convicted him they would be blessed by God. We do not approve of this argument, but we believe the jurors were properly able to discount the prosecuting attorney's promise. We do not believe the defendant was prejudiced by it. It was not so egregious that the court should have intervened *ex mero motu*.

This assignment of error is overruled.

**[5]** The defendant under his next assignment of error argues three different questions. He first says it was error to sustain an objection to a question asked while the jury was being selected. The defendant asked of all the jurors whether any of them had taken classes in psychology and psychiatry. Several of the potential jurors raised their hands and the defendant then asked, "[d]id you form any impressions about the science of psychiatry or psychology in taking that course?" The court sustained the State's objection to this question, saying, "[w]ell, now, we're not going into all of that. . . . I wouldn't want to be quizzed on what I studied in college."

The defendant says it was error to sustain the objection to this question because a potential juror's impression of psychiatry and psychology that may have been formed by earlier experiences is relevant to test whether the juror would be able to fairly assess and give proper weight to psychiatric and psychological evidence offered in mitigation. We do not find reversible error in the sustaining of the objection. In ruling on this question, the court indicated it would not allow the answer based on what the prospective juror had learned in college. This should have allowed the defendant to question the prospective juror about his feelings in regard to psychiatrists and psychologists without reference to college courses. The defendant did not ask such a question and we do not know what the court's ruling would have been had such a question been asked.

**[6]** The defendant next says it was error for the court to *sua sponte* forbid the defendant from asking a prospective juror the following question:

> Can you think of circumstances under which you would not impose the death penalty, for an individual convicted of premeditated murder?

This question was designed to ferret out those potential jurors who would impose the death penalty without regard to mitigating circumstances. It was error pursuant to *Morgan v. Illinois*, 504 U.S. —, 119 L. Ed. 2d 492 (1992), not to allow it. However, it was not reversible error. The defendant peremptorily challenged the prospective jurors to whom the objection was addressed. As to other jurors, the defendant was allowed to ask whether they would automatically vote for the death penalty if the defendant should be convicted of first-degree murder. He was also allowed to ask if they would vote for life if they felt the evidence did not warrant the death penalty. The defendant should have been able from these questions to intelligently exercise his challenges.

**[7]** The defendant finally says under this assignment of error that a statement made by the court during *voir dire* constituted reversible error. During jury *voir dire* the defendant's attorney asked the following question:

> But do you understand that no matter what the evidence shows in the case, the decision about whether or not to impose the death penalty, should it get to that point, is yours and yours alone?

The court then intervened and said:

> Well, it's the jury, not necessarily hers.

The court later instructed the jury as follows:

> Members of the jury, the jury sits together and render your verdict [sic], after listening to everyone talk, and make your verdict that way.

The defendant says these two statements by the court diminished the responsibility of each individual member of the jury to make an independent decision. The question asked by the defendant could have led the prospective juror to believe she alone had to determine the fate of the defendant. The court corrected this impression. We find no error in the statements of the court.

This assignment of error is overruled.

**[8]** The defendant next assigns error to the exclusion of testimony by a clinical psychologist. The evidence showed that the deceased had a blood alcohol content of .35 at the time he was killed. If she had been allowed to testify, the psychologist would have said that a person with a blood alcohol level of .35 would be "extremely inebriated" and that the "disinhibit[ing]" effect of alcohol "makes a person more irritable, more prone to act out and more prone to act on any emotions that they have at the time." The defendant contends this testimony was relevant as some evidence that the deceased was the aggressor in the fight and it was error to exclude it. *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988).

Assuming this testimony should have been admitted, we hold the defendant was not prejudiced by its exclusion. The witness did not relate her testimony to the deceased. There was evidence that the blood alcohol content of the decedent was .35 percent. A witness testified for the defendant that the deceased was a violent man and when he was drinking was "kind of wild." The defendant was able to present stronger evidence of the deceased's violent nature than the testimony of the psychologist would have been. The defendant was not prejudiced by its exclusion.

This assignment of error is overruled.

**[9]** The defendant next assigns error to the court's failure to charge that the jury could find that the decedent's hands were a deadly weapon. The defendant requested that in charging on self-defense, the court instruct the jury that it could find that the decedent was choking or attempting to choke the defendant and that the decedent's hands were being used as a deadly weapon. The defendant relies on two cases decided by the Court of Appeals which hold that under certain circumstances the hands and fists can be deadly weapons to support convictions of assault with a deadly weapon. *State v. Grumbles*, 104 N.C. App. 766, 411 S.E.2d 407 (1991); *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429 (1983).

The defendant does not otherwise take exception to the charge on self-defense. We must assume that the jury knew that depending on the circumstances a person could kill by choking another person to death. It could have properly determined under the charge given by the court whether the defendant was under such assault as would justify his taking the life of the decedent. It was not necessary to tell the

jury that it could find that the decedent's hands were a deadly weapon in order to do so.

This assignment of error is overruled.

We find no error in the guilt-innocence phase of the trial.

Sentencing Hearing

**[10]** One aggravating circumstance was submitted to the jury at the sentencing hearing which was N.C.G.S. § 15A-2000(e)(2), "[t]he defendant had been previously convicted of another capital felony." N.C.G.S. § 15A-2000(a)(1) says, "[a] capital felony is one which may be punishable by death."

To support the finding of this aggravating circumstance, the State introduced evidence that the defendant had pleaded guilty to a charge of first-degree murder in the Circuit Court of the City of Chesapeake, Virginia, on 15 February 1973, and was sentenced to twenty years in prison. On 9 August 1972, the Supreme Court of Virginia held that the part of the statute of that State which provided for the death penalty was unconstitutional. *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972). There was no death penalty in Virginia at the time the defendant pled guilty to first-degree murder.

The crime to which the defendant pled guilty in Virginia was not punishable by death and was not a capital felony as defined in N.C.G.S. § 15A-2000(a)(1). The State's evidence did not support the finding of the aggravating circumstance that the defendant had previously been convicted of another capital felony. There must be a new capital sentencing proceeding.

The State argues that the defendant did not object to the charge of the court when it was explained to the jury how it would find this aggravating circumstance and pursuant to N.C. Rules of Appellate Procedure, Rule 10(b)(2) the defendant cannot appeal from this charge. The defendant does not assign error to the language of the charge. He assigns error to the submission of this aggravating circumstance to the jury. He preserved his exception to the submission of this aggravating circumstance by objecting to it on several occasions. He appeals pursuant to N.C. Rules of Appellate Procedure, Rule 10(b)(1).

The State argues that the defendant pled guilty to a crime in Virginia which is a capital felony in North Carolina and the aggravating circumstance was properly submitted. We hold that the General

Assembly, when it defined capital felony, meant a crime for which the defendant could receive the death penalty. The defendant could not have received the death penalty for the crime to which he pled guilty in Virginia. He did not plead guilty to a capital felony.

For the error in finding the aggravating circumstance, the defendant must have a new capital sentencing proceeding.

IN THE GUILT PHASE: NO ERROR.

IN THE PENALTY PHASE: NEW CAPITAL SENTENCING PROCEEDING.

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STATE OF NORTH CAROLINA v. RICKY ALTON HUGGINS

No. 43A94

(Filed 9 December 1994)

**1. Homicide § 315 (NCI4th)— first-degree murder—no instruction on voluntary manslaughter—no error**

The trial court did not err in a first-degree murder prosecution by not instructing the jury on voluntary manslaughter where defendant did not raise imperfect self-defense and the evidence tended to show that there had been no prior hostility between defendant and the two victims (one of whom lived), defendant indicated that they had been friends in the past, they used obscenities upon getting out of their truck to tell him to put up a motorcycle, and their most provocative act was to take a few steps toward the defendant immediately before he shot them without warning. The victims' actions did not rise to the level of provocation which would render the mind incapable of cool reflection.

**Am Jur 2d, Homicide §§ 519 et seq.**

**2. Evidence and Witnesses § 1693 (NCI4th)— first-degree murder—photographs of victim—admissible**

The trial court did not err in a first-degree murder prosecution by admitting two black and white photographs of victim's fatal wound where a deputy indicated that they would be helpful to illustrate his testimony regarding the location of the wound

and they were not excessive in number, repetitious or peculiarly gruesome.

**Am Jur 2d, Evidence § 974.**

**Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.**

**3. Evidence and Witnesses § 263 (NCI4th)— first-degree murder—defendant's maturity level—excluded**

The trial court did not err in a first-degree murder prosecution by excluding evidence tending to show that defendant played with younger children where defendant contended that the jury should be allowed to infer from this that he was immature. Defendant's association with younger children is an ambiguous indicator of his maturity level, his maturity level is not relevant to the case in the absence of evidence that he lacked the capacity to form the intent required for the crimes charged, and, assuming relevance, exclusion of the evidence was within the court's discretion under N.C.G.S. § 8C-1, Rule 403 because the evidence would have unnecessarily confused the issues in the case, given its slight probative value.

**Am Jur 2d, Evidence §§ 363 et seq.**

**4. Larceny § 195 (NCI4th)— felonious larceny—value of stolen truck—no instruction on misdemeanor larceny**

The trial court did not err in a prosecution for felonious larceny, among other charges, by not instructing on misdemeanor larceny when the only evidence of the value of the stolen truck indicated that it was worth more than $1,000, the threshold amount for felonious larceny. There was no evidence which would have supported a jury verdict of misdemeanor larceny.

**Am Jur 2d, Larceny §§ 174, 175.**

**Lesser-related state offense instructions: modern status. 50 ALR4th 1081.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brown (Frank R.), J., at the 1 June 1993 Criminal Session of Superior Court, Pitt County, upon a jury verdict finding the defendant guilty of first-degree murder. The defendant's motion to bypass the Court of

Appeals as to additional judgments was allowed on 31 January 1994. Heard in the Supreme Court on 11 October 1994.

*Michael F. Easley, Attorney General, by John G. Barnwell, Assistant Attorney General, for the State.*

*Steven M. Fisher for the defendant-appellant.*

MITCHELL, Justice.

The evidence at trial tended to show that on 29 January 1992, the defendant, Ricky Alton Huggins, was drinking wine with his uncle. Subsequently they parted and the defendant encountered his cousin, Danny Hardee. The defendant and Hardee proceeded to Oakland Farms to ride a motorcycle owned by the farm manager, Charles Wall. The defendant was familiar with the farm because he had worked there the previous summer. When they arrived they entered the farm shop and got the motorcycle. They also went into the office in the shop and took some coins and Charles Wall's gun. Each of them shot the gun before they tried to start the motorcycle.

At approximately 5:00 p.m. that afternoon, Louis Perry and Joseph Wallace arrived at Oakland Farms in a truck owned by Wall. They found the defendant and his cousin attempting to start the motorcycle. Perry and Wallace worked for Wall and knew the defendant from their work with him on the farm the summer before. They asked the defendant whether he had permission to ride the motorcycle and he responded that he did. The two men then left. They later discovered upon speaking to Wall that the defendant did not have permission to ride the motorcycle. Wall told them to go back and tell the defendant to get off the motorcycle. When Perry and Wallace returned to the farm and told the defendant that he did not have permission to ride the motorcycle, the defendant shot them both. Wallace died as a result of the gunshot wounds; Perry survived.

After the shootings, the defendant's cousin fled the scene. The defendant left in the truck that the victims had been driving. While driving the truck, he damaged the transmission. David Steffus, a passerby, noticed the defendant broken down on the side of the road and stopped to help him. When Steffus offered his help, the defendant pulled the gun and demanded the keys to Steffus's truck. Steffus, a firearms instructor, noticed that the gun was not loaded. He refused to turn over the keys but agreed to take the defendant to the next town. After doing so, Steffus called the police and informed them of

his encounter with the defendant. The police found and arrested the defendant at the same convenience store where Steffus had left him. Additional evidence pertinent to the issues raised on appeal will be discussed in the relevant issues.

**[1]** In his first assignment of error, the defendant argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. The trial court instructed the jury that it could find the defendant guilty of first-degree murder, either on the theory of premeditation and deliberation or the felony-murder theory. The jury returned a verdict of murder in the first degree based upon the felony-murder theory, but found the defendant not guilty of first-degree murder based upon the theory of premeditation and deliberation. The jury predicated its felony-murder conviction upon two underlying felonies—felonious larceny of Charles Wall's truck and assault with a deadly weapon inflicting serious injury upon Louis Perry.

"[W]hen the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it." *State v. Yelverton*, 334 N.C. 532, 545, 434 S.E.2d 183, 190 (1993) (quoting *State v. Strickland*, 307 N.C. 274, 292, 298 S.E.2d 645, 657 (1983)); *see also State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). The defendant contends that there was evidence which would have supported a verdict of voluntary manslaughter. A killing "committed in the heat of passion suddenly aroused by adequate provocation, or in the imperfect exercise of the right of self-defense, is voluntary manslaughter." *State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980). The defendant has not raised the argument that he acted in imperfect self-defense and the evidence did not support such a charge. Therefore, we are left to determine whether there was evidence from which a reasonable juror could have concluded that the defendant acted in the heat of passion suddenly aroused by adequate provocation.

In *State v. Watson*, 338 N.C 168, 449 S.E.2d 694 (1994), this Court said:

> There are two kinds of provocation relating to the law of homicide: One is that level of provocation which negates malice and reduces murder to voluntary manslaughter. *State v. Montague*, 298 N.C. 752, 757, 259 S.E.2d 899, 903 (1979); *State v. Ward*, 286 N.C. 304, 313, 210 S.E.2d 407, 413-14 (1974), *judgment*

> *vacated in part,* 428 U.S. 903, 49 L. Ed. 2d 1207 (1976). Mere words, however abusive or insulting are not sufficient provocation to negate malice and reduce the homicide to manslaughter. *State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985). Rather, this level of provocation must ordinarily amount to an assault or threatened assault by the victim against the perpetrator. *State v. Rogers*, 323 N.C. 658, 667, 374 S.E.2d 852, 858 (1989); *State v. Williams*, 296 N.C. 693, 252 S.E.2d 739 (1979).
>
> The other kind of provocation is that which, while insufficient to reduce murder to manslaughter, is sufficient to incite defendant to act suddenly and without deliberation. Thus, words or conduct not amounting to an assault or a threatened assault may be enough to arouse a sudden and sufficient passion in the perpetrator to negate deliberation and reduce a homicide to murder in the second degree. *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981); *State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 795-96 (1981); *State v. Thomas*, 118 N.C. 1113, 1124, 24 S.E. 431, 434-35 (1896).

*Id.* at 176-77, 449 S.E.2d at 699-700. We will address only the type of provocation which reduces first-degree murder to manslaughter because the defendant does not contend that there was evidence to support the type of provocation reducing the crime to second-degree murder.

The evidence tended to show that when Mr. Perry and Mr. Wallace first arrived at Oakland Farms they joked with the defendant. The evidence also tended to show that the defendant had fished with one of the men and had planned a fishing trip with the other. Each of the men had bought him food when he worked on the farm. There was no indication of any prior hostility between the defendant and these two men. In fact, even the defendant indicated that they had been friends in the past. The defendant testified that when the men returned to tell him to put up the motorcycle, they used obscenities upon getting out of the truck. The most provocative act the evidence tended to show that the two men did that day was take a few steps toward the defendant immediately before he shot them without warning. Evidence of those several steps by two men who were admittedly the defendant's friends did not amount to evidence of either an assault or a threatened assault. This Court has stated numerous times in the past that

> [k]illing in the heat of passion on sudden provocation means killing, "without premeditation but under the influence of sudden 'passion,' this term means any of the emotions of the mind known

> as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection."

*State v. Jones*, 299 N.C. 103, 109, 261 S.E.2d 1, 6 (1979) (quoting *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449-50 (1970)). We find, under the circumstances presented by the aforementioned evidence, that the actions of Mr. Perry and Mr. Wallace did not rise to the level of provocation which would "render the mind incapable of cool reflection." Therefore, the evidence did not warrant the requested instruction on voluntary manslaughter. This assignment of error is without merit.

**[2]** The defendant next assigns as error the trial court's admission of two black and white photographs which depicted the victim's fatal wound. The defendant contends that uncontroverted evidence previously introduced at trial indicated the location of the victim's wound and that the defendant fired the gun. Thus, he asserts, the slight relevance of these photographs was substantially outweighed by the danger of unfair prejudice to the defendant. The State argues that the photographs were properly admitted to show the location and nature of the wounds as testified to by Deputy Sheriff Moore.

Rule 403 of the North Carolina Rules of Evidence precludes the admission of evidence, including photographic evidence, if the probative value of the evidence is substantially outweighed by, *inter alia*, the danger of unfair prejudice. *See* N.C.G.S. § 8C-1, Rule 403 (1994). Whether the use of photographic evidence is more probative than prejudicial is a matter within the discretion of the trial court and will not be disturbed on review absent an abuse of that discretion. *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

> Photographs may . . . be introduced in a murder trial to illustrate testimony regarding the manner of the killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by a defendant's stipulation as to the cause of death.

*Id.* at 284, 372 S.E.2d at 526 (citations omitted). After the photographs complained of were authenticated, Deputy Moore indicated that they would be helpful to illustrate his testimony regarding the location of the fatal wound. The trial court admitted the photographs for such illustrative purposes and so limited the jury's consideration of them by proper instructions. While the photographs may have been prejudicial to the defendant, they were not unfairly so. They were not

excessive in number, repetitious or peculiarly gruesome—each a relevant factor which weighs against the admission of certain photographic evidence. *Id.* at 285-86, 372 S.E.2d at 527. They were two relevant black and white photographs of the victim properly used to illustrate the testimony of Deputy Moore. As such, their admission by the trial court did not amount to an abuse of discretion. Thus, this assignment of error is without merit.

**[3]** The defendant next contends that the trial court improperly excluded testimony of the defendant's mother and an adult neighbor concerning the defendant's maturity level. Evidence which has a 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 relevant and generally admissible. N.C.G.S. § 8C-1, Rule 401 (1994). The defendant offered evidence tending to show that he played with younger children at times. He contended that the jury should be allowed to infer from this fact that he was immature. First, we note that defendant's association with younger children is an ambiguous indicator of his maturity level. Second, we note that the defendant's maturity level is not relevant to this case in the absence of evidence that it was so extreme that the defendant lacked the mental capacity to form the intent required for the crimes charged. In essence the defendant argues that the evidence he sought to introduce tended to show he played with children and, therefore, he was immature; he was immature and, therefore, he lacked the capacity to form the requisite intent. The connection between the evidence offered and any fact of consequence was very tenuous at best.

Assuming *arguendo* that this evidence was relevant, its exclusion was not error because relevant evidence may be excluded if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury. *See* N.C.G.S. § 8C-1, Rule 403 (1994). A trial court's decision to exclude evidence under Rule 403 is reviewable by this Court for an abuse of discretion. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). As we observed above, the relevance of this evidence is highly questionable. Interjecting evidence which the defendant contends would allow the jury to infer his immaturity, an immaterial matter, so that the jury could make an additional leap to infer a fact of consequence would have unnecessarily confused the issues in this case, given the slight probative value of the contested evidence. Therefore, we conclude that, even when it is assumed *arguendo* that this evidence was relevant and admissible, its

exclusion was within the trial court's discretion. We overrule this assignment of error.

**[4]** In his final assignment of error, the defendant argues that the trial court erred by failing to instruct on misdemeanor larceny. He contends that the evidence was inconclusive on the actual value of the stolen truck and the jury should have been given the option of finding misdemeanor larceny. We disagree.

In *State v. Coleman*, 24 N.C. App. 530, 211 S.E.2d 542 (1975), the Court of Appeals held that the owner of a stolen vehicle could properly testify as to the value of his vehicle and such testimony was sufficient to go to the jury on the issue of felonious larceny. *Id.* at 532, 211 S.E.2d at 543. The owner of the stolen 1985 Chevrolet diesel truck in the present case, Charles Wall, testified that the value of the truck was "about $3,000" at the time it was stolen. This evidence was uncontroverted by the defendant, and he did not object to this valuation. There was no evidence of the vehicle's value other than the testimony by Mr. Wall. When the value of property stolen is greater than $1,000, the crime committed is a felony. N.C.G.S. § 14-72(a) (1994). The jury was instructed twice that it had to find that the value of the truck exceeded $1,000 in order to convict the defendant of felonious larceny. Its verdict necessarily determined the value of the truck as being more than $1,000. *See State v. Cooper*, 256 N.C. 372, 381, 124 S.E.2d 91, 97 (1962). This Court has said that when all the evidence tends to show that the stolen property is worth more than the statutory threshold amount, then it is inappropriate to instruct the jury on the lesser charge of misdemeanor larceny. *State v. Jones*, 275 N.C 432, 437, 168 S.E.2d 380, 384 (1969). The trial court properly refused to give the requested instruction because the only evidence of value indicated that the truck was worth more than the threshold amount and there was no evidence which would have supported a jury verdict of misdemeanor larceny. Therefore, we overrule this assignment of error.

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. RICHARD RAMSEUR

No. 510A93

(Filed 9 December 1994)

**1. Criminal Law § 914 (NCI4th)— jury poll—combining of charges—no constitutional or statutory violation**

The jury poll was not improperly conducted in violation of N.C. Const. art. I, § 24 and N.C.G.S. § 15A-1238 in a prosecution for first-degree murder, two assaults with a deadly weapon with intent to kill inflicting serious injury and possession of a firearm by a felon where each juror was individually told all of the charges for which the jury had returned a guilty verdict and was asked whether this was the juror's verdict and whether he or she still assented thereto.

**Am Jur 2d, Criminal Law § 1014.**

**2. Assault and Battery § 25 (NCI4th)— aggravated assault—serious injury from air conditioning compressor—sufficiency of evidence**

The evidence in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury was sufficient for the jury to find that the victim sustained serious injury as a result of defendant's assault upon him with an air conditioning compressor as alleged in the indictment where it tended to show that defendant beat the victim in the head with the butt of defendant's gun, knocking him to the floor; defendant then stood over the victim and attempted to throw the compressor at his head; the victim managed to move his head, but the compressor struck his shoulder; as a result of the compressor striking his shoulder, the victim was badly bruised, was unable to move his arm properly for three days, and experienced pain and suffering; and the victim was hospitalized for several hours and received treatment for his shoulder injury as well as his head injuries. There was no merit to defendant's contentions that the victim's injury could not be serious because the victim was able to continue struggling with defendant and get in his car and drive toward the police station and because the victim's skin was not broken by the blow and he did not sustain great pain or lingering disability.

**Am Jur 2d, Assault and Battery § 92.**

**Sufficiency of bodily injury to support charge of aggravated assault. 5 ALR5th 243.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments entered by Freeman, J., at the 3 May 1993 Criminal Session of Superior Court, Catawba County, imposing a sentence of life imprisonment in a capital trial upon a jury verdict of guilty of first-degree murder, imposing two consecutive sentences of twenty years upon two jury verdicts of guilty of assault with a deadly weapon with intent to kill inflicting serious injury, and imposing an additional consecutive sentence of five years upon a jury verdict of guilty of possession of a firearm by a felon. Defendant's motion to bypass the Court of Appeals on the assault and possession of a firearm charges was allowed by this Court on 8 February 1994. Heard in the Supreme Court 10 October 1994.

*Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.*

MEYER, Justice.

Evidence presented at defendant's trial showed the following:

Colen Parker operated Long View Salvage Company, with the help of his wife, Martha, and his son, Michael. The salvage company premises consisted of a salvage yard, a cinder-block garage, and a mobile-home type office unit. Defendant purchased an engine from the company, paid $200.00 down, and later paid the $125.00 balance of the purchase price. Defendant made arrangements for the salvage company to hold the engine until defendant paid the full purchase price, and then defendant would pick the engine up. After paying the balance, defendant did not pick the engine up, but did go to the salvage yard and removed parts from the engine.

On 19 March 1992, Martha Parker left the salvage yard shortly after 8:00 a.m. to go to a nearby laundromat and wash clothes. While at the laundromat, Martha saw defendant sitting in his parked car outside the laundromat. Approximately two hours later, Martha returned to the salvage yard and observed defendant walking towards the office. Colen Parker approached Martha and asked her to take their son, Michael Parker, to a nearby repair call. Defendant and Colen

were the only persons present at the salvage yard when Martha and Michael left.

When Martha returned to the salvage yard after dropping Michael off for the service call, defendant was no longer present. Colen came into the office and told Martha that defendant had hit him or kicked him while he was working on a truck tire and that defendant had threatened him, stating that he would be back at 3:00 "to get his money or his [Colen's] ass." Colen called the police, and the police chief came out to the salvage yard. Around 2:30 p.m., Martha went home for the day.

Michael Parker returned to the salvage yard but left again around 4:00 p.m. to pick up some dinner for himself and his father. Michael testified that he was unaware of the altercation between his father and defendant earlier in the day but that he had observed defendant driving by the salvage yard several times during the afternoon. When Michael returned to the salvage yard with the food, he observed Junior Casstevens' car parked there. As Michael pulled up, defendant drove in behind Michael and parked near Michael's truck. Michael got out and walked around to the rear of his truck. Defendant walked up to him and asked if Michael had his money. Michael replied that he did not deal with the money, and defendant pulled out a gun and shot him in the neck. Michael fell to the ground and saw defendant walk into the office trailer. Michael testified that he heard more shots inside the office and then saw defendant come out of the office. Junior Casstevens came out of the office at about the same time and was covered in blood. Michael remained still and attempted to appear dead. Both defendant and Casstevens drove away in their vehicles.

Junior Casstevens testified that on 19 March 1994, he went by the salvage yard at approximately 4:00 p.m. to buy a part. While Casstevens was in the garage paying Colen Parker, defendant drove up. Defendant came into the garage and asked if Colen had his money. Colen replied that Michael was not there but that he would be back shortly. Defendant responded that he would also be back and left. During this conversation with defendant, Colen whispered to Casstevens to go into the office and call the police. Casstevens went into the office and was searching for the police station's phone number when Colen entered the office. Colen called the police and informed them that defendant had returned; Colen asked if they had a car available to come to the salvage yard. As Colen hung up the phone, he said, "Here he is again."

Casstevens further testified that he looked out the window and saw defendant talking to Michael Parker. He heard a shot fired and saw Michael fall backwards. Colen screamed and grabbed a .22-caliber rifle that was located against the wall by the office door. The door to the office was opened by either defendant or Colen, and Casstevens crouched behind the office desk. Casstevens heard a shot, and then Colen threw the .22 at Casstevens and said, "[I]t won't shoot." Casstevens heard another shot and saw defendant and Colen, who had been shot, scuffling. Colen asked Casstevens for help, and Casstevens moved behind defendant and attempted to take away the pistol defendant was holding.

The three men struggled, and defendant knocked Casstevens onto the floor. Defendant then shot Colen again, and he fell to the floor. Defendant turned to Casstevens and began struggling with him. Defendant pointed his gun at Casstevens and attempted to pull the trigger. Casstevens testified that he heard one more shot, and then he heard the gun misfire. Defendant then began beating Casstevens in the head with the butt of the gun. As Casstevens lay dazed on the floor, defendant picked up an air conditioning compressor and stood over Casstevens. Defendant threw the compressor at Casstevens' head, but Casstevens managed to move partially out of the way, and the compressor struck his shoulder.

Defendant and Casstevens continued to struggle, and Casstevens managed to get defendant to the door. Defendant then walked to his car and drove off. Casstevens went to his car and began driving towards the police station; he met two police cars on the way and followed them back to the salvage yard.

Colen Parker died from a gunshot wound to the head. He was also shot twice in the abdomen. Michael Parker was hospitalized for over two months and is confined to a wheelchair. Junior Casstevens spent several hours in the hospital as a result of the blows to his head and shoulder. His head injuries required approximately fifteen stitches. His shoulder was badly bruised, and he experienced pain and suffering as a result of the shoulder injury.

**[1]** Defendant first argues the jury poll in this case was conducted in an improper manner, in violation of Article I, Section 24 of the North Carolina Constitution and N.C.G.S. § 15A-1238. Defendant did not object to the manner in which the jurors were polled.

Upon learning that the jury had reached its verdicts, the trial judge had the jurors returned to the courtroom and asked the clerk to take the verdicts. The clerk read the verdict in each case and asked the foreperson if it was the unanimous verdict of the jury. The foreperson indicated that each verdict was the unanimous decision of the jury. The transcript then reflects that the following occurred:

> CLERK: Members of the jury, would you please stand. Members of the jury, your foreperson has returned into the open court as the unanimous verdicts of the jury that the defendant Richard Ramseur is guilty of first degree murder; is guilty of assault with a deadly weapon with intent to kill inflicting serious injury upon Michael Parker; is guilty of assault with a deadly weapon with intent to kill inflicting serious [injury] upon Junior Casstevens; and is guilty of possession of a firearm by a felon. Are those the unanimous verdicts [of] the jury so say you all? (All jurors indicated in the affirmative.)
>
> CLERK: You may be seated.
>
> THE COURT: You want the jury polled?
>
> MR. HANNAH [defense counsel]: Thank you, Your Honor.
>
> BY THE COURT:
>
> Q Mr. Foreperson, would you please stand up again, please.
>
> Mr. Griffin, you have returned a verdict in open court that the jury unanimously find[s] the defendant guilty of first degree murder; guilty of assault with a deadly weapon with intent to kill inflicting serious injury upon Michael Parker; guilty of assault with a deadly weapon with intent to kill inflicting serious injury upon Junior Casstevens; and guilty of possession of a firearm by a felon. Was that your verdict?
>
> A Yes, it was.
>
> Q Is that still your verdict?
>
> A Yes.
>
> Q Do you still assent to that verdict, sir?
>
> A Yes, sir.

The transcript reveals that the trial judge proceeded to question each of the remaining jurors in a similar fashion and that each of the jurors unequivocally answered these questions in the affirmative.

In *State v. Norris*, 284 N.C. 103, 199 S.E.2d 445 (1973), this Court found no error in a jury poll conducted in virtually the same manner as the one in this case. In *Norris*, the jury returned a verdict of guilty of rape and kidnapping, and the jurors were individually questioned as to whether this was their verdict, whether it was still their verdict, and whether they still assented to their verdict. *Id.* at 107, 199 S.E.2d at 448. Similarly, in this case, each of the jurors individually was told the charges for which the jury had returned a guilty verdict and was asked whether this was their verdict and whether they still assented to the verdict. We find no error in the manner in which the jury was polled.

**[2]** Defendant next assigns error to the trial court's refusal to grant defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury on Junior Casstevens. Defendant argues that the indictment charged defendant only with assaulting Mr. Casstevens with an air conditioning compressor and that the evidence was insufficient as a matter of law to demonstrate that Mr. Casstevens sustained serious injury as a result of defendant's assault with the compressor. We find no merit in this argument.

In determining whether evidence is sufficient to survive a motion to dismiss, the evidence must be considered in the light most favorable to the State. *State v. Mason*, 336 N.C. 595, 597, 444 S.E.2d 169, 169 (1994). The test for sufficiency of the evidence is whether there is substantial evidence of every element of the offense charged, or any lesser offense, and of defendant being the perpetrator of the crime. *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493 (1992). "Substantial evidence" is relevant evidence that reasonable jurors might accept as adequate to support a conclusion. *Id.* 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).

This Court has not defined "serious injury" for purposes of assault prosecutions, other than stating that "[t]he injury must be serious but it must fall short of causing death" and that "[f]urther definition seems neither wise nor desirable." *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). Whether "serious injury" has been inflicted must be decided on the facts of each case. *Id.*

In the case *sub judice*, Mr. Casstevens testified that defendant beat him in the head with the butt of defendant's gun, knocking him

to the floor. Defendant then stood over Mr. Casstevens and attempted to throw the compressor at his head. Mr. Casstevens managed to move his head, but the compressor struck his shoulder. Mr. Casstevens further testified that as a result of the compressor striking his shoulder, he was badly bruised, was unable to move his arm properly for three days, and experienced pain and suffering. Evidence also showed that Mr. Casstevens was hospitalized for several hours and received treatment for his shoulder injury as well as his head injuries.

When viewed in the light most favorable to the State, there is substantial evidence that defendant inflicted serious injury upon Mr. Casstevens when he struck him with the air conditioning compressor. Further, there is substantial evidence of all the other elements of assault with a deadly weapon with intent to kill inflicting serious injury. We do not find persuasive defendant's contention that Mr. Casstevens' injury could not be serious because Mr. Casstevens was able to continue struggling with defendant and get in his car and drive towards the police station. Nor do we find persuasive defendant's arguments that the injury was not serious because Mr. Casstevens' skin was not broken by the blow and because he did not sustain great pain or lingering disability. Accordingly, we find that the trial court committed no error in denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury and that the trial court properly submitted the charge to the jury.

We conclude that defendant received a fair trial, free of prejudicial error.

NO ERROR.

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BARBARA C. FRUGARD v. CALVIN LEE PRITCHARD, WILLIAM MASTORAS, T/A M & M PRODUCE COMPANY, DANIEL FOSTER, AND WILSON PEST CONTROL, INC.

No. 479PA93

(Filed 9 December 1994)

**Evidence and Witnesses § 254 (NCI4th)— negligence action— workers' compensation payments in Virginia—admissible**

There was no prejudicial error in the exclusion of evidence of Virginia workers' compensation payments from a negligence

action arising from an accident in which plaintiff-pedestrian was struck by a station wagon driven by defendant Pritchard after Pritchard collided with a pick-up truck driven by defendant Foster. Evidence of out-of-state workers' compensation payments is admissible in actions against third parties and the court must instruct the jury that the amount of the workers' compensation payments will be deducted from the amount of damages awarded the plaintiff. However, there was no prejudice from the exclusion of that evidence in this case because defendants objected to its admission and, while defendants contend that this was not invited error because the case was tried on the theory that the evidence would not be admitted and this assumption effected their trial strategy, defendants did not show a prejudicial effect. Defendants had the chance to put the evidence before the jury, but refused to do so and cannot now complain.

**Am Jur 2d, Damages §§ 566 et seq.; Evidence § 481.**

**Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits. 69 ALR4th 131.**

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 112 N.C. App. 84, 434 S.E.2d 620 (1993), reversing the judgment entered 23 August 1991 by Rousseau, J., in Superior Court, Forsyth County and remanding for a new trial. Heard in the Supreme Court 9 May 1994.

The plaintiff brought this action for damages as a result of injuries she received in an accident in Winston-Salem, North Carolina. The evidence showed the plaintiff was a pedestrian, standing on the sidewalk at an intersection. The defendant Calvin Lee Pritchard, who was driving a station wagon owned by the defendant William Mastoras and in the scope of his employment by Mastoras, collided with a pickup truck driven by the defendant Daniel Foster within the scope of his employment for the defendant Wilson Pest Control, Inc. As a result of the collision, the vehicle driven by Pritchard crossed the curb and struck the plaintiff.

Prior to the trial of the case, the plaintiff made a motion *in limine* to prohibit any mention at the trial that she, as a resident of Virginia, had received worker's compensation payments in Virginia. The court granted this motion. When the plaintiff's last witness had completed his testimony, the plaintiff withdrew her motion *in limine* and offered

into evidence the fact that she had received worker's compensation payments in Virginia. The defendants objected to this testimony on the ground that the case had been tried based on the court's ruling that the evidence should be excluded. Several key witnesses had been released and were not available for further cross-examination and the defendants argued that it would be unfair to them for the evidence of worker's compensation payments to be admitted under these circumstances. The court sustained the defendants' objection.

The jury answered the issues favorably to the plaintiff and awarded her $700,000.00 in damages. The Court of Appeals overruled two assignments of error by the defendants, but held it was reversible error to allow the plaintiff's motion *in limine* to exclude evidence that she had received worker's compensation payments in Virginia. We allowed the plaintiff's petition for discretionary review.

*Clark & Stant, P.C., by Stephen C. Swain, for plaintiff-appellant.*

*Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. and Denis E. Jacobson, for William Mastoras, t/a M & M Produce Company, defendant-appellee.*

*Womble Carlyle Sandridge & Rice, by Clayton M. Custer, for Daniel Foster and Wilson Pest Control, Inc., defendants-appellees.*

WEBB, Justice.

We agree with the Court of Appeals that it was error to exclude evidence of the worker's compensation payments made to the plaintiff in Virginia. The accident occurred in North Carolina and the substantive law of this state governs. *Braxton v. Anco Electric Inc.*, 330 N.C. 124, 409 S.E.2d 914 (1991). The law of the forum, in this case North Carolina, governs as to the admissibility of evidence. *Transportation, Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973). 1 Brandis and Broun, *North Carolina Evidence* § 1 (4th ed. (1993). The defendants argue that N.C.G.S. § 97-10.2(e) applies to this case and it makes the evidence admissible. That section says in part, "[t]he amount of compensation . . . paid or payable on account of such injury or death shall be admissible in evidence in any proceeding against the third party." The plaintiff argues, relying on *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 305 S.E.2d 528 (1983), that this section does not apply.

We held in *Johns-Manville* that N.C.G.S. § 97-10.2(e) did not apply in that case so that the defendant could not assert a certain defense to a wrongful death claim when the defense was based on a worker's compensation payment under the law of another state. We said that this section applied only to worker's compensation claims made under the laws of this state. We held, however, that the defense could be asserted, based on the common law of this state.

The plaintiff argues, based on our holding in *Johns-Manville*, that N.C.G.S. § 97-10.2(e) does not apply to worker's compensation claims paid in other states and that this section does not allow the admission of this evidence. She argues that we must look to the case law in this state to determine the admissibility of the evidence and that *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E.2d 808 (1965), makes this evidence inadmissible.

In *Spivey*, a case decided before N.C.G.S. § 97-10.2(e) was amended to allow the admission of evidence of worker's compensation payments in an action against a third party, we interpreted the section to hold that such evidence was not admissible. *Spivey* has now been overruled by the amendment to this section. The plaintiff argues that *Spivey* is still viable in cases involving out-of-state worker's compensation claims because the section does not apply to such claims.

*Spivey* does not govern because N.C.G.S. § 97-10.2(e) applied in that case and it does not apply in this case. The question we face in this case is whether we should hold that under our case law, evidence of out-of-state worker's compensation payments is not admissible when by statute evidence of in-state payments is admissible. We can see nothing in the distinction between these two situations that makes a difference. We believe we should have a uniform rule. We hold that evidence of out-of-state worker's compensation payments is admissible in actions against third parties. N.C.G.S. § 97-10.2(e) provides that when evidence of worker's compensation payments is introduced in an action against a third party, the court must instruct the jury that the amount of the worker's compensation payments will be deducted from the amount of the damages awarded the plaintiff. In order to put evidence of worker's compensation payments introduced under the rule of this case on the same footing with evidence which is introduced pursuant to N.C.G.S. § 97-10.2(e), we hold that the court must give the same instruction in cases in which such evidence is introduced under the rule of this case.

Although we hold that it was error not to have admitted evidence of the worker's compensation payments in Virginia, we also hold this was invited error which does not require a new trial. A party may not complain of action which he induced. *Brown v. Griffin*, 263 N.C. 61, 138 S.E.2d 823 (1964); *Darden v. Bone*, 254 N.C. 599, 119 S.E.2d 634 (1961). In this case, the plaintiff's motion *in limine* was granted to exclude evidence of the Virginia worker's compensation payments. Later in the trial, the plaintiff tendered this evidence and the defendants objected to its admission and the objection was sustained. The defendants cannot now complain of the exclusion of the evidence when they objected to its admission.

The defendants contend that the circumstances under which they objected to the testimony did not invite error. They say that the case was tried on the theory that the evidence would not be admitted and this assumption caused them to use a strategy they would not have used if they had known the evidence of worker's compensation would be admitted. The defendants say the plaintiff tendered this evidence as she finished her testimony and it would not have been fair to them to admit it at that time, giving them the right to object without inviting error.

The defendants say that the plaintiff tried the case on the theory that plaintiff had been a hardworking person all her life who would find work if she were physically able to do so. She had several witnesses who testified to this effect. She also introduced evidence that she had been devastated financially by the accident. The plaintiff also had a witness who testified she was attempting to locate a job for her at a charge of $57.00 per hour. The defendants say that by not letting the jury know that plaintiff was receiving worker's compensation payments of $344.00 per week and the job hunter was being paid by the compensation carrier, they could not show the plaintiff was malingering and she was not hurt as much as she claimed.

The difficulty with the defendants' argument is that they have not shown how the trial strategy was such that the introduction of the evidence of the worker's compensation payments would have not been of as much benefit to defendants if introduced when the plaintiff tendered it as it would have been if offered earlier in the trial. The defendants had a chance to put the evidence to the jury, but refused to do so. They cannot now complain.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand to that court for remand to Superior Court,

Forsyth County for the reinstatement of the judgment entered in superior court.

REVERSED AND REMANDED.

ALEXANDER v. N.C. DEPT. OF HUMAN RESOURCES

No. 492P94

Case below: 116 N.C.App. 15

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

ANDERSON v. AUSTIN

No. 329P94

Case below: 115 N.C.App. 34

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

BARNES v. HUMANA OF N.C.

No. 452PA94

Case below: 115 N.C.App. 728

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994.

BARNHARDT v. CITY OF KANNAPOLIS

No. 512P94

Case below: 116 N.C.App. 215

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

CUSTOM MOLDERS, INC. v. AMERICAN YARD PRODUCTS, INC.

No. 326P94

Case below: 115 N.C.App 156

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

DAUGHTRY v. METRIC CONSTRUCTION CO.

No. 366P94

Case below: 115 N.C.App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

DIGGS v. DIGGS

No. 469P94

Case below: 116 N.C.App. 95

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

FIRST UNION NATIONAL BANK v. HINRICHS

No. 397P94

Case below: 113 N.C.App. 836

Petition by defendants (Michelle Lee Sheets Hinrichs and George C. Sheets) for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

H & W TRUCKING v. WARREN TRUCKING

No. 495P94

Case below: 115 N.C.App. 728

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

HONEYCUTT v. TRAVELERS INDEMNITY W.E.S. CO. OF RHODE ISLAND

No. 429P94

Case below: 115 N.C.App. 567

Petition by defendant (The Travelers Indemnity Co.) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

IN RE DAVIS

No. 542P94

Case below: 116 N.C.App. 409

Petition by respondents (James and Dena Davis) for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

IN RE ESTATE OF WRIGHT

No. 399P94

Case below: 114 N.C.App. 659

Petition by petitioner (High Point Bank & Trust Company) for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

IN RE POLLEN-BROWNING

No. 548P94

Case below: 116 N.C.App. 735

Petition by appellant for writ of supersedeas denied 16 November 1994. Petition by appellant for temporary stay denied 16 November 1994. Petition by appellant for discretionary review pursuant to G.S. 7A-31 denied 16 November 1994.

IN RE YOUNGBLOOD

No. 537P94

Case below: 116 N.C.App. 490

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 8 December 1994. Petition by respondent (Curtis Youngblood) for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

INTEGON INDEMNITY CORP. v. UNIVERSAL UNDERWRITERS INS. CO.

No. 516PA94

Case below: 116 N.C.App. 279

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994.

JACKSON COUNTY EX REL. SMOKER v. SMOKER

No. 394PA94

Case below: 115 N.C.App. 400

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994. The case will be consolidated with *State ex rel. Alfred West, Jr. v. Linda G. West*, 395PA94, for purposes of oral argument.

JOHN R. SEXTON & CO. v. JUSTUS

No. 523PA94

Case below: 116 N.C.App. 293

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994.

JONES COUNTY DSS v. GREEN

No. 432A94

Case below: 116 N.C.App. 137

Notice of appeal by defendant (substantial constitutional question) dismissed 8 December 1994.

JOYNER v. DEANS

No. 529P94

Case below: 116 N.C.App. 359

Petition by plaintiffs for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

LAKE TOXAWAY PROPERTY OWNERS ASSN. v. LEDDICK

No. 468P94

Case below: 115 N.C.App. 729

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

LEONARD v. ENGLAND

No. 417PA94

Case below: 337 N.C. 801
115 N.C.App. 103

Motion by plaintiff to rescind grant of discretionary review as improvidently allowed denied 8 December 1994.

LOWERY v. FORD MOTOR CREDIT CO.

No. 494P94

Case below: 115 N.C.App. 729

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

McARDLE CORP. v. PATTERSON

No. 372A94

Case below: 115 N.C.App. 528

Motion by plaintiff to dismiss notice of appeal denied 8 December 1994.

McCORKLE v. AEROGLIDE CORP.

No. 477P94

Case below: 115 N.C.App. 651

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

METROPOLITAN LIFE INSURANCE CO. v. ROWELL

No. 336P94

Case below: 113 N.C.App. 779

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

MULLINS v. WEBER

No. 487P94

Case below: 116 N.C.App. 137

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

MURRAY v. ASSOCIATED INSURERS, INC.

No. 279A94

Case below: 114 N.C.App. 506

Petition by defendants 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 denied 8 December 1994. Petition by defendants for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

NELSON v. HAYES

No. 522P94

Case below: 116 N.C.App. 632

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

NICHOLS v. WILSON

No. 506P94

Case below: 116 N.C.App. 286

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

OAKLEY v. UNIVERSITY OF NORTH CAROLINA

No. 455P94

Case below: 116 N.C.App. 137

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

POWELL v. POWELL

No. 509PA94

Case below: 116 N.C.App. 360

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994.

POWELL v. S & G PRESTRESS CO.

No. 260A94

Case below: 114 N.C.App. 319

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rules 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals denied 8 December 1994.

PURVIS v. BRYSON'S JEWELERS

No. 493P94

Case below: 115 N.C.App. 146

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

RAINTREE REALTY AND CONSTRUCTION v. KASEY

No. 517PA94

Case below: 116 N.C.App. 340

Petition by respondents (Wrights & Lincoln Service Corp.) for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994.

REAVIS v. ITT CONSUMER FINANCIAL CORP.

No. 521P94

Case below: 116 N.C.App. 138

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. ADKINS

No. 439P94

Case below: 101 N.C.App. 430

Petition by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

STATE v. COLE

No. 408P94

Case below: 115 N.C.App. 730

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. FREEMAN

No. 421P94

Case below: 115 N.C.App. 730

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. HOLDER

No. 367P94

Case below: 115 N.C.App. 399

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994. Petition by defendant for writ of certiorari to review the order of the Superior Court, Guilford County, denied 8 December 1994.

STATE v. MILLER

No. 67A93

Case below: 85CRS18803 Robeson County

Motion by defendant for appropriate relief and motion for supplemental briefing denied 8 December 1994.

STATE v. O'NEAL

No. 536P94

Case below: 116 N.C.App. 390

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. QUICK

No. 459A94

Case below: 116 N.C.App. 362

Petition by Attorney General for writ of supersedeas allowed 8 December 1994.

STATE v. ROBINSON

No. 511P94

Case below: 116 N.C.App. 363

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. SPELLMAN

No. 444P94

Case below: 116 N.C.App. 363

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. TAYLOR

No. 403P94

Case below: 115 N.C.App. 732

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE v. WATSON

No. 359A91

Case below: 338 N.C. 168

Motion by defendant for reconsideration and for temporary stay of mandate denied 21 November 1994.

STATE v. WILLIAMS

No. 510P94

Case below: 116 N.C.App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

STATE EX REL. WEST v. WEST

No. 395PA94

Case below: 115 N.C.App. 496

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994. The case will be consolidated with Jackson County, et al v. Owen Smoker, Jr., 394PA94, for purposes of oral argument.

STATE FARM MUT. AUTO. INS. CO. v. YOUNG

No. 335PA94

Case below: 115 N.C.App. 68

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 8 December 1994.

STROUD v. FIELDCREST CANNON, INC.

No. 504P94

Case below: 116 N.C.App. 363

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

TALLY v. WATAUGA HOSPITAL

No. 461P94

Case below: 115 N.C.App. 732

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

TAYLOR HOME OF CHARLOTTE v. CITY OF CHARLOTTE

No. 488P94

Case below: 116 N.C.App. 188

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

WHITE v. N.C. DEPT. OF HUMAN RESOURCES

No. 456P94

Case below: 115 N.C.App. 732

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

WHITFIELD v. TODD

No. 519P94

Case below: 116 N.C.App. 335

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

WILLIS v. RAGGEDY ANN CHILD CARE CENTER

No. 507P94

Case below: 115 N.C.App. 569

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 December 1994.

WOODS v. UZZLE CADILLAC

No. 540P94

Case below: 116 N.C.App. 491

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 8 December 1994.

PETITION TO REHEAR

BEST v. DUKE UNIVERSITY

No. 51PA94

Case below: 337 N.C. 742

Petition by plaintiff to rehear pursuant to Rule 31 denied 8 December 1994.

STATE OF NORTH CAROLINA v. RONNIE WAYNE BAKER

No. 159A92

(Filed 30 December 1994)

**1. Jury § 219 (NCI4th)— capital trial—death penalty views—refusal to return death penalty if polled—excusal for cause**

The trial court did not err in excusing a prospective juror for cause in a capital trial because of her death penalty views where the juror's responses show that if the recommendation were for death, she could not fulfill a juror's duty to state this when polled.

**Am Jur 2d, Jury §§ 289, 290.**

**Comment Note.—Beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.**

**2. Evidence and Witnesses § 419 (NCI4th)— identification testimony—not hypnotically refreshed**

Testimony by a witness that he was "positive" and had "no doubt whatsoever" that he saw defendant with the victim on the morning the victim was murdered did not violate the ban on hypnotically refreshed testimony and was properly admitted where the record shows that the witness positively identified defendant during pre-hypnosis interviews and that the witness's testimony referred to facts he related before his hypnotic session.

**Am Jur 2d, Evidence § 1019.**

**Admissibility of hypnotic evidence at criminal trial. 92 ALR3d 442.**

**Admissibility of hypnotically refreshed or enhanced testimony. 77 ALR4th 927.**

**3. Evidence and Witnesses § 2047 (NCI4th)— inferences based on perceptions—rebuttal testimony**

Where defendant had cross-examined a witness extensively concerning his involvement with a murder victim and his potential involvement in the victim's death, the State was entitled to have an investigating officer testify in rebuttal as to why the witness had been eliminated as a suspect. Therefore, an S.B.I. agent's testimony, in response to an inquiry as to why the witness was a suspect for only a short time, that the witness had no motive for

the murder was admissible under Rule 701 as an inference rationally based on the perception of the witness and helpful to the determination of a fact in issue. N.C.G.S. § 8C-1, Rule 701.

**Am Jur 2d, Expert and Opinion Evidence §§ 26 et seq., 362, 363.**

**4. Evidence and Witnesses § 1007 (NCI4th)— hearsay exception—unavailable declarant—sufficient finding of unavailability**

The trial court made a sufficient preliminary finding that the declarant (a murder victim) was unavailable to testify for the admission under Rule 804 of hearsay testimony by various witnesses who related statements of the victim about threats defendant made against her and her fear of him where ample evidence about the victim's death was presented by the State before the testimony of any of these witnesses; the trial court stated that the issue was "the believability of the declarant . . . [w]ho is unavailable"; and written orders admitting the testimony specified that the statements were those "of the decedent." N.C.G.S. § 8C-1, Rule 804.

**Am Jur 2d, Evidence §§ 690 et seq.**

**Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.**

**5. Evidence and Witnesses § 1006 (NCI4th)— hearsay exception—unavailable declarant—failure to state rule number**

The trial court's omission of the rule number from its written orders admitting a murder victim's hearsay statements to certain witnesses was harmless where it is clear from the transcript and nearly identical findings and conclusions in all of the written orders that the testimony was admitted pursuant to N.C.G.S. § 8C-1, Rule 804(b)(5).

**Am Jur 2d, Evidence §§ 690 et seq.**

**Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.**

**6. Evidence and Witnesses § 1009 (NCI4th)— hearsay statements by murder victim—circumstantial guarantees of trustworthiness—sufficient findings**

The trial court's conclusion that a murder victim's statements to six witnesses concerning defendant's threats and her fear of

defendant possessed circumstantial guarantees of trustworthiness was supported by the court's findings that a confidential and trusting relationship existed between the victim and five of the witnesses and that the sixth witness was a law officer acting in the performance of his duty when the victim made the statements to him.

**Am Jur 2d, Evidence §§ 690 et seq.**

**Residual hearsay exception where declarant unavailable: Uniform Evidence Rule 804(b)(5). 75 ALR4th 199.**

**7. Homicide § 237 (NCI4th)— first-degree murder—sufficiency of circumstantial evidence**

The State's evidence, although circumstantial, was sufficient to support defendant's conviction of first-degree murder of his estranged wife where it tended to show that defendant was enraged over the victim's involvement with another man; defendant uttered racial slurs against the other man, hounded, threatened, and assaulted the victim, enlisted and attempted to enlist the aid of family members in intimidating her, and told others he would kill her; defendant both had and anticipated financial difficulties, and neither robbery nor rape was a motive in the victim's death; defendant was seen with the victim on the morning of her disappearance under circumstances which permitted an inference that he was restraining her; during the interval before the victim was found, defendant suggested that one person could overcome her strength by tying her up, and medical evidence showed that the victim's ankles and wrists had been bound and something had been around her neck; during the same interval there were times in which defendant's whereabouts were unknown and a car like one to which he had access was seen on the road where the victim's body was found, an area well known to defendant and near his home; the victim was murdered in the exact way in which defendant told others he would kill her; defendant possessed a shotgun of the same type as the murder weapon; and defendant indicated by his actions on the morning when the victim was found that he had independent knowledge of the location of her body.

**Am Jur 2d, Homicide §§ 425 et seq.**

**8. Robbery § 55 (NCI4th)— common law robbery—sufficiency of evidence**

The State's evidence was sufficient to support the trial court's submission of an issue of defendant's guilt of common law robbery to the jury where it tended to show that the victim, defendant's estranged wife, managed a convenience store; the store's currency receipts were placed in the safe when the store was closed at the end of the day and the start-up money for the following day was concealed in the back room; on the next morning, when the victim usually arrived at the store, defendant was seen holding her outside the store; the victim was abducted from the store and later found shot to death; a deputy sheriff discovered the open safe and empty cash register; over $2500 was missing from the store, and the disappearance of the money was discovered around thirty minutes after defendant was seen with the victim outside the store; the victim left the store without her pocketbook; and circumstantial evidence tended to show that defendant killed the victim. All of the evidence supports an inference that the victim did not voluntarily part with the money belonging to the store and that it was taken concurrently with her abduction.

**Am Jur 2d, Robbery §§ 62 et seq.**

**9. Kidnapping and Felonious Restraint § 21 (NCI4th)— first-degree kidnapping—removal and restraint to kill victim—sufficiency of evidence**

The evidence was sufficient to support defendant's conviction for first-degree kidnapping because it supported an inference that defendant forcibly removed the victim from the convenience store she managed and restrained her for many hours for the purpose of killing her where it tended to show that defendant was seen restraining the victim outside the store within thirty minutes before here disappearance was discovered; the victim's pocketbook remained in the store and her car remained parked outside; the victim was found the next day shot to death; and after her body was discovered, an autopsy showed that her stomach was empty, her bladder was full, and her ankles, wrists and neck had been bound.

**Am Jur 2d, Abduction and Kidnapping § 32.**

**Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.**

**10. Criminal Law § 762 (NCI4th)— instruction on reasonable doubt—use of "moral certainty" and "substantial misgiving"—no error**

The trial court did not err in its use of "moral certainty" language twice in its instruction on reasonable doubt where the remainder of the instruction lent content to the phrase, and there is no reasonable likelihood the jury understood moral certainty to be disassociated from the evidence in defendant's case. Nor was the instruction erroneous because of any combination of terms used in the definition of reasonable doubt or because it included the words "substantial misgiving."

**Am Jur 2d, Trial § 1385.**

**11. Criminal Law § 709 (NCI4th)— instructions—lapsus linguae—absence of prejudice**

The trial court's lapsus linguae in instructing the jury to return a verdict of "guilty" rather than "not guilty" if it had "a reasonable doubt as to one or more of these things" was not prejudicial error where the lapsus linguae was not called to the attention of the trial court when made; the trial court repeatedly instructed the jury that the State had the burden of proving defendant guilty beyond a reasonable doubt; the court also instructed that "[a]fter weighing all the evidence, if you are not convinced of the guilt of defendant beyond a reasonable doubt, you must find him not guilty"; and it is thus apparent from a contextual reading of the charge that the jury could not have been misled by the instruction.

**Am Jur 2d, Trial § 1127.**

**12. Criminal Law § 1355 (NCI4th)— capital sentencing—mitigating circumstance—no significant criminal history—improper submission**

The trial court erred by failing to properly submit the statutory mitigating circumstance of "no significant history of prior criminal activity" to the jury in a capital sentencing proceeding where the evidence showed that defendant's criminal record was limited to one conviction for driving while impaired and that his criminal history included threats against, and at least one assault on, the victim; the court varied the language of this statutory mitigating circumstance by submitting an issue as to whether "defendant has no record of criminal convictions," thus ignoring

evidence of defendant's uncharged crimes; although the trial court's instructions included language directing the jurors to consider whether defendant had any significant history of prior criminal activity, the jury's consideration of this circumstance was limited to defendant's criminal record when the court stated that the jury should find this circumstance if it found that defendant has one conviction of driving while impaired on his record; and the trial court's instructions erroneously permitted the jurors, if they found this circumstance to exist, to decide whether to give it weight or value.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**13. Criminal Law § 1354 (NCI4th)— capital sentencing— issues and recommendation form—statutory mitigating circumstances—mitigating value**

The trial court erred by submitting an issues and recommendation form to the jury in a capital trial which permitted the jury to determine whether the two statutory mitigating circumstances, as well as the five nonstatutory mitigating circumstances, submitted to the jury had mitigating value. If the jury finds the existence of a statutory mitigating circumstance, it may not refuse to give it weight or value.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**14. Criminal Law § 1334 (NCI4th)— capital sentencing— aggravating circumstances—denial of motion for bill of particulars**

The trial court did not err in denying defendant's motion for a bill of particulars disclosing the statutory aggravating circumstances on which the State intended to rely in seeking the death penalty.

**Am Jur 2d, Criminal Law §§ 598, 599.**

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Butterfield, J., at the 30 March 1992 Criminal Session of Superior Court, Wilson County, upon a jury verdict of guilty of first-degree murder. On 30 April 1992 this Court granted a stay of execution pending defendant's appeal. On 7 May 1992 this Court also granted defendant's motion to bypass the Court of Appeals as to additional judgments imposed for first-degree kidnapping and common-law robbery. Heard in the Supreme Court 15 November 1993.

*Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko, for the State.*

*Thomas R. Sallenger and John E. Clark for defendant-appellant.*

PARKER, Justice.

Defendant was indicted for the murder of his estranged wife, Shirlene Baker; first-degree kidnapping; and robbery with a dangerous weapon. He was tried capitally for the murder and found guilty on the theory of premeditation and deliberation. In accordance with the jury's unanimous recommendation following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, defendant was sentenced to death. Defendant was also convicted of first-degree kidnapping, for which he was sentenced to a twelve-year term of imprisonment consecutive to his death sentence, and of common-law robbery, for which he was sentenced to a three-year term of imprisonment consecutive to the twelve-year term. For the reasons set out herein, we conclude the jury selection and guilt-innocence phases of defendant's trial were free from prejudicial error. However, on account of error in the sentencing proceeding we remand for a new capital sentencing proceeding.

State's evidence tended to show that the victim managed a convenience store on State Highway 91 near Saratoga, North Carolina. In April 1988 she and defendant were married but living apart and had two sons, Shane, who was twenty years old and married, and Ronald, who had just turned fifteen. Both sons resided with defendant. The victim opened the store for business in the mornings and usually arrived there around 5:30 a.m. She turned on the lights, made coffee, started the hot dog machine and bun warmer, and sometimes counted money received during the previous business day. The store was open from 6:00 a.m. until midnight. Several witnesses testified that the victim habitually kept the door locked until 6:00 a.m. but occasionally unlocked it for delivery men. The door had an electronic lock that the victim operated by a button near the cash register.

On Monday morning, 11 April 1988, Joey Gardner, then a uniformed officer on patrol for the Wilson County Sheriff's Department, drove by the store around 5:45 a.m. From the highway, Gardner saw the victim's automobile parked in front of the store. He observed that the lights on the coffee machine and hot dog machine inside were turned on. Gardner testified that since he saw no overt signs of a break-in, he drove on.

Minutes later A.C. Turner, a customer who regularly stopped at the store for coffee, arrived. He recognized the victim's car, went to the store door, and pushed it open. He did not see the victim but noticed the coffee machine light was on and that a light over the counter where the victim usually stood at the cash register was on. He called out to the victim but no one answered. He waited, thinking she was in the bathroom, but no one appeared. He decided to go outside and look around, and he left a bottle in the door to bypass the electronic lock. Outside, he touched the hood of the victim's car, which was warm.

About this time Jerry King, a dairy salesman, arrived to make his usual delivery to the store. Turner approached him, and the two men went in the store. Turner said he would call for help, and King left, saying he would return later to make his scheduled delivery.

Deputy Gardner testified that at 6:17 a.m. he got a radio call to return to the store. He arrived at 6:21 and found Turner, Deputy Newell, and the victim's father, Lynwood Bass, there. Gardner testified further that the men went into the store again, and he went to the back, which was like an office, and observed that a cigarette case there was unlocked. Gardner also checked the storage area, walk-in coolers, and bathrooms. He noticed there were bags on the floor behind the front counter and the door of the safe was open. The electronic cash register was open but contained no money. Interpreting all these signs to indicate a robbery, Gardner notified dispatch to call the store owner, Eddie Ellis. Gardner asked Deputy Newell to begin searching outside the store. In the meantime, around 6:30 a.m., defendant arrived at the store.

Eddie Ellis testified he arrived at the store around 6:30 a.m. In the safe he found a bank bag with the 9 April deposit, but the 10 April deposit and the change bag were missing. Altogether $2,592.10 was missing. Only he and the victim had keys to the safe; other evidence showed the victim's key was never found. There were contact alarms on the windows and doors; when employees closed up, they set the alarm system. Ellis also testified that in the cash register was a device which activated a dialing machine in the office, in turn sounding an alarm at both his house and the sheriff's office. The dialing machine was mounted inside a box which was kept locked. The condition of the cash register device showed the alarm should have sounded. However, the key to the box was hanging in the lock, and the switch inside the box was turned off. Ellis also testified that the victim had

recently given him two weeks' notice that she would be leaving, saying she intended "to make a change." On the Monday when she disappeared, she was in her final week of work.

Michael D. Austin testified that he was employed as a supervisor for Presto Food Stores and oversaw the store managed by the victim. All the employees knew about the cash register device which activated the dialing machine. All employees whose duties included locking up knew how to use the front door key to activate the contact alarm system. However, only Austin, Ellis, and the store managers knew about the dialing machines. There were two sets of keys to each box, as well as a master key retained by Austin. One set of keys was kept at each store. Policy required that the alarm boxes remain locked with the internal switches turned on. At the store managed by the victim, the keys to the dialing machine box were kept in a desk drawer with the keys to the cigarette case. Austin also testified that he knew defendant, having seen him more than once at the store with the victim. Further, whenever the victim spoke to Austin about defendant, she seemed nervous and would wring her hands. Once Austin told defendant not to telephone the store, and defendant agreed not to call. After objection by defense counsel, *voir dire*, and findings by the court, Austin was permitted to testify that the occasion on which he asked defendant not to call the store was within a month of the victim's disappearance. The victim asked Austin to intervene that day because defendant, who had been drinking, was making harassing calls to the store.

William Brice, a long-distance truck driver, who lived on the edge of Saratoga, testified that on the morning in question, around 5:15 a.m., he drove by the store on his way into Wilson to pick up a truck. Brice had known defendant for many years and knew he was married to the victim. Brice did not know the victim well but recognized her when he saw her. Approaching Highway 91, Brice came to a complete stop at a stop sign. He then made a right turn and as he approached the store, he saw a truck on the side of the road. The front of the truck was pointing in the direction of Wilson; on the back was an emblem indicating the truck was owned by Hawley. Brice did not know where defendant was employed; but other evidence showed defendant worked as a truck driver for Hawley Transport. Brice did know that he had never seen a Hawley truck there before.

Although it was dark, the outside of the store was lit up. Brice saw defendant, the victim, and a black man standing in front of the

store. Defendant was standing on the victim's left; one of his hands was holding her wrist and the other was on her upper arm or shoulder; and he had a big smile on his face. The three people looked at Brice, who sped up to avoid being obvious. Brice did not recognize the black man, who was around six feet tall. Brice continued towards Wilson and considered calling authorities. What bothered him was that defendant had his hands on the victim and the other man was standing close by. Brice decided not to approach authorities because he thought no one would believe him and he did not want to get involved. He tried to put what he had seen out of his mind. Late in the afternoon he was dispatched to Maryland. He telephoned his wife from there and found out about the victim's disappearance but still did not come forward. A few weeks later he heard some co-workers discussing the incident and mentioned the people he had seen. The first time Brice revealed his information to authorities was in October 1988, when he was sought out and questioned by Detective John Farmer of the Wilson County Sheriff's Department. When questioned by Farmer, Brice at first could not say who was outside the store and did not remember seeing the Hawley truck. Brice testified he had tried to put the incident out of his mind. Later he recalled the truck and identified the man holding onto the victim as defendant. Brice also thought he recalled seeing a van in the parking lot.

The victim's naked body was discovered on the morning of 12 April 1988. A motorist driving on a dirt road off State Highway 222 between Saratoga and Stantonsburg saw the body from the road. The area was known locally as Boswell's Store. Captain D.A. Jordan of the Wilson County Sheriff's Department arrived at the site around 8:30 a.m. and found the victim lying facedown, with her clothes at her feet but wearing shoes and socks. Jordan photographed the body and searched for evidence. The victim was wearing rings on her left hand. A ring on her right hand appeared to be a sizeable diamond, and she was wearing a watch. A necklace in the shape of a heart was near her right leg. Her clothing bore only a few drops of blood.

Jordan had also processed the safe, alarm box, and cigarette case at the store for fingerprints. No physical evidence was ever found at either site to link defendant to the crimes. In April 1988 an empty bank bag from the store was recovered, but it bore no fingerprints. Nevertheless, the distance from defendant's residence to the store was 7.9 miles, and the victim's body was found 3.3 miles from defendant's residence. The location of the bank bag was 7.7 miles from the

store, 1.9 miles from defendant's residence, and 3.1 miles from the location of the body.

Medical evidence showed that the victim died of a single gunshot wound in the early morning hours of 12 April, sometime after midnight. Dr. Thomas Hooper, who examined the body at the scene, stated that the cause of death was a close-proximity wound to the right jaw, extending into the brain stem, resulting from a shotgun blast. Dr. Hooper opined that since no blood led up to the site and the ground was soaked with blood, the victim was shot there. Moreover, the victim was unclothed when shot. The gun was probably in front of her, and she could have been either on her knees or prone, with someone lifting up her neck. Two discrete areas of marking on her neck suggested that something had been around it.

Dr. Page Hudson performed the autopsy and concurred with Dr. Hooper's assessment of the cause of death. Dr. Hudson added that the explosive force of the gunshot damaged the victim's brain stem and partially separated it and her spinal cord from her brain. The wound was undoubtedly a contact wound, since it was quite round except for stellate tears running from it. The victim would have collapsed and become unconscious immediately; she was effectively dead upon receiving the wound. Slight imprinting of the skin on the front and back of her wrists indicated they had been tied. There was also a soot or grease smear on her left wrist. Imprinting on the victim's neck appeared to be from a belt and was probably caused at the time of death. Dr. Hudson also testified that multiple fresh scratches on the victim's legs looked like typical briar scratching. In addition, fresh bruising on her left arm suggested the arm had been grabbed by a human hand. The victim's stomach was completely empty but there was a considerable amount of urine in her bladder. The materials used to bind her were relatively broad or blunt and soft because the marks left were so faint, particularly about her ankles and wrists.

Special Agent Jerry Ratley of the State Bureau of Investigation ("SBI") testified that pellets removed from the victim's body showed a twelve-gauge shotgun was used in the murder. Later, a twelve-gauge Browning shotgun was removed from defendant's home and tested for bloodstains, but none appeared. On cross-examination, Ratley testified the shotgun was recovered and tested on 25 April 1988, about two weeks after the murder. The length of time that had passed made it impossible to determine whether the gun had been recently fired.

SBI Special Agent Malcolm McLeod testified that he first interviewed defendant on 13 April 1988. Defendant said he and the victim were not living together; she was living at her mother's house. On Sunday, 10 April, the victim came by defendant's house with some videotapes for the couple's sons, Shane and Ronald, who resided with their father. Defendant told the victim he needed a ride into Wilson the next day. The victim left and went home; defendant telephoned her about 11:00 p.m. On Monday, 11 April, the victim's mother, Marlene Bass, telephoned defendant at home and told him the victim's automobile was at the store but she was missing. Defendant woke his son Shane, dressed, and rode to the store with Shane. Defendant also stated that he and the victim were having marital problems and he suspected her of seeing someone else. Defendant had confronted the victim about telephoning one Marvin Bynum. Defendant stated further that he had recorded a telephone call made by the victim and played the recording for the victim, who denied placing the call or trying to arrange any kind of rendezvous. Asked if the victim had any enemies, defendant replied that an employee of the store failed a polygraph examination and was fired. Defendant had also heard that a black man was going to the store and harassing the victim. Defendant thought the victim probably would not open the store door before 6:00 a.m. for someone she did not know. Defendant stated further that on the Saturday before Easter, the victim drove to the coast and returned on Sunday morning. He asked her if she had gone with someone, but she said she had not and had not met anyone there.

On 19 April defendant admitted to McLeod that defendant and his son Shane had followed the victim to the coast. The two men went to Atlantic Beach and rode through the parking lots of area motels. They wanted to find out if the victim met anyone on her trip. They did not see the victim's car and returned home on 2 April. On Sunday, 3 April, defendant drove to Atlanta to make a delivery. He returned home on Thursday afternoon and then drove to Atlantic Beach, where he checked into a motel. He had a fifth of whiskey, and he drank and walked on the beach. He went to bed about 11:00 p.m. The next morning, he walked on the beach again, drank, checked out of the motel, and again walked on the beach. He started to drive home and took a couple of drinks on the way. Other evidence showed that on Friday, 9 April 1988, defendant was charged with driving while impaired in Greene County; his blood alcohol content was .23; and his license was revoked for ten days. Sometime later he pleaded guilty to this charge.

Defendant also gave McLeod an account of his whereabouts on the day of the victim's disappearance, stating that he stayed at the store for a while and then returned home. He was called by a television station and gave an interview. Gilbert Sykes, the victim's brother-in-law drove defendant to the interview. Afterwards defendant waited at home with Gilbert and his wife, Brenda; Marlene Bass; Shane Baker and his wife, Michelle; and Ronald, defendant's younger son. Defendant went to bed around 11:30 p.m. The next morning, 12 April, Elizabeth Cobb either called defendant or came to his house around 8:00 a.m. and told him a body had been found on a dirt road. The family went to the dirt road and waited for Sheriff Gay to tell them if it was the victim.

On 19 April, the date of his second interview, defendant gave the officers a tape recording. He said he thought he had destroyed the tape recording of the telephone conversation between the victim and Marvin Bynum. Although defendant was not sure what was on the tape, it was later shown to be a recording of a conversation between the victim and Bynum.

Marvin Bynum testified that he lived in Wilson and was employed as a brick mason. He knew the victim because he did odd jobs for Presto Stores, including the store she managed. The victim acted very friendly towards him; the two became romantically involved about a year before her death. In addition to seeing each other at the store several times each week, they met away from the store several times and had sex once or twice. The last time Bynum saw the victim was about a week before her death; the last time he talked to her was during the weekend before her death; and he did not see her on the day of her disappearance. When interviewed on that day he denied having a relationship with her; but on Friday, 15 April, he admitted being involved and later cooperated fully with the investigating officers. During Bynum's testimony the tape recording made by defendant was played for the jury. Bynum identified the voices as those of the victim and himself. Other evidence showed the investigating officers talked to witnesses who corroborated Bynum's alibis for 11 and 12 April, and the officers eliminated him as a suspect in the victim's death.

Brenda Sykes, sister of the victim, lived in Emporia, Virginia, and had a close relationship with both victim and defendant. At the time of her sister's death, Brenda was married to Gilbert Sykes. In November 1987 Brenda became aware that her sister was having marital problems and had separated from defendant. On one occasion,

Brenda and Gilbert met defendant at a truck stop in Emporia. Defendant appeared to have lost a great deal of weight and was obsessed with the victim's seeing another man. Defendant said that if he ever caught Marvin Bynum and the victim "together, he would pile them on top of each other and kill them." Sometime during the month of November, when the Sykes family was visiting defendant's home, defendant played for Brenda and Gilbert the recorded conversation between Marvin Bynum and the victim. Defendant was very upset. Brenda testified further that the defendant and victim attempted a reconciliation and came to the Sykes' house at Christmas. Later, after the couple separated again, the victim came to visit Brenda in Emporia. The victim said she was afraid because she thought she was being followed. Brenda and Gilbert visited defendant again around Easter of 1988, when he and the victim were separated. Defendant told Brenda he and Shane had been to the beach to look for the victim. Defendant thought the victim planned to meet Marvin Bynum there.

Gilbert Sykes also testified that he had a close relationship with the defendant and victim. During the fall of 1987 the Sykes family visited in defendant's home, and defendant told Gilbert he thought the victim was seeing another man. Later defendant telephoned Gilbert in Emporia. Defendant said he had taped a call made by the victim and that she was seeing a black man. Defendant was very upset, and Gilbert and Brenda went to visit him that evening. It was on this visit that defendant played the tape; and again, he was very upset. On the same evening Gilbert and Brenda went to see the victim, who was living with her mother. The victim declined to discuss the matter. Later defendant and victim reconciled, but defendant told Gilbert he could not get over what the victim had done to him and his sons. Gilbert testified that the meeting at which defendant appeared to have lost weight took place at Sadler's truck terminal. The last conversation Gilbert had with defendant before the victim disappeared took place at Simmons' terminal in Emporia. Defendant said, "Gil, I could hire somebody for a thousand bucks to blow her away." Gilbert tried to dissuade defendant, reminding him of his two sons and grandchildren. Defendant also commented "that if he ever found Shirlene with this n———, or found for a fact that she was seeing this guy, that he would strip them down of their clothes and blow their brains out." Gilbert was frightened because he thought defendant "meant every word of it." Defendant made this statement within about three weeks of the victim's death. Later, during the Easter visit, defendant said he

and Shane had gone down to the beach to try to find the victim and find out if she was with someone. Gilbert testified defendant "said that he was well prepared, and I knew what he meant." Defendant also said he "would blow the black MF away."

SBI Special Agent William L. Thompson testified that he interviewed defendant on 19 April 1988. Defendant admitted he had told his brother-in-law that if defendant "caught his wife and the other man together, he would shoot them as they lay naked on top of each other." Defendant also said he could have told the victim "on one occasion that it was time to end it for both of them." However, defendant denied that he said he could get the victim killed for a thousand dollars.

Robert Cooke testified that he worked as a police officer from 1977 to 1984. In December of 1987 defendant engaged Cooke to follow the victim. Defendant said he believed his wife was seeing Marvin Bynum. Over the course of a month and a half, Cooke followed the victim on three occasions, twice at night and once during the day. On these occasions defendant called Cooke and told him where the victim was supposed to be. Cooke said the only thing he reported to defendant was that on one occasion the victim went out of her way to drive by Marvin Bynum's workplace but did not stop there. In addition, defendant asked Cooke about tapping the telephone at the store. Cooke said he did not know how to do this, and defendant said he had been told to get a telephone with alligator-type clips to attach to the box outside the store.

Detective James Lucas of the Wilson County Sheriff's Department testified that in late February and early March 1988 he received two telephone calls from the victim. During the first call, the victim complained of harassing telephone calls and abusive language by defendant. Lucas advised her to go to the magistrate's office. During her second conversation with Lucas, the victim was upset and crying. She said defendant had been at the store cursing, abusing, harassing, and threatening her and she was afraid of him. Lucas went to the store and saw the victim, who was "really afraid." She said defendant had been coming to the store continuously that day. He had threatened and harassed her all day. The victim was afraid to go outside the store to take out the trash and asked Lucas to check outside. Lucas did so but saw no one. He waited at the store for about thirty minutes, but defendant did not return.

After objection by defense counsel, *voir dire*, and findings by the court, several of the victim's co-workers and friends were permitted to testify about statements the victim made concerning her relationship with defendant and about his conduct towards her at work.

One such witness, Paula Lynette Bynum, testified that she worked at the same store as the victim during the spring of 1988. On Sunday, 10 April 1988, she reported to work at 4:00 p.m. She relieved the victim, who "was laughing and joking like she always do[es]." Paula Bynum's duties included closing the store. She took the money except for coins out of the cash register and put it in a bag with a cash register tape. She put the bag through the slot in the safe. She put the start-up money for the next day and a key used to remove only change from the safe in a paper bag, which she put in a trash can in the back office. She locked the cigarette case, put the key in a drawer in the office, turned out the lights, locked the door, and left, taking her door key with her. Paula Bynum did not remember how much money she put in the safe; it was the victim's job to make a report on this the next day. Paula Bynum did not have a key to the safe or the dialing machine box; she testified there were no keys in the box when she left that evening. Paula Bynum also testified that the victim confided in her that the victim and defendant were separated and the victim was living with her mother. When defendant got drunk, "he would slap her around." The victim told Paula Bynum she was going with a man, and defendant said if he caught the victim with the man, defendant would kill her. Defendant said he would rather see the victim dead than with a black man. In April, defendant came into the store, and the victim said, "[O]h, s---[,] [h]ere come[s] Ronnie." The victim went up to the defendant and asked him to repay her some money that she had given her son for spring break. Defendant "pushed her back and they started arguing." Paula Bynum went to the back of the store, and defendant eventually left. Paula Bynum also testified that one night a truck came into the store parking lot, drove along the side of the store, and slowed down. Because she was afraid someone was planning to rob the store, Paula Bynum told the victim, who said it was her friend Marvin Bynum. The victim went outside to the telephone booth to call Marvin Bynum because she said defendant had bugged the store telephone and her home telephone. She told Paula Bynum not to tell defendant about the victim's work schedule.

Several witnesses for the State testified as to defendant's whereabouts and actions on 11 April and the day after, when the victim's body was found. Gilbert Sykes testified that since defendant could

not drive, Gilbert "chauffeured him around that morning, that afternoon." Gilbert testified, "Ronnie had wanted me to take him up town to go, I believe it was his phone bill." Gilbert took defendant to the telephone company on Nash Street, and they also stopped at a little shopping center, where defendant bought something but Gilbert did not know what. After returning to defendant's house, the two went back to the store around 5:30 p.m., in order to meet with a television crew. Defendant was nervous and asked Gilbert what he should say. Gilbert said, "You need to tell from your own feelings what you feel and let whoever's got Shirl, let them know that they needed to turn her loose." Gilbert said a few more similar things and was puzzled when the words defendant spoke for the interview "were almost [the] identical words that I had said to him going to the store."

Elizabeth Butts, a hairdresser, had known the victim for over twenty years, remembered defendant from school, and knew the couple dated in high school. Around the time of the murder, Butts usually cut both the victim's and defendant's hair. Butts thought defendant acted very possessive of the victim. On several occasions when Butts was cutting the victim's hair, defendant either came to the shop or called and asked how much longer the victim would be there. Butts testified that the place where the victim's body was found was a local lovers' lane. Butts had seen the defendant and victim together there when they were dating. Moreover, defendant at one time lived across the road from the area.

Around lunchtime on 11 April 1988, Butts went to defendant's house. There were many people there, and Butts was not sure if defendant was there when she arrived. She testified, "There was a lot of leaving and coming back." Sometimes defendant left the house when others did. On one occasion, defendant and "several guys left, and he grabbed a shotgun off the foyer wall." Butts did not remember seeing anyone return the shotgun. On another occasion, Butts and defendant discussed what might have happened. Defendant said he could not believe anyone would kidnap his wife. Butts said, "[I]t had to have been more than one person because one person couldn't have held Shirl. She was too strong." Defendant replied, "[W]ell, they could always [have] tied her up with duct tape or ropes or masking tape," and added, "could always have put her in the trunk of a car." Defendant smoked numerous cigarettes, and Butts could not recall ever having seen him smoke before that moment. Sometime after Brenda and Gilbert Sykes arrived, Brenda threw her car keys to defendant. Apparently the Sykes' car was blocking someone who wanted to leave.

Butts could not remember if defendant returned to the house after taking the keys. Butts stayed to watch the 11:00 p.m. news and left around midnight. Sometime late in the evening defendant left the house, saying he was going to make a telephone call and did not want to use his home telephone. Defendant did not want his telephone tied up because earlier he and someone else had gone to get a tap put on the telephone. Again, Butts could not recall when defendant returned or if he came back by the time she left.

The next morning Butts went to defendant's house around 8:00 a.m., after she drove her younger son to school. She drove up the steep driveway, put on the emergency brake, and turned off the engine. She did not think anyone in the house was awake. She tapped on the side door, but no one answered. She started back to her car and was backing down the drive when she looked up and saw defendant. He had pulled a curtain back and was looking out the dining room window. He was not wearing a shirt. Butts went back; defendant opened the kitchen door for her; and she asked if she had awakened the family. She asked if the family was hungry and wanted her to get some biscuits for them. About that time, the telephone rang, and defendant answered. He said, "[T]hey found Shirlene at Boswell's Store. Let's go." He told Butts the caller was "Lois"; and Butts assumed he meant Lois Bass, the sister-in-law of the victim's father. Defendant asked Butts to take Shane's wife and children in Butts' car. Defendant and his sons rode together, and the two parties drove to the site where the victim's body was discovered. Butts testified further that she did not know when she arrived at defendant's house that a body had been discovered.

Sheriff Wayne Gay testified that about 7:50 a.m. on 12 April, he received a telephone call from defendant, who wanted to know if there was any more information about his wife's disappearance. Sheriff Gay talked for a few minutes about the investigation but was interrupted by a radio communication that a body had been located. Defendant inquired if it was his wife. Sheriff Gay replied that he did not know yet and did not know exactly where the body was; he knew only that a body was found somewhere in the Stantonsburg community. He testified, "I informed Mr. Baker, at that time, that I would get back with him just as soon as we had some details concerning the information on the body." He did not give defendant any road or route numbers. In addition, "I did tell [defendant] it was a body of a female that had been found but did not tell him whether it was white or black." Further, Sheriff Gay did not mention Boswell's Store and did

not know the body was there until he went with other officers to the scene. Nevertheless, within thirty minutes a deputy informed the sheriff that defendant was at the scene. The sheriff spoke to defendant, his children, and the victim's mother and told them the body was that of Shirlene Baker. Defendant asked if his wife was dead and how she had been killed. Defendant asked how she was dressed, the sheriff said she was naked, and defendant asked if she had been raped.

Lois Bass testified that she did not telephone defendant on the morning of 12 April. However, she had a scanner and was listening to it that morning when the victim's body was discovered.

Willie Newsome testified that he lived near Haywood, between Saratoga and Stantonsburg. On the night of 11 April 1988 he stopped at a friend's house on a dirt road that was called lovers' lane. It was around 8:00 p.m. and dark; his car headlights were turned on. He saw a car turn off State Highway 222, drive just a little ways onto the dirt road, and stop. Newsome waited, thinking it was someone who wanted to ask him about his tobacco patch. He waited about twenty minutes to see if someone wanted his help. The car was either light blue or green and very dusty; it was a big car with four doors. Newsome testified it had pretty spokes, with the "fanciest looking rims on it." Newsome had never seen the car before. The driver appeared to be in his forties; he had a beard. His arm was lying over something that looked like a bale of cotton or a fertilizer bag.

Newsome was interviewed by Detective John Farmer on 12 April 1988, the day after Newsome saw the car. On 12 May 1988, Farmer showed Newsome an array of seven photographs, and Newsome selected a photograph of defendant as resembling the man driving the car on the dirt road. Nevertheless, when shown the same photographs at trial, Newsome first selected a photograph of Captain D.A. Jordan of the Wilson Police Department, then selected a photograph of defendant, and finally selected one of someone known to Farmer only as "Watson."

Brenda Finch, a branch manager for Blazer Financial Services, testified that she knew both defendant and victim because they had an account with Blazer. In December 1987 the couple applied for a home equity loan to consolidate some of their bills. Finch testified, "The application was denied for excessive obligations[,] which means they had more going out than they had coming in." Around the first week of January Finch told defendant about the denial, and he said, "I guess, damn it, I'll just file [for] bankruptcy." Defendant was upset

that his loan application was denied. In Finch's opinion, defendant could not have met his financial obligations without the victim's salary, nor could the victim have met the obligations without defendant's salary.

In addition to the testimony described hereinabove, Gilbert Sykes testified that he sold insurance, and defendant "bought [$]50 thousand on Shirl, as well as his own self." Each spouse was the beneficiary of the policy on the other's life. Defendant received the insurance money after the victim's death. After defendant received the money, Gilbert himself had serious financial difficulties, borrowed money from the victim's mother and from the defendant, and ended by declaring bankruptcy. By the time of trial, he was divorced from the victim's sister.

At the close of State's evidence, defendant moved to dismiss the charges against him. After hearing arguments, the trial court denied the motion and ruled that the case would go forward on the charges of first-degree murder, kidnapping, and common-law robbery instead of armed robbery.

Defendant's evidence included testimony from his sons and daughter-in-law, Michelle Baker. Shane corroborated his father's statement about the victim's visit to his house on the Sunday evening before she disappeared. Shane testified that his mother called defendant that night around 9:45 p.m. To Shane's knowledge, his father did not leave the house that night or the next morning. Around 6:45 a.m. on 11 April, Marlene Bass, Shane's grandmother, telephoned and said the victim was missing from the store. Defendant told his son Ronald he should go to school, and defendant reset the alarm clock in case Ronald fell asleep again. Defendant and Shane dressed and left to go to the store; Shane drove. Later in the morning Shane went to Ronald's school and brought him home. Shane also testified that as the day passed, defendant's house and yard filled up with people. Shane recalled special instructions about using the telephone, keeping the line free, and not hanging up if someone called with a ransom demand. He also testified that someone called that night, and defendant said he was going across the street to make a telephone call. Defendant left but returned within ten minutes and did not leave the house again that night. Eventually the guests left, and the family went to bed around midnight. The house had two bedrooms. Shane, his wife, and their two children slept together in a water bed in a bedroom customarily used by Ronald. Ronald and defendant slept

together in a bed in the master bedroom. To the best of Shane's knowledge, neither defendant nor anyone else left the house after the family went to bed.

Shane testified further that around 8:00 a.m. on 12 April, someone knocked on the door of the house. Shane's wife got up, and Shane was putting on his clothes. Elizabeth Butts was at the door; she said she heard on a scanner that a body had been found on a dirt road between Stantonsburg and Saratoga. Within moments of Butts' entering the house, the telephone rang, and defendant answered it. The family finished dressing; and defendant, Shane, and Ronald left in one car. Butts and Shane's wife and children rode in Butts' car. Between 8:15 and 8:30 a.m., they arrived at the end of the dirt road, but a deputy was blocking it. Soon the sheriff came, talked to them, and told them there was nothing they could do. After that, they returned home.

However, on cross-examination, Shane admitted that his father could have left the house on the evening of 11 April without Shane's knowledge. In addition, Shane at first testified that his family did not have a scanner but later said A.C. Hendricks had brought one to their house on Monday. Further, in a statement made on 26 April 1988, Shane did not mention that Butts told the family a body had been found. In a statement made in August 1989, Shane said for the first time that Butts was the source of the information. In addition, on cross-examination Shane said his father came into the kitchen and said the victim was found on a dirt road. Further, Shane did not hear defendant telephone the sheriff on the morning of 12 April 1988.

On direct examination Shane also described an occasion before Christmas 1987 when defendant played the recording of the victim's conversation with Marvin Bynum. Shane and his mother were sitting in the living room at defendant's house, and defendant came in with the tape and started playing it. The victim left and went into the bedroom, Shane followed her and tried to talk to her, and the victim refused to discuss the matter. This was not the first time Shane had heard the recording. Defendant walked into the bedroom, and the victim picked up a candle holder and threw it at the defendant. Shortly afterwards, the victim left. Defendant did not threaten the victim, but he was upset. After this incident defendant and victim attempted to reconcile their differences, and the family went to Virginia at Christmas. Shane also testified that even during times when his parents were separated, the victim would stay with her younger son if defendant was on the road.

On cross-examination Shane testified that the victim was not afraid of defendant. Shane knew that defendant was following the victim or having her followed and that defendant put a tap on his home telephone. Shane also testified that his father would get drunk on weekends but usually passed out on the sofa at home. On redirect-examination Shane testified that he had never seen defendant strike or hit the victim. In addition, Shane did not sign any statements he made to officers during the investigation.

Ronald Baker testified that he was aware that his parents were having marital difficulties. Defendant played the recorded conversation and asked Ronald whom he thought the victim was talking to. Ronald recognized the male voice as that of Marvin Bynum, whom he had seen at the store where his grandmother worked. In addition, Ronald was at home on the night when Shane and the victim were talking and defendant played the tape again. Ronald was not in the room with Shane and the victim; Ronald was upset by the recording. Ronald generally corroborated other testimony about his parents' separation and attempted reconciliation, Christmas trip to Virginia, and subsequent separation. On Sunday, 10 April, Ronald drove with some friends to Raleigh. They returned after dark and stopped at Winn Dixie at Parkwood Plaza, where Ronald saw his mother. She said she had just come from Rose's and intended to buy some steaks at the grocery store. Ronald returned to defendant's house around 10:00 p.m.; defendant was watching a videotape and said the victim had brought it by. Ronald went to bed and did not hear anyone get up in the night.

He was awakened on the morning of 11 April by defendant's speaking on the telephone. Defendant told Ronald that the victim was missing from the store, Ronald could not do anything at the store, and Ronald should go to school. Ronald testified further that Shane brought him home from school and many people came to the house during the day. Ronald recalled seeing defendant leave with Gilbert for a television interview but could not recall defendant's leaving at any other time. In the evening Ronald mostly stayed on the water bed in his bedroom. He went to bed in defendant's bedroom around midnight and did not think anyone left the house after that. Ronald did not know whether Butts knocked on the door on the morning of 12 April. He testified that he was awakened by defendant's telling him a body had been found and then went with defendant to the dirt road.

On cross-examination Ronald said that on one occasion he went with defendant to the store where the victim worked. Defendant got a recording device out of the office and took it home. Ronald tried to help defendant connect the device, which came from Radio Shack, to the telephone in Ronald's room. Defendant said, "I just want to find out who [sic] your mama's talking to." Ronald also testified that defendant drank but, as Shane had said, would fall asleep on the sofa or chair. In addition, Gilbert Sykes had a dark blue, four-door automobile with spoked wheels.

Michelle Baker testified that she and Shane were married 7 December 1984 and divorced 20 April 1989. They lived with Shane's parents for about a year and a half, moved out on their own, moved in again with Shane's parents, and then moved out again. She and Shane separated around June of 1987, Michelle went to live in Green Briar trailer park, and Shane moved back in with his parents. At the time of the trial, their daughter Lauren was six years old, and daughter Ashley was five years old. Michelle knew the layout of defendant's house well and also described the driveway, which was extremely narrow and steep. She and Shane usually parked their car in the backyard.

Around 5:00 p.m. on Monday, 11 April, Michelle went to pick up her daughters at her mother's house. Her mother told her the victim was missing, and Michelle went directly to defendant's house to be with Shane, even though they were separated. She arrived there between 5:30 and 6:00 p.m., and defendant had just returned from a television interview at the store. Many friends and neighbors were at the house, some standing out in the yard and others inside the house. During that evening Michelle saw defendant leave the house once, around 8:15. He left with Gilbert Sykes to get a pack of cigarettes; the two were gone about fifteen minutes. She heard defendant say not to tie up the telephone; but if it rang and no one spoke, not to hang up. She understood the telephone was tapped to find out where incoming calls were coming from. Around 9:30, the telephone rang, she answered, and no one spoke. She said aloud, "They won't talk to me." Defendant said, "Don't hang the phone up. I have to go across the street." Michelle did not actually see defendant leave the house, but he returned within seven minutes. Around 10:00, people began to leave; and by midnight, the only people at the house were defendant, Ronald, Shane, Michelle, and her daughters, whom Michelle's mother had brought over sometime that evening. Michelle was sitting in the den, looked out the window, and saw a car stop directly in front of the

house. Defendant told everyone to stay inside; and he and Shane went out, but the car turned in the driveway of the house across the street and then sped away. After this, the family went to bed; and Shane and Michelle got into the water bed in Ronald's room, where their two daughters had already fallen asleep. The room was over the driveway; cars could not get through to the backyard unless they passed directly under the bedroom window. Michelle had difficulty going to sleep; she remembered looking at the clock for the last time at 4:05 a.m. She did not hear anyone leave the house that night.

The next thing she heard was a knock on the side door. She was already dressed and got up to answer the door. When she opened the door, Elizabeth Butts stepped inside, and the telephone rang. Defendant said, "I got it." Butts said something about breakfast, and Michelle went back to the bedroom to help her daughters dress. She heard the telephone in defendant's room hit the marble top of a bedside table. Defendant came through the house and said, "They found my Shirl. We got to go." Michelle and her daughters rode with Elizabeth Butts, and they did not stop at the dirt road. Instead, Butts drove to her house because she had a scanner and thought they could learn more there than from standing on the road. At Butts' house, Michelle called her mother and then she returned to defendant's house. Sometime in mid-afternoon, Michelle, Shane, and some others went back to the site where the victim's body had been found.

Michelle also testified that she suspected the victim had been cheating on defendant. Michelle had observed that sometimes defendant would drink and pass out; and the victim would get in her car, say she would be back in a little while, and would stay gone for up to one and one-half hours. Michelle had never seen defendant become violent towards the victim. Once Michelle saw the victim go after the defendant with a poker because he was trying to open the fireplace and burn the room.

On cross-examination Michelle was confronted with a statement she made on 10 August 1988, in which she said that during the evening of 11 April 1988, she left defendant's house on two occasions, once for about ten minutes, when she went to the grocery store, and again for about an hour, when she took one of her daughters somewhere. Michelle denied having made the statement. She reiterated that around 8:00 that night, she saw defendant leave with Gilbert Sykes. In addition, she did not watch him as he left to check on the telephone call or as he returned, but she knew he came back. Further,

when Elizabeth Butts came to the door on the morning of 12 April, she did not say anything about a body. Instead, Butts said, "I brought breakfast." In addition, in contrast to Shane's testimony, Michelle did not remember his having asked defendant where the victim's body was found or defendant's having answered that it was down the dirt road to the right going into Saratoga. Moreover, she did not recall saying on 5 March 1992 that Shane asked the question and defendant gave the answer testified to by Shane. Further, she did not hear anyone make a telephone call from the house that morning. Confronted again with her 10 August 1988 statement, in which she also said she felt like defendant had killed the victim, Michelle again denied making the statement.

State's rebuttal evidence included the testimony of Elizabeth Butts that on the morning of 12 April, when she saw defendant standing in the window of the kitchen-dining room, she got back out of her car and returned to the door. Defendant, not Michelle, opened the door for her. Butts did not really give defendant a chance to speak; she began to say she had not wanted to wake the family. She told defendant she came by to see if they wanted her to go to a convenience store and get them some biscuits. She did not have any food with her, having just driven her son to school. Although she constantly listened to a scanner at home, she had not heard anything about the discovery of a body. She was sure of this because she learned later that her elder son, who was sick and at home, heard the news on the scanner. When Butts returned home with Michelle and her daughters, Butts' son told Butts that he thought about calling her at defendant's house, knowing that she was on the way there and did not know about the body. Butts reiterated that she did not tell anyone in defendant's household about the discovery of a body because she did not know it herself. The first time she learned about it was at defendant's house, where the telephone rang within moments of her arrival. Butts had been talking to Shane and was talking to Michelle when defendant said, "They found, Shirl's—at Boswell's Store. Let's go." Butts asked defendant who had telephoned and testified, "[H]e said Lois." Asked whether defendant gave any directions, Butts testified, "That's all I knew. What he said. Which I knew where Boswell Store was." On redirect, Butts clarified that from defendant's words, she thought the victim was still alive. In addition, Michelle first spoke to Butts when Michelle came out of the bedroom door.

Detective Farmer testified that in Michelle's 10 August 1988 statement,

> Michelle stated Elizabeth Butts was at [defendant's] Tuesday morning when the telephone rang, and [defendant] said he would get it.
>
> She said that [defendant] answered it in another room and said that Shirlene has been found.
>
> Michelle said that [defendant] had been awake and was dressed when the telephone rang.

Michelle did not mention opening the door for Butts or say Butts informed the family that a body had been found. Moreover, in her statement made 5 March 1992, Michelle said that defendant "was drinking; was drunk and made a statement that if Shirlene was seeing the n———, that he ought to kill her." Also in that statement Michelle said that on the morning of 12 April, the telephone rang and defendant answered it. She heard the telephone hit the table, and defendant came out and stated, "They found my Shirl." As the family went out the door, Shane asked where, and defendant replied that she was found down the dirt road on the right, going to Saratoga, in the bend. Again, Michelle did not mention opening the door for Butts or that Butts told the family a body had been found.

At the close of all the evidence defendant renewed his motion to dismiss the charges against him. The trial court denied the motion.

JURY SELECTION

**[1]** Defendant's sole contention is that excusal of a prospective juror for cause violated the standard articulated in *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985). We disagree.

In capital cases, venirepersons who express opposition to the death penalty may be removed for cause if their opposition would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oaths. *Id.* at 424, 83 L. Ed. 2d at 851-52. Where a person's responses to questions indicate he does not believe in the death penalty and this belief would interfere with the performance of his duty at the guilt-innocence phase or sentencing proceeding, such responses show that he cannot fulfill the obligations of a juror's oath to follow the law in carrying out his duties as a juror; and the trial court does not err in excusing him for cause. *State v. Syriani*, 333 N.C. 350, 371, 428 S.E.2d 118, 129, *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994).

In the instant case, prospective juror Reid was questioned extensively by the prosecutor, trial court, and defense counsel. In answer to the prosecutor's questions, she first said she had no moral or religious beliefs against the death penalty but later said she could not return a death sentence recommendation. Finally she said she would vote against death, no matter the facts or circumstances. Upon State's challenge for cause, the trial court questioned Reid, who first said she could set aside her own personal feelings and vote for death but later said her conscience would not permit her to stand up in open court and announce her verdict before all concerned. The court noted for the record that Reid was "struggling with these questions and at this moment she is tearful and she is also pregnant."

Defense counsel argued that Reid seemed perfectly qualified to decide the issue of guilt or innocence but because she

> has not been entirely death qualified to satisfy the State[,] she has to be excused for cause when she has certainly stated that she could answer the question of guilt or innocence without any reservation at all. She could go in the back room and make the decisions that were necessary and though she may not agree with the law, she would follow the law. Yet she would not want to be exposed to the situation of having to come into the courtroom and face the Court and face the Defendant and make an overture that would be inconsistent with her conscience but not inconsistent with her guidance in regard to the law. That's saying to me that we've got to have death qualified jurors that are conviction prone in all cases and that if we sit here as people that do not believe in the death penalty, we're going to be having a Defendant tried by death qualified jurors not being qualified at all to be tried by his own peers, that it seems totally unfair to me and he has a right to be so tried[,] I think[,] and that the argument that I make is nothing new to you but this lady has been the best example I've seen of someone that will follow the law completely, doesn't like the law, but is qualified to serve, yet though she doesn't want to espouse a cause that she doesn't believe in, we have to excuse her and I just don't think it's right. I don't think the law is intended to be that way and I seriously object to her being excuse[d].

After listening to this argument, the trial court observed "that *a part of the juror's duty and oath is to submit to polling after a sentence recommendation has been made and if the juror is unwilling to submit herself to be polled, then that would be a violation of her*

*duty and a violation of her oath and would also disqualify her from service.*" (Emphasis added.) Defense counsel argued further that Reid had equivocated but had been sufficiently rehabilitated under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968), and *Davis v. Georgia*, 429 U.S. 122, 50 L. Ed. 2d 339 (1976). The trial court then found and concluded that Reid's views would prevent or substantially impair the performance of her duty as a juror in accordance with the court's instructions and her oath and granted State's challenge for cause.

The arguments and responses quoted above show that this issue was examined carefully and resolved correctly by the trial court. Since Reid's responses showed that if the recommendation were for death, she could not fulfill a juror's duty to state this when polled, we hold the trial court did not err in granting State's challenge for cause and excusing her.

GUILT-INNOCENCE PHASE

**[2]** Defendant first contends the trial court committed reversible error by allowing William Brice to testify that at the time of trial he was "positive" and had "no doubt whatsoever" that on the morning of 11 April he saw defendant with the victim. Defendant argues the testimony deprived him of his federal and state constitutional rights. On 20 March 1992 defendant moved *in limine* to preclude Brice from testifying as to facts related and/or remembered since undergoing hypnosis on 13 January 1989. The record shows that at trial the court was aware of a pretrial order prohibiting Brice from testifying as to statements made after hypnosis. In addition, Assistant District Attorney Josephs stated that he understood nothing Brice revealed after hypnosis was admissible. Brice testified that in his first conversation with authorities he described seeing only a white man, a black man, and the victim. In his second conversation he said he thought defendant was there. Further, only after thinking about it extensively, did Brice say he was positive that he saw defendant. Josephs asked, "Is there any doubt in your mind that's who you saw there that morning?" and "Are you positive now?" Defendant argues these questions violated the ban on hypnotically refreshed testimony. We do not find defendant's arguments persuasive.

"[H]ypnotically refreshed testimony is inadmissible in judicial proceedings." *State v. Peoples*, 311 N.C. 515, 533, 319 S.E.2d 177, 188 (1984). Notwithstanding this rule of inadmissibility, not all testimony of a previously hypnotized witness is barred. Such a witness may tes-

tify "as to facts which he related before the hypnotic session." *State v. Annadale*, 329 N.C. 557, 570, 406 S.E.2d 837, 845 (1991).

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and [if] the ruling is one admitting evidence, a timely objection or motion to strike appears of record." N.C.G.S. § 8C-1, Rule 103(a)(1) (1992). "In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(c)(4).

In the instant case, the record shows defendant did not object at trial, but before this Court defendant does not argue plain error. The record shows further that during pre-hypnosis interviews, Brice positively identified defendant. Since Brice's answers referred to facts he related before his hypnotic session, the trial court did not err in admitting the testimony. Since there was no error, there could be no plain error. *State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836, 93 L. Ed. 2d 77 (1986). Therefore, we overrule this assignment of error.

**[3]** Defendant's next contention is that the trial court erred in permitting Agent Ratley to opine that Marvin Bynum had no motive for the murder. Again we disagree.

Ratley's testimony was as follows:

Q. Was Marvin Bynum ever a suspect?

A. For a short period of time, yes, sir, he was.

Q. Why was he [a] suspect only for a short period of time?

A. He was a suspect to such time that we could run out the story that he had given us of the alibi he established for himself, and determined to ourselves that he had no motive for the murder.

MR. MARTIN: Well—

Q. This alibi?

MR. MARTIN: Objection to the conclusion, Your Honor.

Motion to strike.

THE COURT: Overruled.

Q. This alibi, was that checked out?

A. Yes, sir, it was.

Q. Did it check out?

A. Yes, sir. From both Monday and Tuesday morning, the stories he had given us were corroborated by other witnesses.

Defendant argues that Agent Ratley's testimony that Marvin Bynum had no motive for the murder was not permissible opinion testimony by a lay witness under N.C.G.S. § 8C-1, Rule 701. Agent Ratley made this statement as part of his answer to a specific inquiry as to why Marvin Bynum was a suspect for only a short period of time. Assuming that the objected-to statement was an opinion or inference, we conclude the statement was admissible under Rule 701 as an inference "(a) rationally based on the perception of the witness and (b) helpful to . . . the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1992).

Defendant had cross-examined Marvin Bynum extensively concerning his involvement with the victim and his potential involvement in the victim's death. Under these circumstances the State was entitled to have an investigating officer testify in rebuttal as to why Marvin Bynum had been eliminated as a suspect. The evidence was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion in admitting the evidence. This assignment of error is overruled.

**[4]** Defendant next contends the trial court erred in admitting the testimony of witnesses—Sherill Denise Edwards, Rita Cooper, James Lucas, Paula Bynum, and Carol Farmer—who related statements of the victim about threats defendant made against her and her fear of him. Defendant first argues that the trial court erred in admitting the testimony under N.C.G.S. § 8C-1, Rule 804, because the court failed to make a preliminary finding that the declarant, the victim, was unavailable to testify. We disagree.

Certain hearsay statements are recognized as exceptions to the general hearsay ban if the declarant is unavailable to testify in court. N.C.G.S. § 8C-1, Rule 804 (1992). "Unavailability" exists where the declarant is dead. *Id.* Rule 804(a)(4). This Court has said that if the declarant is dead, the trial court's determination of unavailability

"must be supported by a finding that the declarant is dead, which finding in turn must be supported by evidence of death." *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740 (1986).

In the instant case, State's witnesses Captain D.A. Jordan and Dr. Thomas Hooper both testified that on 12 April 1988 the victim was dead. Immediately after Hooper's testimony, the State presented the testimony of Dr. Page Hudson, who performed the autopsy on the victim's body. All this evidence was admitted before the testimony of any witness now challenged by defendant. Hence, there was ample evidence of death to support the finding required by *Triplett*. Moreover, the first time the State attempted to introduce hearsay statements of the victim was through the testimony of Marvin Bynum, who did not testify until after Jordan, Hooper, and Hudson. While considering defense counsel's arguments against admitting the hearsay, the court stated that the issue was "the believability of the declarant . . . [w]ho is unavailable." Moreover, in the written order excluding the hearsay testimony of Marvin Bynum and in the orders admitting the hearsay testimony of Edwards, Cooper, Dew, Lucas, Paula Bynum, and Farmer, the trial court specified that the statements were those "of the decedent." Since the record shows the trial court did not fail to make the finding required by *Triplett*, we conclude the trial court did not err.

**[5]** Defendant also argues that the trial court erred in not specifying which exception governed admissibility of the testimony of Edwards, Cooper, Dew, Paula Bynum, and Farmer. Defendant concedes that the transcript clearly indicates Lucas' testimony was admitted under the Rule 804(b)(5) exception and that the record includes individual written orders admitting all the witnesses' testimony. Moreover, we find that the written order excluding the victim's statements to Marvin Bynum states, "The proffered statements do not possess equivalent circumstantial guarantees of trustworthiness as required by Rule 804(B)(4) [sic] of the Rules of Evidence." The better practice would have been for the trial court to specify in the other orders that the evidence was admissible under Rule 804(b)(5). However, from the transcript and the nearly identical findings and conclusions in all the written orders in the record, it is clear that the hearsay testimony admitted by the court was admitted pursuant to Rule 804(b)(5). Therefore, omission of the rule number from the orders admitting the testimony was harmless. *Cf. State v. Smith*, 315 N.C. 76, 97, 337 S.E.2d 833, 847 (1985) (holding that before admitting Rule 803(24)

hearsay statements, the trial court must enter in the record appropriate statements, rationale, or findings of fact and conclusions of law).

**[6]** Defendant argues further that there was insufficient evidence to allow the trial court to find and conclude that the victim's statements were worthy of belief. Again, we disagree.

In weighing the circumstantial guarantees of trustworthiness of a hearsay statement for purposes of Rule 804(b)(5), the trial judge must consider such factors as (i) assurances of the declarant's personal knowledge of the underlying events, (ii) the declarant's motivation to speak the truth, (iii) whether the declarant ever recanted the statement, and (iv) nature and character of the statement and relationship of the parties. *Triplett*, 316 N.C. at 10-11, 340 S.E.2d at 742. Where the declarant and witness enjoy a close friendship, the declarant is very likely to be honest in her statements. *Id.* at 11, 340 S.E.2d at 742. Further, *Triplett* teaches that a victim-declarant's statements to a law enforcement officer describing (i) ill will between the defendant and herself and fear of the defendant and (ii) prior attacks by the defendant and the victim's fear are likely to possess the required guarantees. 316 N.C. at 12, 340 S.E.2d at 743.

In the instant case the record shows the challenged hearsay statements concerned defendant's threats and the victim's fear. The trial court found that a confidential and trusting relationship existed between the victim and Edwards, Cooper, Dew, Paula Bynum, and Farmer. The court found further that when the victim made statements to Lucas, he was a law enforcement officer acting in the performance of his duty. Under *Triplett*, these findings were adequate to support the court's conclusions that the statements possessed circumstantial guarantees of trustworthiness. Therefore, we conclude the trial court did not err.

**[7]** Defendant's next contention is that the trial court erred in denying his motion to dismiss the charge of first-degree murder made at the close of State's evidence and renewed at the close of all the evidence. Defendant concedes the evidence showed that the victim died by virtue of a criminal act but argues the evidence was insufficient to show that defendant committed that act. We do not find defendant's argument persuasive.

Recently the Court reiterated the standard of review applicable to defendant's contention. We said as follows:

The law regarding denials of motions to dismiss in criminal trials is well settled. This Court reviewed the law in *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980):

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

*Id.* at 98, 261 S.E.2d at 117 (citations omitted). In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

*State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 914, 918-19 (1993); *see also State v. Triplett*, 316 N.C. 1, 6, 340 S.E.2d 736, 739 (stating that to withstand motion to dismiss, evidence need not be inconsistent with every reasonable hypothesis of innocence). In addition, the trial court is to consider all evidence actually admitted, competent or incompetent, which is favorable to the State, disregarding defendant's evi-

dence unless favorable to the State. If not in conflict with State's evidence, defendant's evidence "may be used to explain or clarify the evidence offered by the State." *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982).

In *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), *judgment vacated*, — U.S. —, 128 L. Ed. 2d 42, *on remand*, 337 N.C. 298, 446 S.E.2d 71 (1994), the defendant did not contend the evidence was insufficient to prove any specific element of the offense of first-degree murder. The Court reemphasized that

> [w]here there is substantial evidence of each element of the offense charged—as here—the fact that there was "scant" physical evidence, or inconsistencies in the evidence, is for the jury's consideration. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). In addition, "the credibility of the witness' identification and the weight given his testimony is a matter for the jury to decide." *State v. Turner*, 305 N.C. 356, 362, 289 S.E.2d 368, 372 (citing *State v. Green*, 296 N.C. 183, 250 S.E.2d 197 (1978)); *State v. Orr*, 260 N.C. 177, 132 S.E.2d 334 (1963); *State v. Bowerman*, 232 N.C. 374, 61 S.E.2d 107 (1950).

*Id.* at 337-38, 432 S.E.2d at 294.

In the instant case, all State's evidence tending to show defendant murdered his wife was circumstantial. Nevertheless, under the standards set out above, there was abundant evidence from which the jury could infer defendant's guilt. State's evidence tended to show that defendant was enraged over the victim's involvement with Marvin Bynum. Defendant uttered racial slurs; hounded, threatened and assaulted the victim; enlisted and attempted to enlist the aid of family members in intimidating her; and told others he would kill her. In addition to his motive of revenge, defendant both had and anticipated financial difficulties. Other evidence tended to show that neither robbery nor rape was a motive in the victim's death. Defendant was seen with the victim on the morning of her disappearance under circumstances which permitted an inference that he was restraining her. During the interval before she was found, defendant suggested that one person could overcome her strength by tying her up; and medical evidence showed the victim's ankles and wrists were bound and something was around her neck. State's evidence showed further that during the same interval there were times in which defendant's whereabouts were unknown and a car like one to which he had access was seen on the road where her body was found, an area well

known to defendant, near his home, and having special significance in the couple's earlier life. Moreover, the victim was murdered in the exact way in which defendant told others he would kill her; and defendant possessed a shotgun of the same type as the murder weapon. Finally, State's and defendant's evidence showed that by his actions on the morning when the victim was found, defendant indicated he had independent knowledge of the location of her body.

All the evidence, taken most favorably for the State, was clearly sufficient to support a finding that defendant was the person who killed the victim. Therefore, we hold the trial court did not err in denying his motions to dismiss and submitting the case to the jury.

**[8]** Defendant's next contention is that the trial court erred in denying his motions to dismiss the charge of robbery with a dangerous weapon and in submitting the charge of common-law robbery to the jury. Defendant argues there was insufficient evidence to show either that (i) the crime of common-law robbery was committed or (ii) defendant committed it. Again, we disagree.

"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." *State v. Davis*, 325 N.C. 607, 630, 386 S.E.2d 418, 430 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

In the instant case State's evidence tended to show that on Sunday, 10 April 1988, Paula Bynum had the duty of closing the store. She put the currency receipts for that day's business and a cash register receipt in the safe; and she concealed the start-up money for the next day in the back room. On the next morning, around the time when the victim usually arrived at the store, defendant was seen holding her outside the store. Within minutes thereafter, a customer appeared, looking for the victim, whose car engine was warm. Shortly thereafter, Deputy Gardner discovered the open safe and empty cash register. Other evidence showed over $2500 was missing. The disappearance of the money was discovered around thirty minutes after defendant was seen with the victim outside the store. That the victim was being held outside the store and left without her pocketbook indicated she was acting under force and, possibly, fear. All the evidence supports an inference that she did not voluntarily part with the money belonging to the store and that it was taken concurrently with

her abduction. Her forceful abduction and the taking of the money are so closely related in time as to form a continuous chain of events.

Defendant argues that under *State v. Moore*, 312 N.C. 607, 324 S.E.2d 229 (1985), the evidence disclosed no more than an opportunity for defendant or others to have taken the money. However, in *Moore*, the victim discovered her wallet was missing some two hours after her encounter with defendant. During that time her purse, from which the wallet was taken, was left unattended in the store, whose back door was unlocked. Under these circumstances the Court found that anyone in the vicinity of the store, a high crime area, would have had opportunity to steal the wallet. *Id.* at 613, 324 S.E.2d at 233.

Defendant's case is easily distinguishable from *Moore*; and all the evidence, taken most favorably for the State, supports an inference that a common-law robbery was committed and defendant was the perpetrator. For these reasons we conclude the trial court did not err in denying defendant's motion and submitting the charge to the jury.

**[9]** Defendant also contends the trial court erred in refusing to dismiss the charge of first-degree kidnapping. Again, we disagree.

Kidnapping is the confining, restraining, or removing from one place to another of a person sixteen years of age or over without the person's consent and for a purpose prohibited by statute. N.C.G.S. § 14-39 (1993). Even the removal of a clerk from that part of a convenience store where the money is kept to some other location is sufficient to support the charge. *State v. Davidson*, 77 N.C. App. 540, 543, 335 S.E.2d 518, 520, *disc. rev. denied*, 314 N.C. 670, 337 S.E.2d 583 (1985), *and disc. rev. denied*, 315 N.C. 393, 338 S.E.2d 882 (1986); *see also State v. Lowry*, 263 N.C. 536, 541, 139 S.E.2d 870, 874 (stating fact, not distance, of forcible removal, constitutes kidnapping), *cert. denied*, 382 U.S. 22, 15 L. Ed. 2d 16 (1965). Similarly, removal of a victim from one location to another prior to murdering her will support a charge of kidnapping. *State v. Garner*, 330 N.C. 273, 294, 410 S.E.2d 861, 873 (1991).

Viewed most favorably for the State, the evidence showed defendant was seen restraining the victim outside the store within thirty minutes before her disappearance was discovered. The victim's pocketbook remained in the store; her car remained parked outside. After her body was discovered, autopsy findings included that her stomach was empty, her bladder was full, and her ankles, wrists, and neck had been bound. All the evidence supports an inference that

defendant forcibly removed the victim from the store and restrained her for many hours for the purpose of killing her. Therefore, we conclude the trial court did not err in denying defendant's motion and submitting the charge to the jury.

**[10]** Defendant next contends the trial court's instruction on reasonable doubt was erroneous. We disagree.

In accordance with defendant's specific request the trial court instructed as follows:

> Now, what is a reasonable doubt?
>
> A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or the lack or the insufficiency of the evidence, as the case may be.
>
> To put it a different way, proof beyond a reasonable doubt is proof that fully satisfies you or entirely convinces you of the Defendant's guilt.
>
> Now, ladies and gentlemen, our Supreme Court has further defined reasonable doubt.
>
> The Supreme Court said a reasonable doubt is not a vain doubt; it's not an imaginary or fanciful doubt, but it is a sane and rational doubt.
>
> When it is said that a Jury must be satisfied of the Defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the Jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty, in the Defendant's guilt, then they have a reasonable doubt.
>
> Otherwise not.
>
> The Court went on to say, ladies and gentlemen, a reasonable doubt as that term is employed in the administration of criminal law is an honest, substantial misgiving generated by the insufficiency of proof, and it's [sic] insufficiency which fails to convince your judgment and conscience, and satisfy your reason as to the guilt of the accused.

> It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity. Not legitimately warranted by the testimony or one born out of merciful inclination or disposition to permit the defendant to escape the penalties of the law or one prompted by sympathy for him or those connected with him.

Defendant argues this instruction is nearly identical to that found unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), *overruled in part by Estelle v. McGuire*, 502 U.S. 62, 116 L. Ed. 2d 385 (1991), and *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992). Further, although the instruction was not identical, the trial court used a combination of terms similar to the combinations disapproved in *Cage* and *Montgomery* and stated the "moral certainty" test twice. Citing *Estelle v. McGuire*, 502 U.S. 62, —, 116 L. Ed. 2d 385, 399, defendant argues there was a reasonable likelihood that the jury applied the instruction in a way that violated the Due Process Clause.

Since defendant made a specific request for the instruction, even if the instruction was erroneous as a matter of law, defendant could not complain. N.C.G.S. § 15A-1443(c) (1988). However, in light of *Victor v. Nebraska*, — U.S. —, 127 L. Ed. 2d 583 (1994), we find no error in the instruction.

In *Victor*, the Court stated as follows:

> Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, see *Jackson* v. *Virginia*, 443 U.S. 307, 320, n. 14 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. *Taylor* v. *Kentucky*, 436 U.S. 478, 485-486 (1978). *Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland* v. *United States*, 348 U.S. 121, 140 (1954).

*Id.* at —, 127 L. Ed. 2d at 590 (emphasis added, alteration in original). The Court carefully considered defendant Sandoval's argument that a modern jury would understand *moral certainty* "to allow conviction on proof that does not meet the beyond a reasonable doubt standard." *Id.* at —, 127 L. Ed. 2d at 595. The Court accepted "Sandoval's premise that 'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt.' " *Id.* Nevertheless, moral certainty language cannot be isolated out of context, and if the rest of the instruction lends content to the phrase, there is no

reasonable likelihood that a jury will understand "moral certainty to be disassociated from the evidence in the case." *Id.* at —, 127 L. Ed. 2d at 597. Although the Court did not condone use of *moral certainty,* it concluded, "[I]n the context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional." *Id.*

Applying these principles, we conclude the trial court did not err in its use of moral certainty language. The rest of the instruction lent content to the phrase, and there is no reasonable likelihood that the jury understood moral certainty to be disassociated from the evidence in defendant's case. Reading the instruction in its entirety, and in light of *Victor,* we also reject defendant's argument that any combination of terms in the definition of reasonable doubt constituted error.

In *Victor,* the Court also considered defendant Victor's argument "that equating a reasonable doubt with a 'substantial doubt' overstated the degree of doubt necessary for acquittal." *Id.* at —, 127 L. Ed. 2d at 599. The Court emphasized that *Cage* "did not hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional." *Id.* Instead, an instruction whose "context makes clear that 'substantial' is used in the sense of existence rather than magnitude of the doubt," will not be found unconstitutional. *Id.*

In light of these principles we also reject defendant's argument that the instruction was erroneous because it included the words *substantial misgiving.* Since it also informed the jurors that a reasonable doubt is not a vain, imaginary, or fanciful doubt, the instruction properly focused on existence rather than magnitude of doubt.

For all the foregoing reasons, we conclude the challenged instruction on reasonable doubt was not violative of the Due Process Clause. Therefore, we hold the trial court did not err in giving the instruction.

**[11]** Defendant's last contention arising from the guilt-innocence phase is that the trial court gave an erroneous instruction on the charge of first-degree kidnapping. We find no prejudicial error.

After correctly instructing on the State's burden of proving each element of this offense beyond a reasonable doubt, the trial court concluded as follows: "However, if you do not so find, or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of guilty."

This Court has repeatedly held that a lapsus linguae not called to the attention of the trial court when made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled by the instruction. *E.g.*, *State v. Laws*, 325 N.C. 81, 98-99, 381 S.E.2d 609, 620 (1989), *judgment vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, 502 U.S. 876, 116 L. Ed. 2d 174, *reh'g denied*, 502 U.S. 1001, 116 L. Ed. 2d 648 (1991). In the instant case, the trial court repeatedly instructed the jury that the State had the burden of proving defendant was guilty beyond a reasonable doubt. The court also instructed that "[a]fter weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty." In addition, in its instructions on murder and common-law robbery, the court stated that if the jurors did not find each element had been shown, it would be their duty to return a verdict of not guilty. Reading the charge in its entirety, we are convinced the jurors could not have been misled by the omission complained of. Therefore, we hold there was no prejudicial error.

For all the foregoing reasons, we conclude defendant received a fair trial free of prejudicial error.

### Sentencing Proceeding

Defendant contends the trial court erred in instructing the jury as to two statutory mitigating circumstances, namely, (i) that the defendant had "no significant history of prior criminal activity," N.C.G.S. § 15A-2000(f)(1) (1988), and (ii) that he was "under the influence of mental or emotional disturbance," N.C.G.S. § 15A-2000(f)(2). We agree with this contention and so remand for a new capital sentencing proceeding.

The United States "Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant v. Stephens*, 462 U.S. 862, 890, 77 L. Ed. 2d 235, 258 (1983). Instead, "the sentencer must be allowed to consider in mitigation 'any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death.' " *Delo v. Lashley*, — U.S. —, —, 122 L. Ed. 2d 620, 626 (1993) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978)).

The Criminal Procedure Act provides that in capital sentencings, "[i]nstructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to

its deliberation." N.C.G.S. § 15A-2000(b) (1988). Where there is no record evidence of a capital defendant's criminal history, the (f)(1) mitigating circumstance may not be submitted to the jury. *State v. Gibbs*, 335 N.C. 1, 436 S.E.2d 321 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994). Where there is evidence supporting this circumstance, "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.' " *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (1989) (quoting *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988)), *death sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991).

In *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992), evidence "tended to show that the defendant had no record of criminal convictions. Evidence of prior history of criminal activities was limited to that tending to show her use of illegal drugs and her theft of money and credit cards to support her drug habit." *Id.* at 597, 423 S.E.2d at 66-67. This evidence "did not establish that the defendant had such a significant history of prior criminal activity that no rational jury could find the existence of" mitigating circumstance (f)(1). *Id.* at 598, 423 S.E.2d at 67. However, the trial court submitted as nonstatutory mitigating circumstances (i) that the defendant had no history of violence or physical injury to others and (ii) that the defendant had no record of criminal convictions. The Court found error, stating as follows:

> The trial court's submission of these two nonstatutory circumstances was inadequate because the trial court gave the jury the discretion, if it found either circumstance to exist, to determine "whether you deem this to have mitigating value." As a result of this instruction, the jury was not required to give any weight to such nonstatutory mitigating circumstances. By contrast, if a jury determines that a statutory mitigating circumstance exists, it *must* give that circumstance mitigating value. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988).
>
> In *Wilson*, we recognized that there was no way of knowing whether the failure to submit a statutory mitigating circumstance to the jury might have tipped the scales in favor of the jury determination that the aggravating circumstances outweighed the mitigating circumstances and were sufficiently substantial to call for the imposition of the death penalty. *Wilson*, 322 N.C. at 146, 367 S.E.2d at 606. "We have also recognized that common sense, fundamental fairness, and judicial economy require that any reason-

> able doubt regarding the submission of a statutory or requested mitigating [circumstance] be resolved in favor of the defendant." *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 822 (1985).

*Id.* at 598-99, 432 S.E.2d at 67.

In the instant case, evidence showed defendant's criminal record was limited to one conviction for driving while impaired. However, evidence also showed that his criminal history included threats against, and at least one assault on, the victim.

**[12,13]** In submitting as a mitigating circumstance that "[t]he defendant has no record of criminal convictions," the trial court erred in several ways. First, the legislature "has determined that certain circumstances, as a matter of law, have mitigating value and *has expressly provided by statute* for their submission to the jury under appropriate circumstances." *State v. Wilson*, 322 N.C. 117, 144, 367 S.E.2d 589, 605 (1988) (emphasis added). If the trial court concludes that evidence of such appropriate circumstances exists, it is without discretion to vary the wording of this mitigating circumstance. Next, by erroneously changing the wording of the circumstance, the court also suggested it ignored evidence of defendant's uncharged crimes. Although the court's instruction included language directing the jurors to consider whether defendant had any significant history of prior criminal activity, the court concluded the instruction as follows: "You would find this mitigating circumstance if you find, ladies and gentlemen, that the defendant only has one conviction of driving while impaired on his record. And that this is not a significant history of prior criminal activity." Assuming arguendo that the trial court in fact considered defendant's criminal history as well as his criminal record, the jury's consideration of this circumstance was limited to defendant's record only. Finally, defendant contends, and we agree, that the trial court's instructions erroneously permitted the jurors, if they found this circumstance to exist, to decide it was without weight. In its oral instructions to the jury, the trial court distinguished between the two statutory mitigating circumstances submitted and the five nonstatutory circumstances. As to the former, the court instructed that if one or more jurors found each such circumstance, they should write "Yes" on the form. As to the latter, the court instructed that if one or more jurors found each such circumstance and deemed it to have mitigating value, they should write "Yes" on the form. However, the issues and recommendation form given the jury did not make this critical distinction. Instead, the jury was directed to

answer, as to all possible mitigating circumstances, whether "[o]ne or more of us finds this circumstance and deem [sic] it to have mitigating value." Thus the wording of the form directly contravened case law holding that having found the existence of a statutory mitigating circumstance, a jury may not refuse to give it weight or value. *E.g.*, *State v. Fullwood*, 323 N.C. 371, 396, 373 S.E.2d 518, 533 (1988) ("If the jury finds the existence of a statutory mitigating circumstance, it has 'found' that circumstance and cannot determine that it does not have mitigating value."), *death sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991).

This Court has no way of knowing how the trial court's errors affected the jurors' weighing of the aggravating and mitigating circumstances. We cannot know whether, if they had been allowed to consider all evidence relevant to the (f)(1) circumstance, the jurors would have declined to find its existence. Moreover, we cannot know if the jury declined to give this mitigating circumstance any weight, thereby tipping the scales in favor of their determination that the aggravating circumstances outweighed the mitigating circumstances and were sufficiently substantial to call for imposition of the death penalty. Therefore, we cannot conclude that the error in failing to properly submit the (f)(1) statutory mitigating circumstance was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *State v. Mahaley*, 332 N.C. at 599, 423 S.E.2d at 68.

Similarly, with respect to mitigating circumstance (f)(2), mental or emotional disturbance, it cannot be known whether the erroneous instruction on the issues and recommendation form functioned to permit the jury to decline to give any weight to this circumstance. For all the foregoing reasons we hold the trial court erred in its instructions on both statutory mitigating circumstances; and because of these errors, defendant is entitled to a new capital sentencing proceeding.

PRESERVATION ISSUE

**[14]** Defendant also contends the trial court erred in denying his motion for a bill of particulars disclosing statutory aggravating circumstances on which the State intended to rely in seeking the death penalty. Defendant concedes this issue was decided against his position in *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). We note that a similar argument was rejected in *State v. Roper*, 328 N.C. 337, 366, 402 S.E.2d 600, 617 (1991), *cert.*

*denied*, 502 U.S. 902, 116 L. Ed. 2d 232 (1991). We have considered defendant's argument on this issue and find no compelling reason to depart from our prior holdings.

NO. 89CRS11600—FIRST-DEGREE MURDER OF SHIRLENE BAKER: NO ERROR IN THE GUILT PHASE; DEATH SENTENCE VACATED AND REMANDED FOR A NEW CAPITAL SENTENCING PROCEEDING.

NO. 89CRS11601—FIRST-DEGREE KIDNAPPING: NO ERROR.

NO. 89CRS11602—COMMON-LAW ROBBERY: NO ERROR.

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STATE OF NORTH CAROLINA v. MARCUS LOIS CARTER, JR.

No. 160A92

(Filed 30 December 1994)

1. **Constitutional Law § 280 (NCI4th)— first-degree murder—motion to proceed pro se—inquiry by court**

The trial court did not err in a first-degree murder prosecution by allowing defendant to proceed *pro se* where the court followed the mandatory inquiry required by N.C.G.S. § 15A-1242. *State v. Pruitt*, 322 N.C. 600, does not set forth any specific guidelines relating to how the statutorily mandated inquiry must proceed. The critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary; Judge Griffin's inquiry elicited the required information and was therefore sufficient for him to determine that defendant's decision was both knowing and voluntary.

**Am Jur 2d, Criminal Law §§ 764 et seq., 993 et seq.**

**Accused's right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.**

2. **Jury §§ 205, 197 (NCI4th)— first-degree murder—jury selection—excusals for cause—acquaintance with defendant or relative—pregnant juror**

The trial court did not err in a first-degree murder prosecution by excusing for cause two prospective jurors after making its own inquiry of them and deciding that they could not be fair and

impartial because of their prior acquaintance with defendant or a relative of defendant, and one prospective juror who was in her eighth month of pregnancy and who had indicated that she could go into labor if the trial lasted more than two weeks.

**Am Jur 2d, Jury §§ 265 et seq., 313 et seq.**

**3. Jury § 260 (NCI4th)— first-degree murder—jury selection—peremptory challenges—racially neutral**

There was no error during jury selection in a first-degree murder prosecution where the defendant contends that the State exercised its peremptory challenges to exclude black jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. at 89, but the prosecutor voluntarily gave reasons for the dismissal of each of the jurors in question, so that the question of whether defendant has made a *prima facie* showing of discrimination need not be addressed, and, of the black prospective jurors who were excused, two had relatives who had been involved in violent behavior; one of those failed to put the information on the juror questionnaire and the other would not give her views on the death penalty; another had significant gaps in his employment history like defendant and his response to the juror questionnaire indicated that he had some difficulty understanding instructions; another was excused because she worked as a guard on death row; and another was excused because he was not candid about his work record. The State's excusal of these jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during *voir dire.*

**Am Jur 2d, Jury § 235.**

**Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.**

**Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.**

**4. Evidence and Witnesses § 305 (NCI4th)— first-degree murder—prior assault—admissible**

The trial court did not err in a prosecution for a first-degree murder committed in 1989 by admitting evidence of an assault committed by defendant in 1981, when he was thirteen, where there were unusual facts and strikingly similar acts in both crimes

so as to permit admission of the 1981 assault for purposes of proving identity. Because the prior crime here is offered to show identity rather than common plan or scheme, the passage of time in this case affects the weight of the evidence rather than its admissibility. The probative value of the evidence outweighs any potential for unfair prejudice because the identity of the perpetrator was a critical issue at trial.

**Am Jur 2d, Evidence §§ 452 et seq.**

**Admissibility of evidence of subsequent criminal offenses as affected by proximity as to time and place. 92 ALR3d 545.**

**5. Evidence and Witnesses § 701 (NCI4th)— first-degree murder—prior assault—limiting instruction**

There was no error in a first-degree murder and attempted rape prosecution where the court admitted evidence of a prior assault and defendant contended that the court improperly instructed the jury as to the purpose of the evidence by failing to specify the charged offense for which the evidence could be considered. The prior crime was relevant on the issue of the identity of the assailant as to both offenses.

**Am Jur 2d, Evidence §§ 1120 et seq., 1283.**

**6. Evidence and Witnesses § 981 (NCI4th)— first-degree murder—prior trial—witness unavailable—mental illness**

There was no error in a first-degree murder prosecution where the court determined that a witness from defendant's first trial was unavailable where the witness had been hospitalized in a psychiatric wing after she testified at the prior trial; she got out of her mother's car at an intersection on the way to testify at this trial and was found by the police hiding at a friend's house; a doctor testified that she would become more depressed if she testified and that her depression could lead to suicide; the witness was located and brought into court; and she told the judge that she did not want to testify and would refuse to do so if ordered. N.C.G.S. § 8C-1, Rule 804(a)(4).

**Am Jur 2d, Evidence §§ 692 et seq.**

**Admissibility of former testimony of nonparty witness, present in jurisdiction, who refuses to testify at subsequent trial without making claim of privilege. 92 ALR3d 1138.**

**7. Evidence and Witnesses §§ 315, 345 (NCI4th)— attempted rape and first-degree murder—other offense—admissible on identity and intent**

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty, where the similarity between the two crimes, closely connected temporally, clearly supports the admission of the other rape to prove identity and intent. N.C.G.S. § 8C-1, Rule 404(b).

**Am Jur 2d, Evidence §§ 437 et seq., 452 et seq.; Rape § 71.**

**Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.**

**8. Evidence and Witnesses § 370 (NCI4th)— attempted rape and first-degree murder—other rape—common plan or scheme**

The trial court did not err in an attempted rape and first-degree murder prosecution by admitting evidence of another rape to show identity on the theory of common scheme or plan.

**Am Jur 2d, Evidence §§ 450 et seq.; Rape § 71.**

**Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.**

**Admissibility, under Rule 404(b) of the Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed 781.**

**9. Evidence and Witnesses § 701 (NCI4th)— first-degree murder and attempted rape—evidence of another rape—instruction**

There was no error in a prosecution for attempted rape and first-degree murder in the trial court's limiting instruction on evidence of another rape. The evidence was relevant and the instructions properly expounded the theories underlying the admissibility of the evidence.

**Am Jur 2d, Evidence § 1283.**

**10. Evidence and Witnesses § 1694 (NCI4th)— first-degree murder and attempted rape—photographs of victim and crime scene**

There was no plain error in an attempted rape and first-degree murder prosecution in the admission of photographs of the victim and the scene where the photographs were used to illustrate the pathologist's testimony concerning wounds on the body, the cause of death, and the crime scene.

**Am Jur 2d, Evidence §§ 960 et seq., 974.**

**Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.**

**11. Criminal Law § 1316 (NCI4th)— first-degree murder—sentencing—evidence of prior incidents—admissible**

The trial court did not err in a first-degree murder sentencing hearing by admitting testimony from defendant's probation officer that defendant was a fair probationer but consistently denied having a drug or alcohol problem despite the offer of assistance in making drug treatment available, and testimony that in the past defendant had punched his girlfriend and hit her with brass knuckles, cursed and spit on his girlfriend and the mother of his children and fought with officers who came to arrest him, and refused to enter a room and haggled with a courtroom deputy while in custody. This evidence was admissible to counter defendant's evidence of his good character traits, to rebut the mitigating circumstances submitted regarding defendant's age, his being a loving father and his good adaption to prison life, and to rebut the mitigating circumstance relating to defendant's "misuse or abuse" of drugs.

**Am Jur 2d, Criminal Law §§ 598, 599; Evidence §§ 428, 431.**

**Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.**

**12. Evidence and Witnesses § 2916 (NCI4th)— first-degree murder—sentencing hearing—scope of cross-examination**

There was no error in a first-degree murder and attempted rape sentencing hearing where defendant contended that the

court erred by permitting the State to cross-examine his psychologist beyond the scope of direct examination where the State's questions regarding defendant's ability to maintain an erection, his earlier expulsion from school, his disciplinary problems as a teenager, a 1981 robbery conviction, and his teenage rejection of attempts to alter his behavior were for the purpose of challenging the psychologist's opinion that, even though defendant had been diagnosed as a teenager as being a Willie-M child prone to uncontrollable violence, his problem on the night of the murder was likely drug and alcohol abuse which resulted in behavioral and mental problems and that defendant was so encumbered by drugs and alcohol on that night that he was incapable of sexual intercourse.

**Am Jur 2d, Witnesses §§ 471 et seq., 520.**

**13. Criminal Law § 1345 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—especially heinous, atrocious, or cruel**

The trial court in a first-degree murder sentencing hearing did not err by submitting the especially heinous, atrocious or cruel aggravating circumstance to the jury where the State's evidence showed that defendant ripped off Amelia Lewis's pants on a cold night in December in a back alley and covered her body with abrasions and lacerations as she struggled against him; Amelia called out numerous times to defendant, "please don't kill me, I will do anything if you don't kill me"; defendant silenced her by squeezing his hands around her neck; Amelia fought for some time, desperately trying to remove his hands, digging her nails into her own skin, to no avail; she struggled for at least two minutes, with defendant's hands pressed firmly around her neck, before losing consciousness; death from manual strangulation would have taken at least four minutes; and defendant was not satisfied with the expedience of her death, so he pounded her in the head several times with a brick. This evidence, when viewed in the light most favorable to the State, was sufficient to support an inference that the murder was physically agonizing or otherwise dehumanizing to the victim; furthermore, the facts of this case support an inference that the murder involved the infliction of psychological torture.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that mur-**

**der was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.**

**14. Criminal Law §§ 1339, 1347 (NCI4th)— first-degree murder—sentencing—aggravating circumstances—course of conduct—murder committed during attempted rape**

The trial court did not err during a sentencing hearing for first-degree murder and attempted rape by submitting to the jury the aggravating circumstances that defendant engaged in a course of conduct including other violent crimes and that the murder was committed during the course of an attempted rape where there was evidence that defendant had committed another rape later in the evening and that he had attempted to rape the murder victim. Although defendant contends that it was not made clear to the jury whether the course of conduct aggravating circumstance was based on the other rape or on the attempted rape of the murder victim, the instruction on course of conduct made clear that the jury was to consider a crime of violence by defendant against another person, referring to a person other than the rape victim, and the circumstance that the murder was committed during another felony referred to an attempt to commit rape. The jury must have understood which respective felonies formed the basis of each of the aggravating circumstances submitted.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like—post *Gregg* cases. 65 ALR4th 838.**

**Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-*Gregg* cases. 67 ALR4th 887.**

**15. Criminal Law § 1339 (NCI4th)— first-degree murder—sentencing—aggravating circumstance—murder committed during attempted rape—evidence sufficient**

The trial court did not err in a first-degree murder sentencing hearing by submitting the aggravating circumstance that the mur-

der was committed during an attempted rape where defendant contended that there was no evidence of an initiation of sexual intercourse, forcible or otherwise, between defendant and the victim, but the victim's left pant leg was completely off when her body was discovered, her panties were down and her brassiere was above her breasts; she had multiple abrasions and lacerations; the defendant's clothes had blood on them of the same type as that of the victim; and there was evidence that shortly after defendant murdered Amelia Lewis he raped Kesha Davis.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like—post-*Gregg* cases. 67 ALR4th 887.**

**16. Constitutional Law § 371 (NCI4th)— first-degree murder—death penalty—constitutional**

The North Carolina death penalty is neither vague nor overbroad and is not applied in a discriminatory and discretionary manner.

**Am Jur 2d, Criminal Law § 628.**

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.**

**17. Criminal Law § 1323 (NCI4th)— first-degree murder—sentencing—instructions—mitigating circumstances—"may" rather than "must"**

The trial court did not err during a first-degree murder sentencing hearing by instructing the jury that it "may" rather than "must" consider any mitigating circumstances found by the jury.

**Am Jur 2d, Trial §§ 1441 et seq.**

**18. Criminal Law § 1373 (NCI4th)— first-degree murder—death penalty—not disproportionate**

A death sentence for first-degree murder was not disproportionate where the record supports the jury's finding of the aggravating circumstances that the murder was committed while defendant was attempting to commit rape, that the murder was

especially heinous, atrocious or cruel, and that defendant was engaged in a course of conduct involving other violent crimes, there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, there is no significant similarity between this case and each of the cases relied upon by the defendant in which the jury recommended life imprisonment, and the present case is more similar to certain cases in which the jury found either the especially heinous, atrocious or cruel aggravating circumstance or the course of conduct aggravating circumstance.

**Am Jur 2d, Criminal Law § 628.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court cases. 111 L. Ed. 2d 947.**

Judge MITCHELL concurring in the result.

Justices MEYER and PARKER join in this concurring opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Griffin, J., at the 10 April 1992 Criminal Session of Superior Court, Wayne County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for attempted second-degree rape was allowed by this Court on 14 July 1993. Heard in the Supreme Court 31 January 1994.

*Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.*

*Urs R. Gsteiger and Elizabeth Horton for defendant-appellant.*

EXUM, Chief Justice.

At the 28 October 1991 Criminal Session of Superior Court, Wayne County, the Honorable James R. Strickland presiding, defendant was tried for first-degree kidnapping, first-degree murder and attempted second-degree rape of Amelia Lewis. At the conclusion of the State's evidence, the trial judge directed a verdict for defendant on the first-degree kidnapping charge. The jury was unable to reach a verdict on the other charges, and a mistrial was declared as to the first-degree murder and attempted second-degree rape charges.

The case again came on for trial at the 30 March 1992 Criminal Session of Superior Court, Wayne County, the Honorable William C. Griffin presiding. At the second trial defendant was found guilty of first-degree murder and attempted second-degree rape. After a separate sentencing proceeding, the jury recommended that defendant be sentenced to death upon his conviction of first-degree murder. On 10 April 1992, judgment was entered by Judge Griffin sentencing defendant to death in the first-degree murder case. In the attempted second-degree rape case, defendant was sentenced to a term of imprisonment of ten years. As to the first-degree murder conviction, defendant brings forward numerous assignments of error relative to both the guilt-innocence phase and the sentencing phase of his trial. Having thoroughly reviewed the transcript, the record on appeal, the briefs and oral arguments, we conclude that defendant received a fair trial free from prejudicial error and that the sentence of death is not disproportionate.

I.

During the guilt-innocence phase, defendant discharged his court-appointed counsel, Mr. Jordan and Mr. Braswell, electing instead to represent himself. Judge Griffin appointed Mr. Jordan and Mr. Braswell as standby counsel.

The State offered evidence which tended to show the following narrated facts. In December 1989, Amelia Lewis was twenty years old, stood five feet tall and weighed ninety pounds. She was last seen alive by her cousin, Latrecia Lewis, on Friday, 15 December, at around 10:00 p.m. Amelia left the home she and Latrecia shared with their grandmother in Goldsboro at that time on foot. Amelia made a collect call to a friend, Cecil Speed-Reid, from a phone booth near Amelia's home on 15 December at about 11:00 p.m. Speed-Reid agreed to drive Amelia to the bus station at midnight to pick up her baggage. Amelia planned to meet Speed-Reid at Speed-Reid's house, but she never made it there.

The Goldsboro Police Department received a call at 11:22 p.m. on 15 December 1989 which reported a woman screaming, "please don't kill me," from the alley on Walnut Street. An officer responded and "cleared the area" at 11:27 p.m. He saw nothing. On Monday, 18 December, at 7:00 a.m., the body of the victim, Amelia Renae Lewis, was found in the alley behind the Old Waynesborough Hotel, the area from which the report had come earlier.

When Amelia's body was discovered by Capt. C.E. Boltinhouse of the Goldsboro Police Department at the scene of the crime at about 8:00 a.m., her left pant leg was off completely. This reminded Capt. Boltinhouse of the description of a rape reported by Kesha Davis on 15 December 1989 which occurred just four blocks away. Defendant was identified by Davis as the rapist. In addition to the left pant leg being off, Amelia's brassiere was above her breasts; her panties were down; and her sweater, saturated with blood, was wrapped around her head, covering her face and head.

On 18 December, Capt. Boltinhouse went to defendant's house to arrest him for the Davis rape. Defendant was not there, and his mother consented to a search of her home. The search resulted in the seizure of defendant's green sweatshirt, a pair of jeans and a pair of black Carolina Turkey boots which matched the description Davis gave of her rapist's clothing. On 18 December, defendant was arrested for the rape of Kesha Davis. As defendant was being processed, investigators observed scratches on his face and a discoloration of his left eye.

An autopsy of the victim's body in this case revealed hemorrhages to her left eye, larger hemorrhages to her right eye, blunt trauma to the head, multiple skull fractures and lacerations of the scalp. There were abrasions above her right breast and between her breasts, inside her right upper arm, on both knees, the front of her left shin, her face, left forehead, chin, left to mid lower lip, and the front and sides of her neck. The neck abrasions indicated nails digging into the skin. The abrasions to the knees indicated a fall. Certain abrasions on her back appeared to have occurred after death. She had a laceration over the left side of her forehead and a large laceration of her right forehead above her eye which contained a reddish-brown material and bone from fractures. Her neck muscles were bruised, and there was a large tear of her liver with no bleeding, indicating this injury also occurred after death. Amelia's death was caused by manual strangulation and blunt trauma to the head, either of which was sufficient to cause death. The blunt trauma to the head caused brain injury and could have been inflicted by a brick. The injury to her liver would have been fatal had she not been dead already. This injury was probably caused by a punch or stomp while the body was lying face up. There were no defense wounds and no trauma to the vagina or genitalia.

Forensic evidence tended to show the following. The only unknown hairs from Amelia's body were Caucasian. Defendant is

Oriental and African-American by race. Fingernail scrapings from the victim were compared with samples from the defendant's sweatshirt. Some of the particles, specifically nail polish, originated from the same source. DNA comparisons provided no positive identification. Defendant's green sweatshirt and blue jeans contained human blood splatter. These blood splatters matched the victim's blood and were inconsistent with defendant's blood.

Inside a dumpster near where the victim's body was found, investigators discovered a brick underneath a couple of garbage bags. The brick had hair and blood on it, and a corner of it was chipped away. The blood on the brick matched the victim's blood and was inconsistent with defendant's blood. Fibers from the wheel of the dumpster were consistent with known samples of fibers from defendant's green sweatshirt. Fingernail clippings from the victim's hand contained fibers consistent with known samples from defendant's green sweatshirt. Fragments of brick from the victim's head fitted together perfectly to fill the chipped area on the brick.

The only evidence that defendant introduced during the guilt-innocence phase of his trial was the testimony of one witness, Audrey Lynch, an FBI expert in DNA analysis. Lynch testified that the materials she received were insufficient to develop or obtain any DNA profiles.

Additional evidence introduced during the trial will be discussed where pertinent to the issues raised by the defendant.

## Guilt Phase Issues

## II.

**[1]** We discuss first defendant's assignment of error that the trial court erred in allowing his motion to proceed *pro se*. At the start of defendant's trial, he told the court that he was dissatisfied with his court-appointed counsel and requested that the court appoint new counsel for him. The court, finding counsel to be competent, informed defendant that he was not entitled to court-appointed counsel of his choice and denied defendant's request. Defendant then requested the right to proceed *pro se*, at which point the following discussion took place:

> THE COURT: Well, you can you have a right to proceed and represent yourself if you want to do that. I would not advise you to do that but I mean if you want to discharge them completely and

> proceed without a lawyer, I mean you are at liberty to do that. However, I would—
>
> MR. CARTER: Send them home then. If I got to do any time, if I got to get any kind of death penalty, I got to do it so send them home. I don't want them.
>
> THE COURT: Mr. Carter, I don't believe you want to do that.
>
> MR. CARTER: I do. Believe me, I do.
>
> THE COURT: Well, I can appoint them as standby counsel and I am going to do that if I allow you to discharge them.

The court next ordered a recess, specifically to afford defendant additional time to reconsider his decision and then asked him the following questions:

> THE COURT: All right. Well, I am going to, I am going to if you want—you are going to discharge them then? That's what you are going to do?
>
> MR. CARTER: Yes, sir.
>
> THE COURT: And you are going to proceed without a lawyer?
>
> MR. CARTER: Yes, I am.

The court then discharged defendant's counsel and permitted defendant to proceed *pro se.*

Before a defendant is allowed to waive in-court representation by counsel, the trial court must insure that constitutional and statutory standards are satisfied. *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). First, the defendant must "clearly and unequivocally" waive his right to counsel and instead elect to proceed *pro se. Id.* Second, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel. *Id.* at 674, 417 S.E.2d at 476. In determining whether the waiver meets this standard, the trial court must conduct a thorough inquiry. *Id.* This Court has held that the inquiry required by N.C.G.S. § 15A-1242 satisfies constitutional requirements. *Id.* The statute provides:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel *only after the trial judge makes thorough inquiry and is satisfied* that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C.G.S. § 15A-1242 (1993) (emphasis added).

Defendant, relying on *State v. Pruitt*, 322 N.C. 600, 369 S.E.2d 590 (1988), contends that the trial judge failed to make the necessary inquiry under N.C.G.S. § 15A-1242 to permit defendant to represent himself. In *Pruitt*, this Court stated:

> The inquiry to be made by the trial court under N.C.G.S. § 15A-1242 is mandatory and failure to conduct such an inquiry is prejudicial error. Furthermore, "neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a *knowing and voluntary waiver*." *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986).

*Pruitt*, 322 N.C. at 603, 369 S.E.2d at 592 (citation omitted) (emphasis added).

We hold that the trial court, in granting defendant's motion to proceed *pro se*, did follow the mandatory inquiry required by N.C.G.S. § 15A-1242. *Pruitt* is not applicable here because in *Pruitt* no colloquy occurred between the trial judge and the defendant. Instead, the trial judge directed his inquiry to defendant's counsel. In this case, defendant asked the court how he could discharge Mr. Braswell and Mr. Jordan, indicating he did not wish to stand trial with them as his counsel. Judge Griffin informed defendant of his right to represent himself, although advising against it. Defendant told the court in clear and unequivocal terms that he would prefer to represent himself. Judge Griffin said that he would appoint Mr. Braswell and Mr. Jordan as standby counsel. Judge Griffin then ordered a recess so that defendant could reconsider his decision to discharge counsel and represent himself. After the recess, defendant reaffirmed his desire to represent himself, and Judge Griffin agreed to defendant's request.

During the discussion between Judge Griffin and defendant, defendant clearly indicated that he realized he was facing a possible death sentence, stating, "[I]f I got to get any kind of death penalty I got to do it so send them home." Defendant also indicated that he realized he was being retried on the same matters on which he had previously been tried during a three and one-half week long trial which ended in a mistrial.

*Pruitt* does not set forth any specific guidelines relating to how the statutorily mandated inquiry must proceed. Rather, the critical issue is whether the statutorily required information has been communicated in such a manner that defendant's decision to represent himself is knowing and voluntary. We find that Judge Griffin's inquiry elicited the required information and was therefore sufficient for him to determine that defendant's decision was both knowing and voluntary. Accordingly, defendant is not entitled to a new trial on this ground.

III.

Defendant's next assignments of error pertain to the jury selection process. Defendant argues that the trial court erred by improperly excusing for cause prospective jurors Bullock, Royal and Stover. Defendant also argues that the trial court erred in permitting the prosecutor to exercise peremptory challenges to exclude black jurors on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

A.

**[2]** Unless the trial court's ruling or a challenge for cause is required by law, *see, e.g., State v. Hightower*, 331 N.C. 636, 417 S.E.2d 237 (1992), and *State v. Cunningham*, 333 N.C. 744, 429 S.E.2d 718 (1993), the ruling is reviewable on an abuse of discretion standard, *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987). N.C.G.S. § 15A-1212(9) permits a challenge for cause against any prospective juror who "is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (1993).

In the present case, the trial judge asked preliminary questions of all the prospective jurors concerning their acquaintance with the defendant or his family. During the *voir dire* of Royal, the following transpired:

> THE COURT: . . . Any of you happen to be acquainted with he [sic] or his family? Yes, ma'am, Mrs., Mrs. Royal?

A: I, I worked with some, with one of his families [sic] at Busman's and she says she is kin to him.

THE COURT: All right. Do you know what the nature of that relationship is?

A: All she said was cousin.

. . . .

THE COURT: Do you feel like that your acquaintance with her or the fact that you will be working there would put you in a position that would make it so you feel like you shouldn't be a juror in this case?

A: Yes, sir. I do.

THE COURT: You feel like that it might bear upon your ability to be fair and impartial in the case?

A: Yes, sir.

THE COURT: All right. You rather not be on it I take it the way you are answering?

A: That's right.

THE COURT: Okay. And you say you work with this lady every day?

A: Yes, sir. Every day.

. . . .

THE COURT: Okay. All right. I believe I am going to let you step down, Mrs. Royal.

A: Okay. Thank you.

During the *voir dire* of Stover, the following transpired:

THE COURT: . . . Do either of you know the defendant in this case, Mr. Carter, or any of his family.

JUROR: 12: (Nodded affirmatively).

THE COURT: Ms. Stover, can you tell us a little bit about that if you would please.

A: I mean I don't know him—I know him but not enough to—

THE COURT: Okay. You, you know him as a member of the community; is that what you are saying?

A: Yes.

THE COURT: Do you know him as, any of his family personally?

A: No.

THE COURT: All right. Is your acquaintance with him such that it would make it impossible for you to sit in this case as an impartial juror you think?

A: Yes, it would.

THE COURT: You feel like that that acquaintance is such it would make it so you would not be able to be impartial; is that right?

A: Yes.

THE COURT: All right. I will let you step down. Thank you.

The trial court excused jurors Royal and Stover after making its own inquiry of them and deciding that they could not be fair and impartial because of their prior acquaintance with defendant or a relative of defendant. The colloquy between the trial court and these jurors supported this decision; therefore, there was no abuse of discretion in excusing either of them.

Finally, the trial court excused for cause juror Bullock because she was in her eighth month of pregnancy and had indicated that if the trial lasted more than two weeks, she could go into labor. This was Bullock's first pregnancy. We conclude that the trial court did not abuse its discretion by allowing a challenge for cause against Bullock. Accordingly, defendant's assignments of error on this issue are overruled.

B.

**[3]** Second, defendant contends that the State exercised its peremptory challenges to exclude black jurors on the basis of race in violation of *Batson v. Kentucky*. The United States Supreme Court, in *Batson v. Kentucky*, 476 U.S. at 89, 90 L. Ed. 2d at 83, held that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbids the use of peremptory challenges in a racially discriminatory manner. Likewise, this Court has held that the North Carolina Constitution forbids such race-based use of peremptory challenges. *State v. Smith*, 328 N.C. 99, 119, 400 S.E.2d 712, 723 (1991).

In *Batson*, the Supreme Court set forth a three-part test to determine if a prosecutor has impermissibly excluded jurors because of their race. First, the defendant must establish a *prima facie* case that the prosecutor peremptorily challenged prospective jurors on the basis of race. *State v. Robinson*, 330 N.C. 1, 15, 409 S.E.2d 288, 296 (1991). In this case, the prosecutor voluntarily gave reasons for the dismissal of each of the jurors in question. Accordingly, we need not address the question of whether defendant has made a *prima facie* showing of discrimination and may proceed as if defendant has met this burden. *Id.* at 17, 409 S.E.2d at 296.

Once the defendant succeeds in making a *prima facie* showing, the burden shifts to the prosecutor to offer a racially neutral explanation for each challenged strike. The prosecutor's explanation need not, however, rise to the level justifying a challenge for cause. *Batson*, 476 U.S. at 97, 90 L. Ed. 2d at 88. Finally, the trial court must determine whether the defendant has proven purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 405 (1991). Because the trial court's findings will be based on the prosecutor's credibility, an appellate court should not overturn these findings in the absence of a clear abuse of discretion. *Id.* at 364-65, 114 L. Ed. 2d at 408-09.

Defendant in this case is fifty percent Asian and fifty percent African-American. His jury consisted of twelve white individuals. Of the prosecutor's first three peremptory challenges, two were used to excuse whites and one to excuse a black person (Ms. Wilkins). The next three peremptory challenges were all against blacks (Ms. Hines, Mr. McDowell and Ms. Thomas). Following the peremptory challenge of these three jurors, the defendant objected. Later, the prosecutor exercised a peremptory challenge against one more black person (Mr. Garner), and defendant again objected. Meanwhile, the prosecutor had exercised peremptory challenges against seven white jurors. The prosecutor then accepted a black person as a second alternate although he had two unused peremptory challenges.

Although the trial court did not find that defendant had made a *prima facie* showing of racial discrimination, the prosecutor nevertheless offered his explanations for the exercise of peremptory challenges against the five blacks. The explanations were as follows: Ms. Wilkins was excused because she had a nephew who had been involved in two shootings, and she had failed to put this information on the juror questionnaire. Ms. Hines was excused because she had a

relative who was recently convicted of armed robbery and would not give her views on the death penalty. Defendant in this case had a history of violent behavior dating back to his teenage years, and the prosecutor did not want jurors who were sympathetic to persons with this kind of history.

Mr. McDowell was excused because he had significant gaps in his employment history like defendant, and his responses to the juror questionnaire indicated he had some difficulty understanding instructions. On the questionnaire, Mr. McDowell was unclear about whether he had previously been tried for embezzlement, whether he had served on a jury where someone else was tried for embezzlement, or whether he had served as a juror in a civil case that somehow related to embezzlement. Because most of the evidence in this case was circumstantial, the prosecutor stated that he preferred jurors who did not have difficulty with instructions.

Ms. Thomas was excused because she worked for the Department of Correction as a guard on death row. In defendant's prior trial, a Department of Correction's employee had been responsible for hanging up the jury. Finally, Mr. Garner was excused because he was not candid about his work record, and his responses in court differed from his responses on the questionnaire. Therefore, the prosecutor was suspicious of his honesty in general and his motives for wanting to sit on the jury.

We hold that the trial court properly overruled defendant's objection to the State's use of its peremptory challenges to excuse each of these jurors. The State's excusal of these jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during *voir dire*. The trial court correctly ruled that the State did not exclude any jurors based solely on their race in violation of *Batson*. Defendant's assignments of error on these grounds are overruled.

IV.

**[4]** In his next assignment of error, defendant contends the trial court erroneously admitted evidence of an assault committed by defendant in 1981.

A.

The evidence was that on 15 October 1981, defendant assaulted an elderly man named John Hughes in a housing project with a piece

of a cinder block. The cinder block was roughly the same size and dimensions of a brick which the State's evidence tended to show was the murder weapon in this case. Defendant was thirteen years old at the time of this assault. The State offered this evidence as tending to prove that defendant was Amelia Lewis's assailant.

Rule 404(b) provides that evidence of other crimes, wrongs, or acts may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (1993). Such evidence is relevant and admissible under Rule 404(b) against a defendant "if the incidents are sufficiently similar and not too remote in time so as to be more probative than prejudicial under the Rule 403 balancing test." *State v. Scott*, 318 N.C. 237, 248, 347 S.E.2d 414, 420 (1986).

The other crime may be offered on the issue of defendant's identity as the perpetrator when the *modus operandi* of that crime and the crime for which defendant is being tried are similar enough to make it likely that the same person committed both crimes. *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983). This theory of admissibility requires "some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes." *Id.* at 106, 305 S.E.2d at 545.

Here, we find there are unusual facts and strikingly similar acts in both crimes so as to permit admission of the 1981 assault for purposes of proving identity. The State's evidence tended to show that one cause of Amelia Lewis's death was blunt trauma to the head, which was caused by a brick. The primary wound was above the right eye, and defendant is right-handed. In the 1981 assault, the wound to the victim was also above the victim's right eye, and the weapon was a square portion of a cinder block which the State argues was very similar in size to the brick in this case.

Defendant argues that because the prior assault occurred eight years ago, it is too remote in time and should be excluded on that basis. In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991), this Court held that a prior act which occurred ten years before the crime charged was not too remote. The Court reasoned:

> Remoteness in time . . . is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan. In contrast, remoteness in time is

> less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility.

*Id.* at 307, 406 S.E.2d at 881 (citations omitted).

This Court also admitted evidence of a six-year-old offense under Rule 404(b) in *State v. Riddick*, 316 N.C. 127, 340 S.E.2d 422 (1986). In *Riddick*, the Court stated:

> Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes.

*Id.* at 134, 340 S.E.2d at 427.

The prior crime here, like in *Stager* and *Riddick*, is not being offered to show common plan or scheme, but to show identity. Therefore, the passage of time in this case affects the weight of the evidence rather than its admissibility.

Next, defendant argues that even if evidence of the 1981 assault had some relevancy, it fails the balancing test of Rule 403 since its probative value is far outweighed by its prejudicial effect. We are well aware of the propensity for unfair prejudice to a defendant when evidence is introduced that he has committed a crime separate and distinct from the crime or crimes for which he is being tried. However, the facts of each case will ultimately determine whether evidence of a defendant's former crime is pertinent in his prosecution for another independent crime. *State v. Shane*, 304 N.C. 643, 654, 285 S.E.2d 813, 820 (1982), *cert. denied*, 465 U.S. 1104, 80 L. Ed. 2d 134 (1984).

In this case, we are satisfied that the probative value of the 1981 assault evidence outweighs any potential for unfair prejudice against defendant. The similarities between the 1981 crime and the crime charged here are highly probative on the issue of identity. Defendant was clearly identified as the assailant in the 1981 case. However, the identity of the perpetrator in this case was a critical issue at trial since the evidence connecting defendant to the crime was totally circumstantial.

B.

**[5]** Defendant next argues the trial court improperly instructed the jury as to the purpose of the evidence. The trial judge instructed the jury as follows:

> The State seeks to offer this evidence for a limited purpose and that is in an effort to provide the evidence which it contends would establish the identity of the defendant in the case we are presently engaged [in] trying. Again, as I told you earlier, this evidence, if it does show that, then that's for you to say and determine, the weight and credibility of this evidence on that question is for the jury always to determine.

Later, the trial judge again instructed the jury by stating: "I earlier told you, of course, that the weight and credibility of the evidence with regard to the defendant's prior conduct in 1981 is received for the sole purpose to, if the jury finds that it does, show his identity by *modus operandi*." (Emphasis added.)

Defendant contends these instructions erroneously failed to specify for which charged offense, murder or attempted rape, the evidence could be considered. We agree with the State that there was no need for the trial court to specify the offense to which the 1981 assault evidence related inasmuch as it was relevant on both offenses. Defendant's reliance on *State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992), is misplaced. In *White*, evidence of a prior rape was offered to show defendant's intent to rape the murder victim. Yet, the trial court later dismissed the rape charge. This Court determined that the trial court erred in failing to instruct the jury to ignore the evidence of the prior rape because of the dismissal of the only charge to which it was relevant. Unlike *White*, the prior crime evidence was relevant on the issue of the identity of Amelia Lewis's assailant as to both offenses, the murder and the attempted rape.

V.

In his next assignment of error, defendant contends the trial court committed error in offering the prior testimony of Kesha Davis taken at defendant's first trial, recounting how the defendant raped her shortly after midnight on 16 December 1989. Defendant argues that the trial court erred in concluding that Kesha Davis was unavailable as a witness, that the evidence was inadmissible under Rule 404(b) and that the trial court's limiting instruction on this evidence was improper.

A.

**[6]** We will first address defendant's contention that Kesha Davis was not unavailable as a witness. Evidence Rule 804(a)(4) states that a witness is unavailable if she is unable to testify due to "an existing physical or mental illness or infirmity." N.C.G.S. § 8C-1, Rule 804(a)(4) (1993).

Kesha Davis, who was nineteen years old at the time of this trial, was under subpoena from the State to testify. Davis's mother testified that as she drove Davis to court, she stopped at an intersection, and Davis got out of the car and began walking away. She did not know where Davis went, and Davis did not return home that evening. The police located her hiding out at a friend's home. According to her mother, Davis was hospitalized in the psychiatric wing at Wayne Memorial Hospital approximately one month after she testified in the previous trial of this case. While Davis was hospitalized at Wayne Memorial, she was treated by Dr. Buttar.

Dr. Buttar met with Davis at the courthouse. He testified that Davis was admitted for depression and alcohol abuse. She was hospitalized for three days and left against his recommendation. In his opinion, Davis would become more depressed if she testified, and her depression could lead to suicide. He believed she needed therapy before testifying.

Davis was located and brought into court. She told the court that she did not want to testify, and if ordered to do so, she would refuse. The trial court found that Kesha Davis was unable to testify due to an existing mental illness and ruled that she was unavailable within the meaning of Rule 804(a)(4).

In *State v. Chandler*, 324 N.C. 172, 376 S.E.2d 728 (1989), a four-year-old victim was so overcome with fear that she could not communicate. After failing to respond to numerous questions by the prosecutor, the trial judge found that the child was unable to testify, declared her unavailable as a witness and admitted her testimony from a former trial. This Court found no error in this ruling, despite the absence of medical testimony to establish the victim's mental disability, saying the trial judge had the opportunity to observe the demeanor of the witness and her inability to respond to questions.

In this case, the trial judge not only observed the demeanor of the witness, but heard the testimony of the witness's former psychiatrist that the witness suffered from a mental infirmity such that testifying

could make her suicidal. The record, therefore, supports the trial court's determination that Kesha Davis was unavailable as a witness, and we find no error in this ruling.

B.

**[7]** Next, we consider defendant's contention that upon finding Davis unavailable, the trial court improperly admitted her prior testimony on the issues of identity and intent under Evidence Rule 404(b).

Under Rule 404(b), evidence of other crimes, wrongs or acts may be admissible to show motive, opportunity, intent, plan or identity. N.C.G.S. § 8C-1, Rule 404(b) (1993). Defendant was charged with attempted rape in this case. Kesha Davis identified defendant as her assailant, and defendant pled guilty to raping her. The similarity between the Davis rape and the attempted rape of Amelia Lewis is remarkable. The State's evidence at trial tended to show that Amelia Lewis and Kesha Davis were both young women out walking in the same area alone on the night of 15 December 1989. Davis was initially approached by defendant approximately one hour after Amelia's murder and just one block from where Amelia's body was discovered. Moreover, Davis stated that during the rape, defendant completely removed her left pant leg and pulled her panties down. Likewise, Amelia Lewis's left pant leg was off completely, and her panties were down. The similarity between these two crimes, closely connected temporally, clearly supports the admission of the Davis rape to prove identity and intent in the attempted rape of Amelia Lewis for which defendant was being tried.

**[8]** In addition, we conclude the rape of Kesha Davis was admissible to show defendant's identity as Amelia Lewis's assailant on the theory that both the attempted rape of Lewis and the rape of Davis arose out of a common plan or scheme to rape a woman on the night of 15 December 1989. According to Davis's testimony at trial, after the defendant raped her, he warned her that she should not walk alone at night because someone else might hurt her. Defendant also told Davis he raped her because he was "horny." The evidence supports the admission of the Davis rape on the common plan or scheme theory.

C.

**[9]** Next, we discuss whether the trial court's limiting instruction to the jury as to the purpose of Kesha Davis's evidence was improper. The trial court instructed that the Davis rape was offered for the purpose of "showing identity, motive, opportunity and so-forth, the things I told you about earlier." Earlier, the court had told the jury:

> This evidence can be received solely for the purpose of showing the identity of the person who committed the crime charged in this case . . . . That the defendant had a motive . . . . That the defendant had the intent . . . and that there existed in the minds of the defendant a plan, scheme or design involving the crime charged in this case.

We find nothing improper with these instructions inasmuch as they properly expound the theories underlying the admissibility of this evidence.

*State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992), again relied on by defendant, provides no support for his contentions. In *White*, evidence admitted to prove defendant's identity as the rapist became irrelevant when the rape charge was dismissed. Therefore, the trial court should have instructed the jury to disregard that evidence. Here, the attempted rape charge was submitted to the jury. Accordingly, evidence of the Davis rape was relevant and the instruction was proper.

VI.

**[10]** Defendant's last assignment of error in the guilt-innocence phase of his trial is that the trial court erred in admitting photographs of the murder victim, Amelia Lewis. The trial court admitted fifteen color photographs of the victim taken in the alley and during autopsy. Of these fifteen photographs, defendant now challenges the admission of eleven as needlessly cumulative and inflammatory. Because defendant failed to object to the photographs at trial, we review for plain error.

Plain error is " 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)). The eleven photographs challenged on appeal are five-by-seven inch autopsy photographs and four five-by-seven inch photographs of the victim in the alley, all of which were admitted at trial without objection.

The autopsy photographs were submitted to illustrate the pathologist's testimony concerning Amelia Lewis's multiple wounds. Amelia Lewis's body was found in the back of an alley, partially unclothed, with blood splatters on several surrounding surfaces. The alley photographs were offered to illustrate this scene. One photograph

showed Amelia from the chest up, including the area around her head. There was one close-up of Amelia's face for identification purposes. There were two photographs of the full view of Amelia's body as it was found in the alley, showing how her clothing was partially removed and the area surrounding the body.

Defendant recognizes that the State is allowed to introduce photographs to illustrate the crime. In addition, this Court has determined that "photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as . . . their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988).

Contrary to defendant's contentions, we conclude the admission of the eleven photographs was neither unduly excessive nor repetitious. They were used to illustrate, respectively, the pathologist's testimony concerning wounds on the body of the victim, the cause of death, and the crime scene. Their admission clearly did not amount to fundamental error or error so basic and so prejudicial that justice could not have been done. *Odom*, 367 N.C. at 660, 300 S.E.2d at 378.

<u>Sentencing Phase Issues</u>

Having found no errors in the guilt-innocence phase of defendant's trial, we turn now to the sentencing proceeding. Defendant offered the following evidence.

Dr. Robert Borgman, a psychologist and Director of Adult Services at Wayne County Mental Health Center, testified that he examined defendant on 1 November 1991 and diagnosed him as being alcohol and cocaine dependent. Defendant had consumed a great deal of both alcohol and cocaine on 15 December 1989 and as a result had some psychotic symptoms. Defendant had been diagnosed as a Willie-M child between 1981 and 1984 because of his extreme violence against both people and property, but he had never been tested for neurological impairment. In Dr. Borgman's opinion defendant's problem on the day of the murder was likely drug and alcohol abuse which resulted in behavioral and mental problems. Dr. Borgman stated that defendant was so encumbered by drugs and alcohol on the night of 15 December 1989 that he was incapable of sexual intercourse.

Defendant's mother testified that she and her previous husband adopted defendant when he was nine months old when they lived in

Korea, where her husband had been assigned by the Air Force. She separated from her husband and moved to Goldsboro in 1971 when defendant was four. She married her present husband in 1986. Defendant's initial relationship with his new adoptive father was good but began to deteriorate when defendant was about nine or ten years old. Defendant began to have behavior problems and was certified as a Willie-M child after fighting and not communicating.

Since being incarcerated, defendant has received his GED and has enrolled at Shaw University. His mother felt that defendant was now the "normal Marcus," kind, giving, and helping. Defendant idolized his first adoptive father and wanted to be like him. Defendant felt rejected when his first adoptive father remarried and was jealous of his first adoptive father's other children. Defendant was smart, and his failure to get a high school education was not due to a lack of ability. He simply refused schooling until he went to prison. He quit school in the ninth grade. He tried to play basketball but was thrown off the team because he had trouble with the coach two games into the season. Most of his bad behavior involved drugs, but that was not always the case.

In rebuttal, the State offered the following evidence. Defendant was convicted on 17 June 1988 for felonious larceny upon a plea of guilty and on 2 March 1985 for felonious possession of marijuana upon a plea of guilty.

One of defendant's probation and parole officers testified that in 1985 defendant was a "fair" probationer, but despite this officer's offer of assistance in making drug treatment available to defendant, defendant consistently denied having a drug or alcohol problem.

In February or March of 1986, defendant punched his then girlfriend, Sharon Gibbs, in the face. Near the end of 1985, defendant ordered Gibbs to prostitute for him at a truck stop on Highway 117 and threatened to beat her if she did not go along. When they got there, she was afraid to go through with it, and she, defendant, and another man drove to Kinston instead. Later, in May 1986, defendant tried to force Gibbs to perform fellatio; when she refused, he hit her with brass knuckles.

On 25 July 1987, when officers went to arrest defendant at the home of his then girlfriend, Jacqueline Street, the mother of his children, defendant cursed her and spit on her. Defendant fought with and had to be subdued and restrained by the arresting officers.

In November 1991, while defendant was in custody, he refused to enter a room at the request of a courtroom deputy. Finally, after haggling, defendant entered the room.

At the close of the sentencing proceeding, the jury found the following three aggravating circumstances: (i) the murder was committed while the defendant was attempting to commit rape, N.C.G.S. § 15A-2000(e)(5); (ii) the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) defendant engaged in a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). The jury considered sixteen mitigating circumstances and unanimously rejected fifteen. One or more jurors found a single nonstatutory mitigating circumstance, that the defendant admitted to prior criminal offenses. The mitigating circumstances rejected were:

(1) This murder was committed while defendant was under the influence of mental or emotional disturbance.

. . . .

(2) The capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

. . . .

(3) The age of defendant at the time of this murder is a mitigating circumstance.

. . . .

(4A) Marcus L. Carter is an adopted child. He is also a loving father of two children. He has always provided for his children to the best of his ability.

. . . .

(4B) At a very early age, Marcus exhibited signs of mental or emotional disturbance that went untreated.

. . . .

(4C) Marcus Carter's mental and/or emotional disturbances were caused in part by the emotional instability of his family members during his early developmental stages.

. . . .

(4D) Marcus Carter's mental or emotional disturbances were aggravated throughout his childhood and early adulthood by the

actions and interactions of family members towards each other and towards Marcus.

. . . .

(4E) Marcus Carter did not develop a healthy father-son relationship which left him with feelings of isolation and abandonment.

. . . .

(4F) Marcus Carter never felt a part of his family and was deprived of the family nurturing necessary to properly develop.

. . . .

(4G) Marcus Carter's use and misuse or abuse of drugs was a result of his mental or emotional disturbances.

. . . .

(4H) Marcus Carter did not resist arrest.

. . . .

(4I) After his arrest, Marcus Carter voluntarily consented to a blood, pubic hair and saliva test.

. . . .

(4J) Marcus Carter has adapted well to prison life.

. . . .

(4K) Marcus Carter was gainfully employed up to the date of his offense.

. . . .

(4M) Any other circumstances arising from the evidence.

VII.

**[11]** Defendant contends the trial court erred in admitting evidence of defendant's assault on Sharon Gibbs in 1986, the July 1987 incident, the November 1991 incident, and the testimony of his probation and parole officer. This evidence was offered in rebuttal by the State.

We think this evidence was admissible in rebuttal to counter defendant's evidence of his good character traits and to rebut the mitigating circumstances submitted regarding defendant's age, his being

a loving father and his good adaption to prison life. The testimony of his probation and parole officer was admissible to rebut the mitigating circumstance relating to defendant's "misuse or abuse" of drugs.

While defendant did not offer "good character" evidence *per se*, his adoptive mother did testify that she felt defendant was the "normal Marcus," kind, giving and helping. In *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981), this Court found no error in the admission of rebuttal evidence by the State concerning defendant's bad reputation in the army, which tended to contradict defendant's evidence that he had been a good child, a good husband and father, and a good neighbor. The Court said:

> Our capital sentencing statute not only permits but requires juries to determine the sentence guided "by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson*, *supra*, 298 N.C. at 63, 257 S.E.2d at 610. This statute, however, limits the state in its case in chief to proving only those aggravating circumstances listed in section (e). Bad reputation or bad character is not listed as an aggravating circumstance. Therefore the state may not in its case in chief offer evidence of defendant's bad character. A defendant, however, may offer evidence of whatever circumstances may reasonably be deemed to have mitigating value, whether or not they are listed in section (f) of the statute. *State v. Johnson*, *supra*, 298 N.C. at 72-74, 257 S.E.2d at 616-617. Often this may be evidence of his good character. *Id.* The state should be able to, and we hold it may, offer evidence tending to rebut the truth of any mitigating circumstance upon which defendant relies and which is supported by the evidence, including defendant's good character. Here, despite defendant's contentions to the contrary, he did offer evidence of his good character. It is true that the evidence was not cast in terms of defendant's reputation in his community. Nevertheless it was evidence tending to show defendant to be, generally, a good person by those most intimately acquainted with him. In [the] face of this evidence, the state was entitled to show *in rebuttal* that defendant's reputation among others familiar with it was not good. Both the state and defendant are entitled to a fair sentencing hearing, and the jury is entitled to have as full a picture of a defendant's character as our capital sentencing statute and constitutional limitations will permit.

*Id.* (emphasis added).

In *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), defendant argued on appeal that the trial court erred by allowing a guard at Central Prison to testify for the State concerning Moore's assaultive behavior and uncooperative attitude in prison. The Court concluded that the guard's testimony was relevant to rebut the statutory mitigating circumstance of defendant's age at the time of the crime. We said: "Relevant to this inquiry is not only the chronological age of the defendant, but also his experience, criminal tendencies, and presumably the rehabilitative aspects of his character." *Id.* at 370, 307 S.E.2d at 332. In *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), the Court reasoned: 'Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances.' *Id.* at 393, 346 S.E.2d at 624 (quoting *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894, 54 L. Ed. 2d 180 (1977)).

Defendant's evidence tended to show that his bad conduct was due to his abuse of alcohol and drugs, which in turn tended to support the statutory diminished capacity mitigating circumstance and the nonstatutory mitigating circumstance relating to his "misuse or abuse" of drugs. The testimony of his probation and parole officer that defendant refused assistance for and denied having a substance abuse problem was clearly admissible to rebut these mitigating circumstances.

Accordingly, defendant's assignments of error to the admission of this evidence are overruled.

VIII.

**[12]** In his next assignment of error, defendant contends that the trial court erred by permitting the State, over defendant's objection, to cross-examine Dr. Borgman "well beyond the scope of the direct examination." We disagree.

On cross-examination, the State questioned Dr. Borgman's opinion regarding defendant's ability to sustain an erection on the night of Amelia's murder, pointing out that he had pled guilty to raping another victim on the same evening. The State questioned Dr. Borgman concerning defendant's earlier expulsion from school, his disciplinary problems as a teenager, his 1981 robbery conviction and his rejection as a teenager of several attempts to alter his behavior. This cross-examination was essentially for the purpose of challenging

Dr. Borgman's opinion that even though defendant had been diagnosed as a teenager as being a Willie-M child prone to uncontrollable violence, on the night of Amelia's murder, he suffered from drug and alcohol abuse.

Evidence Rule 611(b) provides: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b). Defendant refers us to no authorities which would support his position that the State's cross-examination was improper. We conclude his argument that it injected "irrelevant character evidence into the case to the prejudice of defendant's rights" is feckless. We further conclude the cross-examination was altogether proper.

Defendant's assignment of error is overruled.

IX.

**[13]** In his next assignment of error, defendant contends the trial court erred by submitting to the jury the aggravating circumstance that the crime was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9).

We have discussed the considerations for submitting the heinous, atrocious, or cruel aggravating circumstance to the jury:

> [T]his 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. It also arises when the killing demonstrates an unusual depravity of mind on the part of the defendant.

*State v. Artis*, 325 N.C. 278, 316-17, 384 S.E.2d 470, 492 (1989) (citations omitted), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). This Court has identified two 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." *Id.* at 317, 384 S.E.2d at 492.

Defendant contends that the facts of this case do not support a finding that this murder was excessively brutal, physically agonizing, dehumanizing or involved any psychological suffering. We disagree.

In determining if there is sufficient evidence to submit a particular aggravating circumstance to the jury, the trial court 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). Here, the State's evidence showed that defendant ripped off Amelia Lewis's pants on a cold night in December in a back alley and covered her body with abrasions and lacerations as she struggled against him. Amelia called out numerous times to defendant, "please don't kill me, I will do anything if you don't kill me." Defendant silenced her by squeezing his hands around her neck. Amelia fought for some time, desperately trying to remove his hands, digging her nails into her own skin, to no avail. Amelia struggled for at least two minutes, with defendant's hands pressed firmly around her neck, before losing consciousness. Death from manual strangulation would have taken at least four minutes. Defendant was not satisfied with the expedience of her death, so he pounded her in the head several times with a brick.

We believe that this evidence, when viewed in the light most favorable to the State, was sufficient to support an inference that the murder was physically agonizing or otherwise dehumanizing to the victim. Furthermore, the facts of this case support an inference that the murder involved the infliction of psychological torture. Therefore, we hold that based on the facts before us, there was sufficient evidence to submit this aggravating circumstance for jury consideration. This assignment of error is overruled.

X.

**[14]** Defendant next contends the trial court erred in submitting to the jury both the aggravating circumstance that defendant engaged in a course of conduct including other violent crimes, N.C.G.S. § 15A-2000(e)(1), and that the murder was committed during the course of an attempted rape, N.C.G.S. § 15A-2000(e)(5). His argument seems to be that it was not made clear to the jury whether the course of conduct aggravating circumstance was based on the rape of Kesha Davis or the attempted rape of the murder victim, Amelia Lewis. Since the same evidence cannot be used to support more than one aggravating circumstance, *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 288, 401 S.E.2d 632 (1991); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), the course of conduct aggravating circumstance should not have been submitted or, at least, it was erroneously submitted.

This argument has no merit because we are satisfied the jury understood that the course of conduct aggravating circumstance was based solely on the evidence of the rape of Kesha Davis. The trial court instructed the jury on this aggravating circumstance as follows:

> If you find from the evidence and beyond a reasonable doubt . . . that in addition to killing the victim, the defendant on or about the alleged date was engaged in a course of conduct which involved a commission of another crime of violence *against another person* and that these, this or these other crimes were included in the same course of conduct in which the killing of the victim was also a part, you would find this aggravating circumstance . . . .

(Emphasis added.) This instruction made clear to the jury that in finding the course of conduct circumstance, it was to consider a crime of violence committed by defendant "against another person." The crime referred to was against some person other than the murder victim. The only other person against whom defendant committed a crime of violence within the relevant time frame was Kesha Davis.

Further, the other aggravating circumstance, that the murder was committed during the commission of another felony, referred to the other felony as an "attempt to commit rape." Since the felony committed against Kesha Davis was a completed rape and the felony against Amelia Lewis was an attempted rape, the jury must have understood which respective felonies formed the basis of each of the aggravating circumstances submitted.

This assignment of error is overruled.

XI.

**[15]** In his next assignment of error, defendant contends that the trial court erred in its submission of the aggravating circumstance that the murder was committed during an attempted rape. N.C.G.S. § 15A-2000(e)(5).

Defendant argues there was insufficient evidence to support this aggravating circumstance. He contends there was no evidence of an initiation of sexual intercourse, forcible or otherwise, between defendant and Amelia Lewis. The only evidence which could support the commission of an attempted rape, defendant contends, is that tending to show the victim was partially disrobed. Defendant concedes he did not make this argument at trial, but that failure does not

absolve the trial court from correctly determining on its own motion whether there is evidence from which the jury could infer the existence of an aggravating circumstance. *State v. McCollum*, 334 N.C. 208, 443 S.E.2d 144 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 895, *reh'g denied*, — U.S. —, 129 L. Ed. 2d 924 (1994).

This Court in *State v. Harris*, 319 N.C. 383, 354 S.E.2d 222 (1987), dealt with the sufficiency of the evidence to support a conviction of felony murder based on the underlying felony of attempted rape. In *Harris* the victim's body was found on its back with the legs spread apart. The victim's sweatpants had been removed, and the panties were entwined with the sweatpants as if both had been removed at the same time. The victim had multiple stab wounds, and the defendant's clothes had blood of the same type as the victim on them. This Court found that there was sufficient evidence to sustain a conviction for felony murder based on attempted rape.

*State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), is another case where this Court looked at the sufficiency of the evidence to support a conviction of felony murder based on the underlying felony of attempted rape. In *McDougall*, the victim's body was found on its back with the legs spread wide, her feet nearly up to her buttocks, knees raised and apart, and the victim's nightgown drawn up to her upper chest, exposing her left breast. Many of the wounds had been inflicted while the victim was in a prone position. Shortly after the body was discovered, the defendant was arrested and found to have blood on his clothes which was of the same type as that of the victim. This Court held there was sufficient evidence to survive a motion for nonsuit on the theory of murder during an attempted rape.

The facts in this case are similar to the facts in both *Harris* and *McDougall*. When Amelia's body was discovered, her left pant leg was completely off, her panties were down and her brassiere was above her breasts. Amelia had multiple abrasions and lacerations. The clothes of the defendant had blood on them of the same type as that of the victim. In addition, there was evidence that shortly after defendant murdered Amelia Lewis he raped Kesha Davis. This fact in addition to those which are similar to the facts in *Harris* and *McDougall* lead us to conclude the evidence here is sufficient to support the inferences that the defendant knocked Amelia Lewis to the ground and forcibly removed her pants and panties in an attempt to rape her. Thus, we conclude the evidence in this case supports the

submission of the aggravating circumstance that the murder was committed during the course of an attempted rape.

Defendant's assignment of error on this ground is overruled.

XII.

Next, defendant contends the trial court erred in submitting this case to the jury for sentencing since the evidence was insufficient to show that any aggravating circumstance existed. Based on the conclusions we reached in sections IX, X and XI above, this argument has no merit. Therefore, we overrule this assignment of error.

XIII.

**[16]** In his next assignment of error, defendant argues that the North Carolina death penalty statute, N.C.G.S. § 15A-2000, is unconstitutional in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution. Defendant maintains that the North Carolina death penalty statute is imposed in a discriminatory manner, is vague and overbroad, and involves subjective discretion.

Defendant recognizes that this Court has recently reaffirmed that the North Carolina death penalty statute is neither unconstitutionally vague nor overbroad and is not applied in a discriminatory and discretionary manner. *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, — U.S. —, 116 L. Ed. 2d 232 (1991). After considering the arguments by defendant on this issue, we continue to adhere to our previous decisions and overrule this assignment of error.

XIV.

**[17]** In his next assignment of error, defendant contends that the trial court erred in instructing the jury that it "may" rather than "must" consider any mitigating circumstances found by the jury. In this case the trial court instructed the jury in Issue Three as follows:

> Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?
>
> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. *In deciding this issue, each juror may consider any mitigating circumstance or circumstances*

> *that the juror determined to exist by a preponderance of the evidence in Issue Two.* In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances, but rather you must decide from all the evidence what value to give each circumstance, and weigh the aggravating circumstances so valued against the mitigating circumstances so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.
>
> If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstances found, you would answer Issue Three "yes." If you do not so find or if you have a reasonable doubt as to whether they do, you would answer Issue Three "no." If you answer Issue Three "no," it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three "yes," you must then move to consider Issue Number Four.

(Emphasis added.) The defendant assigns error to the above italicized language.

Defendant argues that this instruction allowed the jurors to ignore the mitigating circumstances they found. As a result, defendant argues, the instruction violated the Eighth Amendment. We have recently addressed and rejected arguments identical to those made by defendant in support of this assignment of error. *State v. Green*, 336 N.C. 142, 443 S.E.2d 14, *cert. denied*, — U.S. —, — L. Ed. 2d —, 1994 WL 557502 (1994); *State v. Lee*, 335 N.C. 244, 439 S.E.2d 547, *cert. denied*, —, U.S. —, — L. Ed. 2d —, 63 USLW 3264, *reh'g denied*, —, U.S. —, — L. Ed. 2d —, 1994 WL 662807 (1994). Thus, this assignment of error is without merit and is overruled.

Proportionality

XV.

**[18]** Having found no error in the guilt and sentencing phases of defendant's trial, we now consider the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. We have thoroughly examined the record on appeal, transcripts, briefs, and oral arguments of counsel in the present case. We conclude the

record supports the jury's finding of the following three aggravating circumstances: (i) that the murder was committed while the defendant was attempting to commit rape, N.C.G.S. § 15A-2000(e)(5); (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) that the defendant engaged in a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). Further, we find no indication 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 determining whether the death sentence imposed here " 'is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' " *State v. Green*, 336 N.C. 142, 194, 443 S.E.2d 14, 44 (1994) (quoting *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983)); N.C.G.S. § 15A-2000(d)(2).

This Court has said:

> "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 the defendant's character, background, and physical and mental condition."

*State v. McCollum*, 334 N.C. 208, 239, 433 S.E.2d 144, 161 (quoting *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 of cases that this Court uses for comparative purposes consists of:

> "*all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time."

*State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146 (quoting *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983)), *cert. denied*, — U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, — U.S. —, 126 L. Ed. 2d 707 (1994). The pool, however, includes only those cases which have been affirmed by this Court. *State v. Stokes*, 319 N.C. 1, 19-20, 352 S.E.2d 653, 663 (1987). In *State*

*v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), this Court clarified the composition of the pool so that it reflects post-conviction relief awarded to death-sentenced defendants:

> Because the "proportionality pool" is limited to cases involving first-degree murder convictions, a post-conviction proceeding which holds that the State may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is acquitted or found guilty of a lesser included offense results in the removal of that case from the "pool." When a post-conviction proceeding results in a new capital trial or sentencing proceeding, which, in turn, results in a life sentence for a "death-eligible" defendant, the case is treated as a "life" case for purposes of proportionality review. The case of a defendant sentenced to life imprisonment at a resentencing proceeding ordered in a post-conviction proceeding is similarly treated. Finally, the case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing proceeding ordered in a post-conviction proceeding, which sentence is subsequently affirmed by this Court, is treated as a "death-affirmed" case.

*Id.* at 107, 446 S.E.2d at 564. Moreover, this Court has resolved timing issues relating to post-conviction relief: "[A] conviction and death sentence affirmed on direct appeal is presumed to be without error, and . . . a post-conviction decision granting relief to a convicted first-degree murderer is not final until the State has exhausted all available appellate remedies." *Id.* at 107 n.6, 446 S.E.2d at 564 n.6.

While only cases found to be free from error in both phases of the trial are included in the pool, the Court is not required to discuss every case in the pool of similar cases. *State v. Syriani*, 333 N.C. at 400, 428 S.E.2d at 146.

In the present case defendant was convicted of first-degree murder under the theory of premeditation and deliberation and the theory of felony murder. The jury found the following three aggravating circumstances: (i) that the murder was committed while the defendant was attempting to commit rape, N.C.G.S. § 15A-2000(e)(5); (ii) that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) that the defendant engaged in a course of conduct involving other violent crimes, N.C.G.S. § 15A-2000(e)(11). The jury considered sixteen mitigating circumstances and rejected

fifteen. One or more jurors found a single nonstatutory mitigating circumstance, that the defendant admitted to prior criminal offenses.

This Court has held the sentence of death to be 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 by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). Of these seven cases, only two involved the especially heinous, atrocious, or cruel aggravating circumstance, *State v. Stokes* and *State v. Bondurant*. Furthermore, only one case involved the course of conduct involving other violent crimes aggravating circumstance, *State v. Rogers*. Each of those cases is distinguishable from the present case.

In *Stokes*, the defendant was convicted of first-degree murder solely on the theory of felony murder; whereas, here defendant was convicted on both the theories of felony murder and of premeditation and deliberation. The jury in *Stokes* found only one aggravating circumstance, yet the jury here found three aggravating circumstances. Additionally, in *Stokes* the accomplice in the crime was not sentenced to death, although both "committed the same crime in the same manner." *Stokes*, 319 N.C. at 21, 352 S.E.2d at 644. In the present case defendant acted alone.

In *Bondurant*, the defendant shot the victim but then immediately directed the driver to proceed to the emergency room of the local hospital. In deciding that the death penalty was disproportionate there, we noted that defendant did not kill the victim in the perpetration of another felony, that he did not coldly calculate the commission of the crime for a long period of time, and that it was not a torturous murder. *Bondurant*, 309 N.C. at 693, 309 S.E.2d at 182. Furthermore, we found it significant that "immediately after he shot the victim, [defendant] exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. In this case, defendant deliberately set out to rape the victim, and when she struggled against him, he silenced her by squeezing his hands around her neck. The victim fought to remove defendant's hands. He pounded her in the head with a brick. Defendant then left his victim partially disrobed on a cold night in December in a back alley. Also, in *Bondurant* the jury found

only one aggravating circumstance; whereas, three aggravating circumstances were found in this case.

In *Rogers*, the only aggravating circumstance that the jury found was that the killing was part of a course of conduct which included the commission of other crimes of violence against other persons. This Court emphasized that those cases in which the death penalty was imposed on this circumstance alone involved facts considerably more egregious than those in *Rogers*. Here, the jury found that aggravating circumstance and two others.

Of the remaining four cases, *Young* is the only one in which the jury found multiple aggravating circumstances. In ruling that the death penalty was disproportionate, this Court focused on the jury's failure to find either that the murder was part of a course of conduct which included the commission of other crimes of violence against other persons or that the crime was especially heinous, atrocious, or cruel. *McCollum*, 334 N.C. at 241, 433 S.E.2d at 162 (citing *Young*, 312 N.C. 669, 325 S.E.2d 181). Unlike *Young*, the jury here found both of these circumstances.

Defendant characterizes this case as typical of those involving sexual assault and a killing. As support for the proposition that his sentence of death is disproportionate, defendant relies on four such cases in which the jury recommended life sentences. *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991); *State v. Harris*, 319 N.C. 383, 354 S.E.2d 222 (1987); *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).

Just because juries in the past "have returned recommendations of life imprisonment in cases similar to the one under review does not automatically establish that juries have 'consistently' returned life sentences in factually similar cases." *Green*, 336 N.C. at 198, 443 S.E.2d at 47. In every proportionality review, this Court independently considers "the individual defendant and the nature of the crime or crimes which he has committed." *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), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517, *and by State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994). We find the facts and circumstances of all four life cases cited above distinguishable from the present case.

All of those cases differ significantly from this case with respect to the nature of the crime, as reflected by specific jury findings. In *McKinnon*, *Harris* and *Fincher*, the defendants were convicted solely upon the felony murder theory. In *Franklin*, the defendant was convicted solely upon premeditated and deliberated murder. Here, defendant was convicted on theories of *both* felony murder and premeditated and deliberated murder. In addition, the juries in those cases found the existence of only one aggravating circumstance. Here, the jury found the existence of three aggravating circumstances.

For the foregoing reasons, we find no significant similarity between this case and each of the cases relied upon by the defendant in which the jury recommended life imprisonment.

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool when engaging in our statutorily mandated duty of proportionality review, we reemphasize here "that we will not undertake to discuss or cite all of those cases each time we carry out that duty." *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We conclude the present case is more similar to certain cases in which the jury found either the especially heinous, atrocious or cruel aggravating circumstance or the course of conduct aggravating circumstance. *See, e.g.*, *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. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983); *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); *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). This Court affirmed death sentences in all of the cited cases.

For the foregoing reasons, we conclude this case is similar to those cases in which we have affirmed the death penalty, dissimilar to those cases in which we have held the death penalty to be disproportionate and those in which juries have recommended life sentences. The sentence of death here, therefore, is not disproportionate.

We hold that defendant's trial and sentencing proceeding were free from prejudicial error and the sentence of death is not disproportionate. The result is

NO ERROR.

Justice MITCHELL concurring in the result.

I concur in the result reached by the majority. I disagree, however, with the conclusion of the majority, relying upon *State v. Silhan*, 302 N.C. 223, 273, 275 S.E.2d 450, 484 (1981), that evidence of a defendant's bad character may not be introduced in a capital sentencing proceeding unless and until it is offered in rebuttal of evidence introduced by the defendant tending to show his good character.

It should be kept firmly in mind here that we are discussing a capital *sentencing proceeding*, rather than the determination of guilt. The constitutional purpose of a capital sentencing proceeding is to determine the proper sentence to be imposed in light of the particular circumstances of the crime committed and the *particular characteristics of the defendant. See, e.g., Lockett v. Ohio*, 438 U.S. 586, 602-603, 57 L. Ed. 2d 973, 988-89 (1978) (as a matter of due process, the sentencer must have the "fullest information possible concerning the defendant's life and characteristics, which are highly relevant 'if not essential [to the] selection of an appropriate sentence. . . .' "). For this reason, in a case decided subsequent to *Silhan*, we quoted with approval the following language from the Supreme Court of Florida indicating that the State's evidence tending to show the life and characteristics of a defendant is always relevant and admissible,

> "[B]ecause we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition' of the death penalty. (Citation omitted.)"

*State v. Taylor*, 304 N.C. 249, 280, 283 S.E.2d 761, 780-81 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983) (quoting *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)).

I believe that under *Lockett* the evidence of the defendant's bad character was admissible for purposes of the *sentencing proceeding* in this case. I also think it is clear that this is exactly the result the General Assembly of North Carolina intended when it expressly and specifically provided in the clearest English possible that the North

Carolina Rules of Evidence, as set forth in Chapter 8C of the General Statutes of North Carolina, *do not apply in sentencing proceedings.* N.C.G.S. § 8C-1, Rule 1101(b)(3) (1992). *See* N.C.G.S. § 15A-2000(a)(3) (1988) (any evidence the court deems relevant to sentence may be introduced). Therefore, I disagree with the conclusion of the majority that evidence of a defendant's bad character is not generally admissible in a capital *sentencing proceeding.* I believe that such evidence is generally admissible in any sentencing proceeding and may be considered by the jury for all sentencing purposes.

As I am unable to join the reasoning of the majority in this opinion, I concur in the result only.

Justices MEYER and PARKER join in this concurring opinion.

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STATE OF NORTH CAROLINA v. JOHNNIE LEE SPRUILL

No. 404A92

(30 December 1994)

**1. Jury § 259 (NCI4th)— first-degree murder—jury selection—peremptory challenges—racial discrimination**

Although the trial court in a first-degree murder resentencing hearing did not find or conclude that the defendant had met his burden of showing a *prima facie* case of discrimination in the use of peremptory challenges during jury selection, the court required each party to state reasons for its challenges and the case was treated as if the defendant had made out a *prima facie* case. In reviewing the issue of purposeful discrimination during jury selection, relevant considerations include the race of the defendant, victims, and key witnesses; the prosecutor's questions and statements during *voir dire*; the use of a disproportionate number of peremptory challenges to strike black jurors in a single case; and the acceptance rate of black jurors by the State. This case does not involve an interracial killing, most of the witnesses are African-Americans, the acceptance rate was 53%, while the prosecutor may have in part confused one prospective juror with another person, the prosecutor clearly stated a race-neutral reason manifestly supported by the record, defense counsel did not exercise his right of surrebutal to show the trial court that any of

State's proffered reasons constituted pretexts, and defendant made no independent argument based on Article I, Section 26, of the North Carolina Constitution.

**Am Jur 2d, Jury § 235.**

**Proof as to exclusion of or discrimination against eligible class or race in respect to jury in criminal case. 1 ALR2d 1291.**

**Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.**

**2. Jury § 145 (NCI4th)— first-degree murder—jury selection—questions concerning death penalty—challenges for cause ultimately granted—no error**

There was no error during jury selection for a first-degree murder resentencing hearing where defendant on appeal addressed an argument to the *voir dire* of a particular juror but included no assignment of error thereon, and assigned error to two others on the same ground but included no arguments, and the court granted defendant's challenges for all three for cause, so that there could be no error under *Morgan v. Illinois*, 119 L. Ed. 2d 492.

**Am Jur 2d, Jury §§ 201, 202.**

**3. Jury § 201 (NCI4th)— first-degree murder—denial of challenges for cause—trial court not partisan**

There was no error during jury selection for a first-degree murder resentencing hearing where defendant argued that the court showed partiality during jury selection in denying his motion to excuse for cause prospective juror Morgan and in denying the motion to excuse for cause prospective juror King after questions regarding crime and the death penalty where defendant used a peremptory challenge to excuse Morgan, renewed his challenges for cause as to these two prospective jurors, and the court granted defendant one additional peremptory challenge. Although the defendant contends that it is not possible to tell which denial the court intended to reverse, Morgan repeatedly said that she could follow the law on capital punishment even though she had some difficulty following the twists of *voir dire* questioning. The trial court must grant a challenge for cause only where a venireperson's responses indicate that her belief about

the death penalty would interfere with the performance of her duties. Any error as to prospective juror King was cured by granting an additional peremptory challenge, and the trial court's conduct did not amount to partisan conduct denying defendant a substantial right.

**Am Jur 2d, Jury §§ 289, 290.**

**Comment Note.—Beliefs regarding capital punishment as disqualifying juror in capital case—post-*Witherspoon* cases. 39 ALR3d 550.**

**4. Jury § 141 (NCI4th)— first-degree murder—jury selection—questions as to parole not permitted—no error**

There was no error in jury selection for a first-degree murder resentencing hearing where the trial court denied defendant's motion to permit questioning of prospective jurors on their beliefs about parole eligibility. Although in *Simmons v. South Carolina*, 129 L. Ed. 2d 133 (1994), the United States Supreme Court held that due process had been violated where the state had secured a death sentence partly on the ground of future dangerousness while concealing from the jury the true meaning of a noncapital sentencing alternative, in this case it would have been entirely reasonable for the jury, if given accurate information about parole, to view defendant as a greater threat to society; the two prosecutors' arguments, which consume over 100 pages of the transcript, included only one reference to defendant's future dangerousness; and defendant's jury did not submit to the trial court a question about the effect of a life sentence as in *Simmons*. The State has answered arguments that defendants should have been permitted to inform juries that a life sentence in North Carolina means the defendant must serve twenty years in prison before he is eligible for parole with the argument that it should be able to respond with accurate information about such related issues as the possibility of pardon and commutation; it appears that common-law precedents excluding such information from the jury's consideration have offered capital defendants greater protection than does federal law.

**Am Jur 2d, Jury §§ 201, 202.**

**5. Criminal Law § 1312 (NCI4th)— first-degree murder—resentencing hearing—reference to prior death sentence—no error**

There was no error in a first-degree murder resentencing hearing where the prosecutor, while cross-examining a psychiatrist, read from a report made by a Central Prison psychiatrist after defendant's first trial which contained a reference to the death row. The prosecutor made only one mention of death row and the record makes clear that it was inadvertent; the remark went unnoticed by defense counsel or the court when it was made and so was never brought to the jury's attention by way of an objection or limiting instruction; defendant did not move for a mistrial; and it was clear from other testimony that defendant had been in prison since 1984, from which the jury could have inferred that defendant had previously been sentenced to death because otherwise he would not be receiving a new capital sentencing hearing. Although defendant contends that *State v. Simpson*, 331 N.C. 267, mandates inquiry into the issue of prior knowledge of a death sentence when it becomes apparent that a juror has such knowledge, this case does not involve exposure to potentially prejudicial media exposure outside the courtroom; the exposure here occurred during cross-examination with defense counsel present; defendant not only had the opportunity to observe the extent and manner in which jurors were exposed, but to have a limiting instruction and, if desired, to request an inquiry, but did not make such a request and specifically rejected the trial court's offer to instruct the jury; and the jury's knowledge, if any, of defendant's previous death sentence, could not with certainty be attributed solely to conduct of the prosecutor.

**Am Jur 2d, Evidence §§ 427 et seq.**

**6. Criminal Law § 1312 (NCI4th)— first-degree murder—resentencing hearing—photographs of cellblock—argument that defendant in secure cell block**

There was no error in a first-degree murder resentencing hearing from the introduction of photographs of the cellblock in which defendant had lived since 1985 and the argument that defendant was under a twenty-four hour watch in the most secure cell block in the most secure prison in the State of North Carolina. Defendant requested several mitigating circumstances based on his time in confinement, and it was clear from defendant's evidence that he had been in maximum security in Central Prison for

six or more years dating roughly from the time of the murder. If the jury learned from defendant's evidence that he had previously received a death sentence, defendant cannot be heard to complain that the State argued against mitigation from that same evidence.

**Am Jur 2d, Evidence §§ 427 et seq., 960 et seq.**

**7. Criminal Law § 382 (NCI4th)— first-degree murder—resentencing hearing—questions by court to psychologist—no error**

There was no error in a first-degree murder resentencing hearing where the court asked defendant's expert witness questions concerning an opinion involving mitigation. Although defendant contends that the trial court improperly expressed an opinion that the psychologist's evidence was deficient or suspect as to proof of mitigation, the questions did not denigrate either defendant's witness or her evidence, but instead helped to develop testimony favorable to the defense and to assist the trial court in deciding whether mitigating circumstances which might later be requested by the defense were in fact supported by the evidence.

**Am Jur 2d, Trial §§ 274, 275.**

**8. Criminal Law § 400 (NCI4th)— first-degree murder—resentencing hearing—judge turning back during defendant's testimony—no error**

There was no error during a first-degree murder resentencing hearing where the trial judge turned his back during defendant's testimony but nothing of record indicates where, in relation to the judge's position, the defendant was sitting, whether the judge's back was partially or fully turned, or how long his back might have been turned; the transcript is devoid of any indication that the court in fact took such action; record facts suggest that the judge could not have had his back to defendant more than a few minutes; and, even assuming that the trial judge may have turned his back for a few minutes during defendant's direct examination, the record does not clearly show any prejudice to defendant.

**Am Jur 2d, Trial §§ 272 et seq.**

**9. Criminal Law § 441 (NCI4th)— first-degree murder—resentencing hearing—prosecutor's argument regarding psychologists**

There was no error in a first-degree murder resentencing hearing where, assuming arguendo that the prosecutors' statements regarding defense experts' testimony concerning defendant's mental disorders were improper and should have been condemned by the trial court, they do not entitle defendant to a new resentencing proceeding because the thrust of the lengthy arguments was not that the witnesses had been paid, but that their testimony did not provide a factual basis for finding personality disorder or blackout spells independent of seizures arising from a disorder. The statements are nothing like those made by the prosecutor in *State v. Sanderson*, 336 N.C. 1.

**Am Jur 2d, Trial §§ 695.**

**Propriety and prejudicial effect of counsel's negative characterization or description of witness during summation of criminal trial—modern cases. 88 ALR4th 209.**

**10. Criminal Law § 447 (NCI4th)— first-degree murder—resentencing hearing—prosecutor's argument—victim**

The trial court did not err by not intervening *ex mero moto* in the prosecutor's closing argument in a first-degree murder resentencing hearing where the prosecutor's remarks concerning the victim were indistinguishable from those in *State v. Artis*, 325 N.C. 278.

**Am Jur 2d, Trial §§ 664 et seq.**

**Propriety and prejudicial effect of prosecutor's remarks as to victim's age, family circumstances, or the like. 50 ALR3d 8.**

**11. Criminal Law § 415 (NCI4th)— first-degree murder resentencing hearing—prosecutor's arguments**

Arguments in a first-degree murder resentencing hearing that defendant had enjoyed stalking and killing the victim; was a "hound of hell," lay in wait for the victim "like a durned snake," and changed "like a lizard changes colors"; took notes during the arguments; attempted to lay blame for the murder on his father; perjured himself in testifying that he had not been convicted of possession of stolen property; colluded with his attorneys to pre-

sent himself as remorseful; and chose to affirm rather than swear to tell the truth were within the wide latitude permitted counsel in arguments to the jury.

**Am Jur 2d, Trial §§ 554 et seq.**

**Negative characterization or description of defendant, by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.**

**12. Criminal Law § 458 (NCI4th)— first-degree murder resentencing—closing arguments—parole—comment during objection**

There was no error during a first-degree murder resentencing hearing where defense counsel asked the jury not to kill defendant but to put him in prison for the rest of his life and the prosecutor objected with the comment "That's not what happens." The trial court properly overruled the objection and defendant was permitted to argue again that his adjustment to prison was another reason not to take his life. No case has been found holding that the court must instruct the jury to disregard the objection.

**Am Jur 2d, Trial §§ 575, 576.**

**Prejudicial effect of statement of prosecutor as to possibility of pardon or parole. 16 ALR3d 1137.**

**13. Criminal Law § 1355 (NCI4th)— first-degree murder—resentencing—instructions—mitigating factor—no prior criminal activity**

There was no plain error in a first-degree murder resentencing hearing where defendant contended that the court's wording of its instruction on the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity expressed the court's opinion by presenting the evidence in the light most favorable to the State. Read in its entirety, the instruction did not constitute an improper expression of opinion which probably resulted in the jury's reaching a different verdict. N.C.G.S. § 15A-2000(f)(1).

**Am Jur 2d, Criminal Law §§ 598, 599; Trial § 1204.**

**14. Criminal Law §§ 1357, 1360 (NCI4th)— first-degree murder—resentencing—mitigating circumstances—instructions—mental disturbance and impaired capacity**

There was no plain error in a first-degree murder resentencing hearing in the instructions on mental or emotional disturbance and impaired capacity where defendant contended that the court's use of "and" meant that a juror's failure to find any one of the factual elements meant consideration of the circumstance was entirely precluded, but, read in its entirety, the jurors could not have applied the instruction in a way that prevented "consideration of constitutionally relevant evidence."

**Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1120 et seq.**

**15. Criminal Law § 1323 (NCI4th)— first-degree murder—resentencing—instructions—use of discretion in considering mitigating circumstances**

There was no plain error in a first-degree murder resentencing hearing where defendant contended that the court erred by instructing the jury that jurors could exercise their discretion in deciding whether to consider any mitigating circumstance found in Issue Two when answering Issues Three and Four. Instead of precluding any individual juror from considering any mitigating circumstance or circumstances she or he found at Issue II, these instructions plainly directed that the evidence in mitigation, if found by one or more jurors, had to be weighed against the evidence in aggravation. The instructions are in accord with the dictates of *McKoy* and could not have been misapplied by the jury.

**Am Jur 2d, Trial §§ 1441 et seq.**

**16. Criminal Law § 1362 (NCI4th)— first-degree murder—resentencing—mitigating circumstances—age of defendant**

The trial court did not err in a first-degree murder resentencing hearing by failing to submit the mitigating circumstance of defendant's age where defendant contended that chronological age is not the determining factor and the circumstance was supported by evidence that he was an immature and dependent person who had borderline intelligence, but defendant did not request that the trial court submit this mitigating circumstance to the jury and the evidence showed that he was thirty-one years old, had worked as an automobile mechanic and in a shipyard,

moved on to a better position, attended church, and functioned quite well in the community. N.C.G.S. § 15A-2000(f)(7).

**Am Jur 2d, Trial §§ 1441 et seq.**

**17. Criminal Law § 1363 (NCI4th)— first-degree murder—resentencing—nonstatutory mitigating circumstances—no prior felony involvement**

The trial court did not err in a first-degree murder resentencing hearing where defendant argued that the court failed to submit that defendant had no prior felony involvement, but the statutory mitigating circumstance that defendant had no significant history of criminal activity was submitted and the instruction on this circumstance included an accurate summary of the evidence presented, which showed defendant's prior criminal activity included some offenses resulting in charges and convictions and other offenses which had not resulted in charges or convictions.

**Am Jur 2d, Trial §§ 1441 et seq.**

**18. Criminal Law § 1323 (NCI4th)— first-degree murder—resentencing—nonstatutory mitigating circumstances—combined—no error**

There was no error in a first-degree murder resentencing hearing where the court combined aspects of defendant's mitigating evidence when submitting nonstatutory mitigating circumstances.

**Am Jur 2d, Trial §§ 1441 et seq.**

**19. Jury § 103 (NCI4th)— first-degree murder—individual voir dire denied—no error**

The trial court did not err in a first-degree murder resentencing hearing by denying defendant's motion for individual jury *voir dire.*

**Am Jur 2d, Jury § 197.**

**20. Jury § 150 (NCI4th)— first-degree murder—sentencing—voir dire—defendant denied right to question jurors challenged by State**

The trial court did not err in a first-degree murder resentencing hearing by denying defendant the right to examine each juror challenged by the State during death qualification.

**Am Jur 2d, Jury §§ 201, 202.**

**21. Evidence and Witnesses § 876 (NCI4th)— first-degree murder—sentencing--hearsay statements by victim—state of mind—admissible**

The trial court did not err in a first-degree murder resentencing hearing by admitting hearsay statements of the victim relating to her state of mind.

**Am Jur 2d, Evidence § 866.**

**22. Criminal Law § 1348 (NCI4th)— first-degree murder—sentencing—instruction defining mitigation denied—no error**

The trial court did not err in a first-degree murder resentencing hearing by denying defendant's request for an instruction defining "mitigation."

**Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.**

**23. Criminal Law § 1363 (NCI4th)— first-degree murder—sentencing—nonstatutory mitigating circumstance—determination of mitigating value**

The trial court did not err in a first-degree murder resentencing hearing by instructing the jurors that it was for them to determine whether the nonstatutory mitigating circumstances in fact possessed mitigating value.

**Am Jur 2d, Criminal Law §§ 598, 599; Trial §§ 1441 et seq.**

**24. Criminal Law § 1343 (NCI4th)— first-degree murder—sentencing—especially heinous, atrocious or cruel aggravating circumstance—not unconstitutionally vague**

The especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague.

**Am Jur 2d, Criminal Law §§ 598, 599.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.**

**Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.**

**25. Criminal Law § 1373 (NCI4th)— first-degree murder—death sentence—not disproportionate**

A sentence of death for first-degree murder was not disproportionate where the record supports the jury's finding of the sole aggravating circumstance upon which the death sentence was based; nothing of record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and the sentence was not disproportionate. Characteristics distinguishing this case include a murder preceded by physical and mental abuse, including assaults and threats; a senseless and brutal public stabbing found to be especially heinous, atrocious, or cruel by the jury; and a distinct failure of the defendant to show remorse after the killing. Further, of twenty-three mitigating circumstances submitted, the jury rejected twenty-two, finding the existence of only one nonstatutory circumstance, that the defendant suffered from a personality disorder with dependency traits.

**Am Jur 2d, Criminal Law § 628.**

**Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-*Gregg* cases. 63 ALR4th 478.**

**Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances—Supreme Court Cases. 111 L. Ed. 2d 947.**

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Britt (Joe Freeman), J., at the 12 October 1992 Criminal Session of Superior Court, Northampton County, upon a plea of guilty to first-degree murder. Heard in the Supreme Court 17 March 1994.

*Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.*

*Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, and Gretchen M. Engel, Death Penalty Resource Center, for defendant-appellant.*

PARKER, Justice.

In 1985 defendant was convicted of the first-degree murder of his former girlfriend, Beatrice Williams, and was sentenced to death. On

appeal this Court affirmed defendant's conviction and sentence. *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988). On 21 February 1992, the trial court granted defendant's motion for appropriate relief, vacated the order sentencing defendant to death, and ordered a new trial. A capital trial began on 12 October 1992, but on 20 October defendant elected to plead guilty to the charge of first-degree murder.

In support of defendant's plea, the prosecutor summarized the State's evidence. In March 1984 defendant and victim, both African-Americans, had been romantically involved; but the victim had ended their relationship. On the night of 31 March, they went separately to a nightclub where defendant attempted to talk to the victim, who decided it would be best for her to leave. Defendant followed her to the door, where he stood very close to her, regarding her steadily. The victim was crying, shifting her weight from one foot to the other, and wringing her hands. She walked outside, and defendant followed, his hand in his pocket. A bystander observed the two and decided to try to help the victim to her car. At the car, the victim opened the door, but defendant blocked her way and stabbed at her as she got into the car, cutting her across the chest and on one of her hands. Some bystanders pulled defendant away, and he said he would not bother the victim any more. However, defendant got into the car and slashed the victim's throat. Again he was pulled away, and someone asked him why he had killed her. He said, "I meant to do it; I meant to do it." In the summer of 1983 defendant had threatened to kill the victim and had stalked her. About two weeks before her death, defendant had knifed her and on an earlier occasion had attempted to choke her. At the time of the murder, defendant was subject to a court order directing him to stay away from the victim.

Pursuant to N.C.G.S. § 15A-2000, a capital sentencing proceeding was conducted, and both parties offered evidence. State's evidence included testimony from Harold Williams, Joe Louis Jackson, and Corrine Simmons, all of whom were present at the time of the murder. Their testimony was consistent with State's factual summary. Further, Corrine Simmons, Lemile Lockhart, Helen Britton, and Rosa Williams testified about defendant's drinking and his stalking and assaulting of the victim; and their testimony was consistent with the prosecutor's summary. Simmons also testified that in September 1983 she heard defendant threaten to kill the victim. In the same month, she heard defendant threaten to put the victim and her son "six foot

[sic] under." In addition to her other testimony, Helen Britton denied seeing defendant use marijuana or other drugs.

State Highway Patrolman D.E. Harris testified that he responded to a dispatch about the murder at the nightclub and drove towards the scene. About a mile south of the club, Trooper Harris saw a man who fit the description of the suspect running along the road. Harris stopped his car, got out, and called to the man, who put his hands in the air and began walking towards Harris. The man was defendant, who said he was the one Harris was looking for and the knife he used was in his pants pocket. Defendant appeared calm, his speech was not slurred, and he did not smell of alcohol or marijuana. Chief Deputy Otis Wheeler patted defendant down and advised him of his rights at the Northampton Sheriff's Department. Defendant said he understood his rights. He was calm; nothing appeared to be wrong with him. However, after his arrest, defendant had to be taken to the hospital several times on account of seizures. Eventually he was moved to Central Prison, where appropriate treatment was available.

Defendant's evidence included the testimony of several family members and friends who described his chaotic upbringing. Defendant was one of eight siblings, and his father kept the entire family in poverty and terror by drinking to excess and then striking them, depriving them of food, shooting at them, or driving them away from home. On one occasion when defendant's father attempted to strike defendant's brother with a poker, defendant stepped between the two and took a blow to his head. As an adult, defendant suffered occasional seizures and headaches severe enough to require hospitalization. Nevertheless he could do almost any kind of mechanical work and was steadily employed. He was known to drink to excess, but no witness testified that he was violent when drinking. While working at a shipyard in Newport News, Virginia, defendant met Gloria Williams, and they had a son, Sherrod, who was eighteen years old at the time of the sentencing proceeding.

James Odom testified that he ran a service station in Jackson, North Carolina, and had known defendant from defendant's childhood. Defendant worked for Odom for several years, ending in 1978. Defendant changed oil, washed cars, drove a cab, and did mechanical work. He learned to perform minor mechanical work unsupervised; he could change engines in cars under Odom's supervision.

Several witnesses who knew defendant in prison testified in his behalf. Chaplain Michael Smith met defendant in 1986, counselled

him, and participated regularly in religious services with him. In Smith's opinion, defendant was sincere in his religious beliefs. Correctional Officer Thomas Humphrey also met defendant around 1986. Humphrey testified that defendant attended religious services regularly and although defendant had committed some disciplinary infractions, Humphrey had never had to report him. Chaplain Luther Pike met defendant in 1985 and since then had made weekly contact with him. Pike testified that defendant had responded positively to programs in which Pike was involved and defendant's behavior never created problems. Like Smith, Pike thought defendant was sincere in his religious beliefs.

Dr. James Groce was accepted by the court as an expert in forensic psychiatry. Sometime around late 1984 he examined defendant at the request of defense counsel. Groce testified that defendant had an IQ of 64 and read at the 5.5 grade level, both being consistent with mild mental retardation. Defendant suffered from a seizure disorder, but his reported actions on the night of the murder were inconsistent with seizure behavior. Defendant's retardation resulted in an impairment of his judgment; and he reported multiple drug use on the night of the murder, which also would have had an impairing effect. Dr. Groce testified he had made three diagnoses: Mild mental retardation, a medical diagnosis of seizure disorder, and a conversion disorder with paralysis of the legs. In Dr. Groce's opinion, at the time of the murder defendant was under a mental disturbance, namely mild mental retardation. Defendant's capacity to appreciate the criminality of his conduct or conform it to law was impaired by his retardation and use of drugs, which together produced a negative synergistic effect. Defendant told Dr. Groce that on the night in question he drank three or four beers and smoked marijuana. The marijuana was given to defendant by a friend, who told him it was laced with phencyclidine. Nevertheless, reports of defendant's behavior on the night of the murder were consistent with goal-directed, rational behavior.

Dr. Groce testified further that in February 1985 a psychiatrist at Central Prison noted that defendant's cognition was "fair," his insight was "poor," his judgment was "fair," and his recognition of his personality type was "poor." "Cognition" refers to recognition, general knowledge, and accurate interpretation of general knowledge at the moment. "Insight" means some accurate self-assessment of situations and personal functioning. "Judgment" is the ability to make accurate assessments of situations and appropriate plans based thereon. The psychiatrist's diagnosis was one of mixed personality disorder with

inadequate and dependent features. Personality disorder is characterized by a less than usual ability to adjust appropriately to situations. Mixed personality disorder is characterized by several features. "Inadequate and dependent features" refer to (i) a tendency to depend excessively on external sources for emotional support and to weigh reactions of others heavily and (ii) general immaturity and inability to cope with stressful situations. Dr. Groce also testified that the combined effects of such a personality disorder and low IQ are additive, each condition contributing to overall impaired function.

Dr. Groce also examined defendant in 1992 and noted that his full-scale IQ was 73, placing him in the low borderline range of intellectual functioning. The elevation in IQ was consistent with prolonged sobriety. During his 1992 evaluation, defendant stated that at the time of the murder he had also snorted cocaine.

Dr. Claudia Coleman, a specialist in neuropsychology and forensic psychology, examined defendant in October 1992 at the request of defense counsel. In her opinion defendant was in the borderline range of adult intelligence. His school records showed he was a slow learner and was placed in special education classes beginning in ninth grade. He repeated a grade and dropped out of school in eleventh grade. Dr. Coleman considered defendant's head injury significant because many people who suffer major head injuries (i) experience concentration and attention problems and problems with judgment and emotional control and (ii) are more susceptible to the effects of alcohol and other drugs. Dr. Coleman opined that the following factors impaired defendant's cognitive abilities and emotional control: (i) history of head injury severe enough to induce chronic headaches and seizure disorder, (ii) history of alcohol and possibly other drug abuse, (iii) possible intoxication at the time of the murder, and (iv) borderline intelligence. Further, owing to these factors, at the time of the murder defendant was acting under the influence of mental or emotional disturbance; and his capacity to appreciate the criminality of his conduct or to control his conduct was impaired. Dr. Coleman stated further that defendant had inadequate and dependent personality traits, being overly dependent on others, particularly for emotional support. He was immature, acting more like a child than others in his age group. On cross-examination, she testified that a number of his behaviors on the night of the murder could be characterized as goal-oriented.

Defendant testified in his own behalf, and his testimony about his chaotic childhood was consistent with that of other witnesses. After his relationship with Gloria Williams ended and while he was working for James Odom, defendant met and married a woman named Barbara Edwards. During his marriage defendant drank alcohol and smoked marijuana almost daily. He also tried other drugs but did not use them on a regular basis. He met the victim in 1982, was involved with her until 1984, and thought they had a good relationship. Nevertheless, there were times when they fought and did not see each other for several weeks. He admitted slapping the victim sometime around Thanksgiving 1983 but denied choking her. He maintained that in the incident two weeks before her death, the victim accidentally cut herself on his knife, which he was using to clean his fingernails.

Defendant testified further that on 31 March 1984, he awoke, did a line of cocaine, and then went to work. He had several beers at work since his boss let him drink there if he did not leave cans lying about. He left work around 2:00 p.m. and had a few more beers. That night he went to the club and had several more beers. He saw the victim come into the club with a friend. Defendant went outside and smoked some marijuana with a man he knew. Defendant remarked that the joint tasted odd; the man said it contained PCP. Defendant recalled going back into the club and trying to talk to the victim, but he could not remember what was said. He remembered Harold Williams staring at him. Defendant recalled going outside with the victim but could not remember what he said to her. He admitted that he had cut and killed her but thought it would not have happened had he not been drinking alcohol and using drugs. He expressed remorse for having killed the victim.

He testified further that at Central Prison he had three fights with other inmates and several other disciplinary violations, most occurring within the first two or three years of his incarceration. On cross-examination he testified that he had been convicted of misdemeanor possession of stolen property. In connection with the Thanksgiving 1983 incident he pleaded guilty to assaulting the victim. He denied following the victim, threatening to kill her or her son, and intentionally cutting her. He also denied that he had assaulted his wife. On recross-examination, defendant testified that PCP does not cause the user to act drunk or fall down. Instead it causes the user to be "spaced out" and able to remember some things but not others.

State's rebuttal evidence included testimony from Deputy Wheeler, who said that around 1:45 a.m. on 1 April 1984, defendant appeared to be calm and cool. Asked if he were under the influence of alcohol or drugs, defendant said, "No," paused, and stated he had had a beer or two.

In addition, the State introduced evidence of defendant's convictions for misdemeanor possession of stolen goods and for assault on and communicating threats against the victim in November 1983. Further, Sergeant Ray Campbell, supervisor of inmate records at Central Prison, described defendant's cellblock from 1985 until the time of trial. Illustrating his testimony with photographs, Campbell described the restrictions on defendant's freedom of movement, comparing these with lesser restrictions on other inmates. Campbell testified that defendant had a major infraction in October 1985 for fighting, a July 1986 infraction for assaulting the inmate with whom he had been fighting in 1985, an April 1988 major infraction for refusing to report to his cell, a July 1988 infraction for fighting, a December 1989 infraction for using a mop wringer to threaten other inmates, an August 1990 major infraction for fighting, and an October 1990 major infraction for disobeying orders by entering a cell not assigned to him. Punishment, which consisted of confinement to his cell, was suspended on the last two infractions.

Barbara Spruill testified that in 1977 she was married to defendant but left him after four months because he was mean to her and picked fights with her until he provoked her to hit him. Once he ran her car off the road, reached into the car and choked her, and then left. On cross-examination she testified that when they were first married, defendant was kind to her and fun to be around except when drinking. He drank on weekends with friends and also stayed out late at night during the week and drank. He drank more after they were married. He also smoked marijuana and sometimes drank and smoked at the same time. Sometimes he accused her of seeing other men. The choking incident occurred after she left him.

The jury found the existence of the sole aggravating circumstance submitted, that the murder "was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). Four statutory mitigating circumstances were submitted, but the jury declined to find the existence of any. Of the nineteen nonstatutory mitigating circumstances submitted, the jury found only one, that at the time of committing the crime, "defendant suffered from a personality disorder with depend-

ency traits." Pursuant to section 15A-2000(b), the jury found that (i) the mitigating circumstance was insufficient to outweigh the aggravating circumstance and (ii) the aggravating circumstance was sufficiently substantial to call for imposition of the death penalty. On 4 November 1992 the jury recommended that defendant be sentenced to death, and the trial court entered judgment in accord therewith. Execution was stayed 18 November 1992 pending defendant's appeal. For the reasons discussed herein, we conclude defendant's capital sentencing proceeding was free from prejudicial error and the death sentence is not disproportionate.

JURY SELECTION

**[1]** Defendant first contends the State exercised its peremptory challenges in a racially discriminatory manner, excusing jurors of African-American descent in violation of the federal and state constitutions. Defendant argues that eight prospective jurors, Bottoms, Squire, Joyner, Lowe, Phillips, Grant, Walton, and Liverman, were improperly excused. We disagree.

Defendant filed a motion in limine requesting the trial court "to prohibit the District Attorney from exercising peremptory challenges as to Black jurors, or, in the alternative, to order that the District Attorney state reasons on the record for peremptory challenges of such jurors." The motion stated that the district attorney for Judicial District 6B had shown a pattern of discriminating against black venirepersons and cited *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991), and *State v. Hall*, 104 N.C. App. 375, 410 S.E.2d 76 (1991), as cases from the district in which the appellate courts have found inferences of such discrimination. The trial court denied the motion. During jury selection, after the State peremptorily challenged eight African-American venirepersons, defendant objected and asked to be heard. The trial court stated, "Well, if you're making a Batson motion, I'll hear you later." The district attorney then stated that defense counsel had

> excused twelve White jurors and one Black juror, and I could have made that motion, I felt three times I could, but I have not done so. And the first eleven of his were White, I take that back, the first twelve of his were White and the last one was Black. And I make the same motion in this particular case.

The court responded, "I understand and I'll hear you later, too."

After completion of selection of twelve jurors and two alternates, court was recessed and reconvened without any jurors present. The trial court brought up the matter of the motions and asked first to hear from defense counsel. After considerable discussion, counsel for both parties agreed that the State had excused eight black jurors and five white jurors. The prosecutor then argued that under *Georgia v. McCollum*, 505 U.S. —, 120 L. Ed. 2d 33 (1992), the defense also was prohibited from engaging in purposeful discrimination in the exercise of peremptory challenges to exclude prospective jurors. The court then asked, "All right, Solicitor, do you care to put on the record an explanation as to each of these?" The prosecutor replied as follows:

> If Your Honor please, I think that where the defendant has excused, if I may just briefly say what he [h]as excused by my count, fourteen jurors altogether, maybe fourteen or fifteen. How many is it altogether, madam clerk?
>
> MS. SPRUILL: Fifteen.
>
> Fifteen jurors altogether. And of those fifteen jurors, thirteen of those were White that he excused; that he excused eleven in a row until he got to the twelfth one, and that was a Black juror, and that was Mr. Royal, which was the first Black juror that he— let me go back. He had fifteen excuses and of those fifteen, fourteen were used for White jurors.
>
> . . . .
>
> Now, if Your Honor please, before I—this is the way I feel about it. I'll do whatever the Court directs me to do, but before I state any reasons for the reasons that I have excused the jurors that I have, where someone has excused fourteen, fourteen times one, a hundred and forty per cent of them, I think they ought to go through everyone [sic] of theirs and give the reasons why.

The court stated that looking at the contentions of both sides, it appeared that the State had come closer to making out a prima facie case than had the defense. Nevertheless, the court required each party's counsel to state reasons for the peremptory challenges objected to by opposing counsel. The court then stated as follows:

> All right. The Court accepts the Solicitor's clear and race neutral specific explanations as to his reasons for peremptorily challenging the eight Black jurors. Therefore, Court concluding that the explanations are race neutral denies your motion to set aside this panel and start anew, Mr. Warmack.

> And as to the fourteen Whites that were challenged by the defense, the Court accepts the explanations of Mr. Warmack as clear and race neutral specific explanations as to the exercise of those peremptories.

The jury which heard defendant's case consisted of six white and six African-American members.

The Equal Protection Clause of the United States Constitution prohibits a prosecutor from challenging prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986); *accord State v. Glenn*, 333 N.C. 296, 301-02, 425 S.E.2d 688, 692 (1993). Although the *Batson* three-part test for reviewing claims of racial discrimination requires a defendant to make out a prima facie case of discrimination, where prosecutors voluntarily give reasons for their challenges, this Court proceeds as though the burden has been met. *State v. Robinson*, 336 N.C. 78, 93, 443 S.E.2d 306, 312 (1994), *cert. denied*, — U.S. —, 130 L. Ed. 2d 650 (1995).

In the instant case, the trial court did not find or conclude that the defendant had met his burden. Instead, the record indicates the court was more inclined to find a prima facie case of discriminatory intent on the part of the defense. Nevertheless, since the record suggests that the court considered it in the interest of justice and general fairness to require each party to state reasons for its challenges, we treat the case as though defendant made out a prima facie case.

The second part of the *Batson* test "requires the State to 'articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group.' " *Id.* (quoting *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989)). "Defendant 'has a right of surrebuttal to show that the prosecutor's explanations are a pretext.' " *Smith*, 328 N.C. at 120, 400 S.E.2d at 724 (quoting *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990)). Finally, it is for the trial court to decide whether the defendant has proved purposeful discrimination. *Robinson*, 336 N.C. at 93, 443 S.E.2d at 312.

In reviewing the issue of purposeful discrimination during jury selection, this Court has considered a number of facts and circum-

stances. Relevant considerations include (i) race of the defendant, victims, and key witnesses; (ii) the prosecutor's questions and statements during *voir dire*; (iii) use of a disproportionate number of peremptory challenges to strike black jurors in a single case; and (iv) acceptance rate of black jurors by the State. *Smith*, 328 N.C. at 120-21, 400 S.E.2d at 724. Notwithstanding defendant's motion in limine, in accord with the test established by the United States Supreme Court, this Court reviews each case involving a *Batson* issue on its individual merits. More importantly, however, the instant case differs from *Smith* in that it does not involve an interracial killing, and most of the witnesses are African-Americans. In addition, in *Smith* the Court stated that an acceptance rate of 42.8% is some evidence that there was no discriminatory intent; and in the instant case, the acceptance rate was 53%.

In *Robinson*, the Court also said as follows:

> When evaluating the prosecutor's stated reasons for dismissal, the ultimate question to be decided by the trial court is whether the prosecutor was exercising his peremptory challenges with a discriminatory intent. The United States Supreme Court has acknowledged that, "[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' " *Hernandez*, 500 U.S. at 365, 114 L. Ed. 2d at 409 (quoting *Wainright v. Witt*, 469 U.S. 412, 428, 83 L. Ed. 2d 841, 854 (1985)). The findings of a trial court are not to be overturned unless the appellate court is "convinced that its determination was clearly erroneous." *Id.* at 36[9], 114 L. Ed. 2d at 412. " 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.' " *Thomas*, 329 N.C. at 433, 407 S.E.2d at 148 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574, 84 L. Ed. 2d 518, 528 (1985).

336 N.C. at 94, 443 S.E.2d at 313.

With these principles in mind, we have reviewed the reasons given by the prosecutor for peremptorily challenging the prospective jurors named above and find no reason to overturn the trial court's judgment. Defendant has argued that of the prosecutor's stated reasons for excusing prospective juror Bottoms, only one, that Bottoms knew defense counsel Harvey, was supported by the record. We do not find this argument persuasive. While our review of the transcript suggests that the prosecutor may have in part confused Bottoms with

another venireperson, the prosecutor stated clearly that he excused Bottoms because he "knew [defense counsel] Thomas Harvey, and he was the one who had visited—Mr. Harvey had visited his house, seeing his mother and his sister." Since this race-neutral reason is manifestly supported by the record, any confusion as to the prosecutor's other statements about Bottoms could at most present another view of the evidence, which under *Robinson* is insufficient to permit this Court to find the trial court's determination clearly erroneous. We also note that although given an opportunity to respond, defense counsel did not exercise his right of surrebuttal to show the trial court that any of State's proffered reasons constituted pretexts. Further, before this Court, defendant has made no independent argument based on Article I, Section 26 of the North Carolina Constitution, which prohibits the use of peremptory challenges solely on the basis of race. *Smith*, 328 N.C. at 119, 400 S.E.2d at 723. For all the foregoing reasons, we conclude the trial court did not err in determining that the prosecutor did not exercise his peremptory challenges in a racially discriminatory manner.

**[2]** Defendant's next contention is that he was denied a fair trial by the trial court's partisan conduct during *voir dire*. Defendant argues that on many occasions the trial court "exhibited partisanship by frustrating defendant's attempts to remove death-prone jurors." Defendant argues further that the trial court's (i) attempts to rehabilitate prospective juror Morgan and refusal to grant defendant's challenge for cause, (ii) partisan conduct throughout *voir dire* of prospective juror King, and (iii) granting of only one additional peremptory challenge to the defense denied defendant a substantial right. We disagree.

We note first that defendant has made a six-page argument addressing the *voir dire* of prospective juror Willis. However, the record includes no assignment of error based thereon. Defendant argues that under *Morgan v. Illinois*, 504 U.S. —, 119 L. Ed. 2d 492 (1992), searching *voir dire* must be permitted in order to reveal biased venirepersons who as jurors would always impose death upon a finding of guilt. In the instant case, however, since the trial court granted defendant's challenge for cause of Willis, there could be no *Morgan* violation. In addition, although defendant assigned error on the same ground to the *voir dire* of Moore and Motley, defendant's brief includes no arguments based thereon. Again, since the record shows the trial court granted defendant's challenges for cause of these two venirepersons, there could be no *Morgan* error.

**[3]** We next consider defendant's argument that the trial court showed partiality in denying defendant's excusal for cause of prospective juror Morgan. We do not find defendant's argument persuasive. The transcript makes clear that Morgan had some difficulty in following the twists of *voir dire* questioning. She stated to the court that she could follow the law in deciding whether to vote for life or death. The following exchange then took place:

> THE COURT: All right. Now, considering your previous statements to [defense counsel] about the death penalty, state whether you would be able to vote for a recommendation of life in prison if the State fails to satisfy you beyond a reasonable doubt of the three things required by law concerning the aggravating and mitigating circumstances previous mentioned?
>
> MS. MORGAN: Would you repeat that?
>
> THE COURT: In other words, would you be able to vote for a recommendation of life imprisonment if the State fails to satisfy you beyond a reasonable doubt of those three things?
>
> MS. MORGAN: I don't quite understand that one.
>
> THE COURT: All right.
>
> Considering your previous statements, I want you to state whether you would be able to vote for a recommendation of life imprisonment if the State fails to satisfy you beyond a reasonable doubt of the three things that I just mentioned?
>
> MS. MORGAN: Oh. No, sir. I wouldn't be able to.
>
> THE COURT: You would not be able to?
>
> MS. MORGAN: No, sir.
>
> THE COURT: You would not be able to follow the law in that respect?
>
> MS. MORGAN: Maybe I should be dismissed because I don't understand all of these things. I can listen to the jury [sic] and I can form my own opinions, but whether it should be a sentence of death or whether it should be life imprisonment, you know all these fancy words and everything, I just can't understand all that.
>
> THE COURT: Would you follow the law as given to you by the Court?

MS. MORGAN: Yes, sir.

THE COURT: And be guided by the law?

MS. MORGAN: Yes, sir. That much I can do. I know what you're talking about there. These other fancy words, I'm sorry.

Upon further questioning by defense counsel, Morgan responded, "You're trying to get me tangled up again." Later defense counsel attempted to question Morgan further, but she restated that she would consider the law as given by the trial court. Defense counsel then used a peremptory challenge to excuse her.

Defendant also argues that the trial court erred in denying defendant's challenge for cause of prospective juror King. In response to the prosecutor's asking whether the venire or their family had been victims of a violent crime, King first indicated that his brother had shot someone. The prosecutor asked a second time whether anyone or their family had been hurt or shot. King said that his sister's boyfriend had killed her. Later, the prosecutor asked King if he had been the victim of a crime or charged with a crime. King replied, "One time. I got in a fight with a dude and the gun went off and shot him." Questioned later by defense counsel, King said that in April of 1990, his sister was strangled by her boyfriend. Defense counsel then asked if the matter would have any bearing on King in his deliberations. King answered, "No, sir. It wouldn't," and "It wouldn't, it wouldn't have no bearing on me." Moments later, in response to defense counsel's question, King said, "I've been in favor of the death penalty a long time." Asked how strong his belief was, King answered, "Well, like I told [the prosecutor], I'd have to have both sides of the case first before I make my decision. I have to hear his side and his side, and then I go from there."

Defendant argues further, and the transcript shows, that the challenges for cause of Morgan and King were preserved when defendant exhausted his peremptory challenges and renewed the challenges for cause to these two prospective jurors. However, the transcript also shows that upon defendant's renewal of these two challenges for cause, the trial court granted defendant one additional peremptory challenge. Although defendant also argues that it is not possible to tell which denial the court intended to reverse, we can find no error in the court's denial of defendant's challenge for cause of Morgan.

"The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is

whether those views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Syriani*, 333 N.C. 350, 369, 428 S.E.2d 118, 128 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)), *cert. denied*, 510 U.S. —, 126 L. Ed. 2d 341 (1993), *reh'g denied*, 510 U.S. —, 126 L. Ed. 2d 707 (1994); *accord State v. Gibbs*, 335 N.C. 1, 29, 436 S.E.2d 321, 337 (1993), *cert. denied*, — U.S. —, 129 L. Ed. 2d 881 (1994). Applying this principle in the instant case, Morgan repeatedly said that she could follow the law. Only where a venireperson's responses indicate that her belief about the death penalty would interfere with the performance of her duty at the guilt-innocence or sentencing phases must the trial court grant a challenge for cause. *Gibbs*, 335 N.C. at 29, 436 S.E.2d at 337. Assuming without deciding that the trial court erred in denying defendant's challenge for cause of King, the error was corrected by the granting of an additional peremptory challenge. In sum, since (i) there was no *Morgan* error or error as to prospective juror Morgan and (ii) error, if any, as to prospective juror King was corrected by the granting of an additional peremptory challenge, we overrule defendant's assignments of error. We hold that the trial court's conduct during *voir dire* did not amount to partisan conduct denying defendant a substantial right.

**[4]** Defendant's final contention relating to *voir dire* is that the trial court erred by denying his motion to permit questioning of prospective jurors on their beliefs about parole eligibility. Again, we disagree.

In *Simmons v. South Carolina*, — U.S. —, 129 L. Ed. 2d 133 (1994), the capital defendant was ineligible for parole under South Carolina law. Prior to jury selection, the trial court granted State's motion for an order barring defendant from asking questions about parole. Defendant Simmons was subsequently convicted of murder, and in the penalty phase, evidence tended to show that he posed a continuing danger to elderly women. The prosecutor argued that in its punishment recommendation the jury should consider defendant's future dangerousness. *Id.* at —, 129 L. Ed. 2d at 139. Defendant's rebuttal evidence, and arguments based thereon, tended to show that he would not be a danger to other inmates. Defendant asked the trial court for an instruction that in his case, life imprisonment did not include the possibility of parole. *Id.* at —, 129 L. Ed. 2d at 139. Defendant argued there was a reasonable likelihood that the jurors would vote for death simply because they mistakenly believed he would eventually be released on parole. The trial court denied defendant's request. After deliberating for ninety minutes, the jury

sent a note to the trial court asking if a life sentence included the possibility of parole. In response, the court instructed the jury not to consider parole or eligibility therefor and to understand "life imprisonment" in its plain and ordinary meaning. Twenty-five minutes later, the jury returned to the courtroom with a death sentence. *Id.* at —, 129 L. Ed. 2d at 140.

On appeal, the Court found the State had secured a death sentence partly on the ground of future dangerousness while concealing from the jury the true meaning of a noncapital sentencing alternative, that life imprisonment meant life without parole. The Court held this constituted a violation of due process, *id.* at —, 129 L. Ed. 2d at 141, but declined to decide that defendant's Eighth Amendment protection was also abridged, *id.* at — n.4, 129 L. Ed. 2d at 141 n.4. The Court also said as follows:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, *it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not.* Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.
>
> . . . .
>
> Like the defendants in *Skipper* and *Gardner*, petitioner was prevented from rebutting information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death. The State raised the specter of petitioner's future dangerousness generally, but then thwarted all efforts by the petitioner to demonstrate that, contrary to the prosecutor's intimations, he never would be released on parole and thus, in his view, would not pose a future danger to society. *The logic and effectiveness of petitioner's argument naturally depended on the fact that he was legally ineligible for parole and thus would remain in prison if afforded a life sentence.* Petitioner's efforts to focus the jury's attention on the question whether, in prison, he would be a future danger were futile, as he repeatedly was denied

> any opportunity to inform the jury that he never would be released on parole. The jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested.

*Id.* at ——, 129 L. Ed. 2d at 142-43 (emphasis added).

We think it important that the Court did not hold that a defendant has a constitutional right to question the venire about parole. Neither did the Court establish a blanket rule that an instruction giving information about parole or parole eligibility is required in all cases, even if the jury asks a question about parole. Instead, the Court said that in states wherein parole is available, how the jurors' knowledge thereof will affect their recommendation "is speculative, and we shall not lightly second-guess a decision whether or not to inform" them about parole. *Id.* at ——, 129 L. Ed. 2d at 145. Further,

> States reasonably may conclude that truthful information regarding the availability of commutation, pardon, and the like, should be kept from the jury in order to provide "greater protection in [the States'] criminal justice system than the Federal Constitution requires." Concomitantly, nothing in the Constitution prohibits the prosecution from arguing any truthful information relating to parole or other forms of early release.

*Id.* at ——, 129 L. Ed. 2d at 145 (quoting *California v. Ramos*, 463 U.S. 992, 1014, 77 L. Ed. 2d 1171, 1189 (1983)) (alteration in original).

It will readily be seen that the instant case is quite different from *Simmons*, wherein the jury was kept in ignorance of truthful information about defendant's parole *in*eligibility. Instead, in defendant's case it would have been entirely reasonable for the jury, if given accurate information about parole, to view him as a greater threat to society. Defendant's case is further distinguishable in that the two prosecutors' arguments, which consume over 100 pages of the transcript, included only one reference to defendant's future dangerousness. Moreover, defendant's jury did not submit to the trial court a question about the effect of a life sentence.

In many capital cases defendants have argued to this Court that they should have been permitted to inform juries that in North Carolina, a life sentence means the defendant must serve twenty years in prison before he is eligible for parole. Often the State has answered that it should have a similar right to respond with accurate informa-

tion about such related issues as the possibility of pardon and commutation. From such arguments and from *Simmons*, it appears that our common-law precedents excluding such information from the jury's consideration, *see, e.g.*, *State v. Syriani*, 333 N.C. at 399, 428 S.E.2d at 145, have offered capital defendants greater protection than does federal law. For this reason, and because of significant differences between the instant case and *Simmons*, we hold the trial court did not err in denying defendant's motion to explore during *voir dire* the issue of parole.

SENTENCING ISSUES

**[5]** Defendant first contends that he is entitled to a new capital sentencing proceeding because the prosecutor introduced evidence that defendant had previously been sentenced to death. We disagree.

Before jury selection, defendant moved orally to prohibit the prosecutor from introducing evidence that defendant had been sentenced to death after his first trial for the murder of Beatrice Williams. On direct examination, Dr. Groce testified about his 1984-85 psychiatric examination of defendant in connection with the murder. During recross-examination of Dr. Groce, the prosecutor sought to elicit evidence about whether defendant suffered from a conversion disorder which prevented him from walking. The prosecutor read from a report made by a Central Prison psychiatrist after defendant's first trial. The report stated that defendant's "privately retained psychiatrist [Groce] had given [defendant] the diagnosis of a conversion disorder." The prosecutor also read as follows:

> Q. Now, you go back to the second page that he had, when he finished it off, he's still talking about this same thing, is he not? That was about [defendant's] walking. Said, "Inmate Johnnie Spruill was felt to be somewhat inadequate. When held as a safekeeper, he became extremely anxious and claimed that he was paralyzed, but on many occasions was observed walking without difficulty."
>
> A. Yes.
>
> Q. "He was seen by Doctor . . ." how do you pronounce it?
>
> A. "Saldias . . ."
>
> Q. ". . . our neurologist here, who did extensive work which revealed no neurological deficits. It was felt as if this was inmate Spruill's conscious wish not to ambulate and there was no evidence of . . ." what is that?

A. "Dissociative disorder."

Q. That means, something wrong with him?

A. It's a specific type of something wrong, but, yes.

Q. "At this time he seems to be making adequate adjustment to his death row environment." Is that correct?

A. Yes.

Q. States that, "He's taken on the Lord," and states that "he reads his Bible everyday [sic] and still having some back pain, but feels like he's going to recover."

A. Yes.

Q. And in this that you were reading right here . . .

MR. WARMACK: Objection. I think Mr. Beard can sit down now.

THE COURT: Sir?

MR. WARMACK: I said I object to Mr. Beard['s] standing up at the witness and reading him the report.

The objection was overruled, and the prosecutor pursued the issue of defendant's alleged conversion disorder through four more pages of the transcript. Evidence was admitted showing that another psychiatrist had confirmed that defendant could walk, and the following exchange took place:

Q. And when you talked about being goal oriented, the defendant could be goal oriented to present things that would appear to you and to other people to put him in the best light. Isn't that a fair statement?

MR. WARMACK: Objection to what is a fair statement.

THE COURT: Overruled.

A. That is possible. He certainly, like most individuals, tries to present himself as well as possible.

Defense counsel then asked a few more questions, and Dr. Groce's testimony came to an end. Dr. Groce asked to be excused, but the prosecutor informed the court that during the luncheon recess he wanted to discuss with defense counsel the admitting of certain exhibits used during Dr. Groce's testimony. The court instructed Dr. Groce to stand by, excused the jurors for lunch, and recessed court.

After reconvening at 2:00 p.m., the court asked of all counsel, "Anything before the jury is brought in?" Defense counsel answered as follows:

> MR. WARMACK: Yes, sir, Judge.
>
> I think now would be as good a time to do it as opposed to running the jury in and out. We have some witnesses here at some point [in] time this afternoon who will testify concerning [defendant] while he has been at Central Prison. They will not be the first witnesses that we would call, but they will be somewhere down the line, and rather than pop the jury back up at that time, I'm just going to go ahead and do it at this time.
>
> I would—earlier we had made a motion in limine to prevent the District Attorney or anyone else from referring to the fact that the defendant was on death row. And I would renew that motion at this time. My reason . . .
>
> THE COURT: (Interjected) Do you have a copy of it? Did you hand it up at one time? I'm going to allow it, but I'm just having trouble remembering.
>
> MR. WARMACK: No, sir. I made that motion orally before we got started. I have not done that in writing.
>
> THE COURT: Did I rule on it at that time? I don't even remember.
>
> MR. WARMACK: No, sir. You just—you said we'd cross it when we got to it. And I guess we're at it now.
>
> THE COURT: All right.
>
> MR. WARMACK: I think my reasons for it are obvious. This jury has got to make its own independent determination and if—I'm sure they probably in their own minds know, but *it hasn't been presented, you know, to them.*
>
> THE COURT: You're sure in their own minds they know what?
>
> MR. WARMACK: That maybe—well, possibly I'll say, I'm sure they may be wondering what he was sentenced to at the last trial, and they ma[y] think they know, *but it has not been brought to their attention.* They have to make their own independent determination and if they found out for sure that another jury had sen-

tenced him to death, it would make it that much easier for them. I would—that's the basis of my motion.

THE COURT: All right. Motion is allowed. Anything else?

MR. WARMACK: No, sir.

(Emphasis added.) Immediately thereafter, defendant presented the testimony of several witnesses, including the following people who met defendant at Central Prison: Chaplain Michael Smith, who met defendant in 1986; Correction Officer Thomas Humphrey, who met defendant in late 1985 or 1986; and Chaplain Luther Matthew Pike, Jr., who met defendant in January 1985.

The next morning, before the jury was brought into the courtroom, the prosecutor raised the issue of the reference to death row:

MR. BEARD: Your Honor, at this time—yesterday afternoon the Court instructed the—before the officers, the correction officers and the ministers got on the witness stand, the Court instructed the State of North Carolina not to ask any questions concerning death row, or the defendant['s] having received the death penalty. And after that occurred, later that afternoon, I recall[ed] that I had inadvertently when mister—on redirect by Mr. Warmack, Mr. Warmack had asked the—Dr. Groce when he was testifying on redirect to read at the bottom of a page entitled "Office Memorandum." And I had earlier asked on, first recross, on my first recross I had asked some questions off of his psychiatric history on that page, and I think I've got a copy . . .

. . . . [Court and prosecutor attempted unsuccessfully to determine which document was at issue.]

THE COURT: All right. Anyway, what happened? What are you referring to?

MR. BEARD: Your Honor, what I'm referring to is—do you have what I'm talking about?

MR. WARMACK: I don't have it, but I'm familiar with the documents

MR. BEARD: All right, sir. The document had to do with a—it was to Nathan Rice, Warden, from James Smith, M.D. And counsel for the defendant had asked on recross, he said, he went through a series of questions with Dr. Groce on recross in which he said, "He seemed somewhat anxious but appeared to be han-

dling himself in [an] appropriate manner. There was no evidence of any delusions, there was no paranoid, suicidal or homicidal ideations. Sleep and appetite were good. Cognition is fair. Insight poor. Judgment fair. Cognition of his personality style poor." That's what he had—and then he asked him to amplify on that. He also mentioned that work-up revealed he was—had marked anxiety and possible psychosis. That was on redirect where counsel was reading from the office memorandum.

I then on recross, then went to the doctor and asked the doctor basically to read, starting with the office memorandum, started with the psychiatric history because I was attempting to show that what the doctor was referring to had to do with the operation of his legs and [was] in that context. I began reading psychiatric history . . . . [Recounts details of psychiatric history.]

Then there was a second page to this that took off where counsel did not read on redirect, and that had to do with psychiatric discussion. "Inmate Johnnie Spruill. . ." I read this to the witness, "Inmate Johnnie Spruill was felt to be somewhat inadequate when held as a safekeeper. He became extremely anxious and claimed that he was paralyzed, but on many occasions was observed walking without difficulty. He was seen by Dr. Saldias, our neurologist here, who did an extensive work-up which revealed no neurological deficits. It was felt as if this was inmate Spruill's conscious wish not to ambulate and there was no hard evidence of disassociative [sic] disorder. At this time he seems to be making an adequate adjustment to his death row environment. He states he's taken on the Lord." And it states that he. . .

THE COURT: You better slow down. The court reporter is looking very intently at you right now.

MR. BEARD: All right, sir. And about that point as I recall, somewhere right about that point[,] I broke off and did not continue reading any further.

Now, I want to bring this to the Court's attention because [I] inadvertently read out where it said, "At this time he seems to be making an adequate adjustment to his death row environment." I did not—I was standing up at the—where the witness was and was reading through the letter to get the entire part of the letter, trying to get the entire part of the letter concerning his legs into evidence. And I did not read—did not—just was not careful, and

> unintentionally read that part concerning the death row environment. I want to bring that to the Court's attention, although counsel for the defendant did not object.

The court then asked to hear from defense counsel. Mr. Warmack stated that only then did he remember the death row reference. The court asked whether defense counsel wanted an instruction to the jury "or whether you just desire to go forward with the trial without any further mention of it." After a short, off-record conference between Messrs. Warmack and Harvey, Mr. Warmack stated that they did not want the court to give a limiting instruction. Further, he had (i) objected to the prosecutor's standing before Dr. Groce and (ii) asked to be heard at the bench. If heard, he had intended to object to the prosecutor's reading into the record long passages from the report. However, Mr. Warmack agreed that defense counsel had failed to object to the death row reference. The prosecutor stated that he had received over 200 pages of material relating to Dr. Groce's testimony on the night before he testified, tried to look through it, did not intentionally refer to death row, and brought the matter to the court's attention because he did not want to hide it. The court then instructed the reporter to find the reference. After reviewing the testimony, the court noted that defense counsel's objection did not immediately follow the death row reference. Again the court asked if defense counsel wanted an instruction, and Mr. Warmack responded as follows:

> No, sir, Judge, and I think that's one of those situations in which it would be worse to call attention to the mistake than it would be for the—and I don't, you know, and I'll say this for the record, and Mr. Beard was reading everything through it and the way he was reading it, I didn't catch him mak[ing] an issue of that. And I'm not—I'll say this, I'm satisfied with that explanation as far as he is concerned. We would, of course, [prefer] for it not to have been said, but at the same time I think it would do my client more harm now to go back and tell the jury to ignore what they may not have heard to begin with.

The court agreed not to give an instruction and then noted that it accepted the prosecutor's explanation that the reference was inadvertent.

Defendant argues that under *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), and *State v. Simpson*, 331 N.C. 267, 415 S.E.2d 351 (1992), the prosecutor's comment entitles defendant to a new sentencing hearing. We disagree.

In *Britt*, in cross-examining the defendant, the prosecutor referred to defendant's having "sat on death row for the past year" and having been "on death row . . . after you were convicted the last time." 288 N.C. at 708, 220 S.E.2d at 289. Defendant's objection was sustained, and the trial court sent the jury out. "[D]efense counsel moved for a mistrial on the ground that a fair trial by this jury was no longer possible." *Id.* After an in camera conference, the court

> with the consent of defense counsel, recalled the jury and instructed it that defendant previously had been convicted of first degree murder and sentenced to death but his conviction had been reversed by the Supreme Court of North Carolina so that the present trial was entirely new. The judge instructed the jury not to consider the prior trial and not to be influenced to any extent by defendant's prior conviction. Following such instruction defense counsel stated that he desired no further instructions and that his motion for mistrial was withdrawn. Subsequently, upon completion of the trial and during its charge to the jury, the court again instructed the jury to disregard defendant's prior trial and conviction, not to hold it against him, and to render their verdict solely upon new evidence offered at this particular trial.

*Id.* This Court stated that "[c]ross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, *if knowingly done, unethical. Id.* at 712, 220 S.E.2d at 292 (emphasis added). Further, "[S]ome transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors." *Id.* at 713, 220 S.E.2d at 292.

We find that the instant case differs significantly from *Britt*. First, the prosecutor made only one mention of death row, and the record makes clear that it was inadvertent. Second, when the remark was made, it went unnoticed by defense counsel or the court and so was never brought to the jury's attention by way of an objection or limiting instruction. Third, defendant did not move for a mistrial. Fourth, from the testimony of Dr. Groce, the prison chaplains, and a prison guard, it was clear that defendant had been in prison since 1984. From this evidence the jury could have inferred already that defendant had previously been sentenced to death; otherwise, he would not be receiving a new capital sentencing hearing. In light of all the circumstances, we cannot say that the prosecutor's inadvertent comment constituted a transgression so gross or highly prejudicial that it alone

constituted the source of adverse impression, if any, in the minds of the jurors.

In *Simpson*, this Court joined "other jurisdictions in declining to impose a *per se* rule that any juror with knowledge that a previous jury returned a recommendation of death for the same murder must be excused for cause." 331 N.C. at 271, 415 S.E.2d at 354. Defendant argues that (i) *Simpson* "mandates inquiry into the issue of prior knowledge of a death sentence when it becomes apparent that a juror has [such] knowledge" and (ii) this Court has said, "When there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court *must* question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Barts*, 316 N.C. 666, 683, 343 S.E.2d 828, 839 (1986) (emphasis added by defendant). Both *Simpson* and *Barts* are distinguishable from this case for the reason that both involve potentially prejudicial media exposure occurring outside the courtroom. By contrast, in the present case exposure to the potentially prejudicial information occurred during cross-examination with defense counsel present. Defendant not only had the opportunity to observe the extent and manner in which jurors were exposed, but to have a limiting instruction and, if desired, to request an inquiry. Defendant did not make such a request and specifically rejected the trial court's offer to instruct the jury. Furthermore, in the present case the jury's knowledge, if any, of defendant's previous death sentence, could not with certainty be attributed solely to conduct of the prosecutor.

Defendant argues further that he was prejudiced by the introduction, during State's rebuttal evidence, of State's Exhibit 59, a report of clinical notes by psychiatrist James H. Carter, which ended with the following entry: "DISPOSITION: Contact was made with the nurse, Mr. Craft, on Ward 440, who will facilitate this patient's move to Death Row as soon as a bed becomes available." The report was among materials Dr. Groce reviewed in evaluating defendant in 1992. Defense counsel made only a general objection when the State moved admission of the report into evidence and apparently did not examine the report. Again, we cannot find any gross transgression on the part of the prosecutor. Further, as noted above, the jury could already have inferred from defendant's evidence that he had previously received a death sentence.

**[6]** Finally, defendant argues that he was prejudiced by the State's (i) introduction of photographs of the cellblock in which defendant had

lived since 1985 and (ii) argument to the jury that defendant was "under a twenty-four hour watch in the most secure cell block in the most secure prison in the State of North Carolina." Again, we disagree.

Defendant requested several mitigating circumstances based on his time in confinement, and this was the purpose for which he offered the testimony of the prison chaplains and guard. It was clear from defendant's evidence that he had been in maximum security in Central Prison for six or more years dating roughly from the time of the murder. Under these circumstances, the State was entitled to attempt to rebut any mitigating quality of defendant's evidence. If the jury learned from defendant's evidence that he had previously received a death sentence for the murder of Beatrice Williams, defendant cannot be heard to complain that the State argued against mitigation as arising from that same evidence.

For all the foregoing reasons, we conclude defendant was not prejudiced by the prosecutor's inadvertent remark, the introduction of Dr. Carter's notes, or the prosecutor's argument rebutting mitigation value of defendant's time spent in confinement. We hold defendant is not entitled to a new sentencing hearing based on these assignments of error.

**[7]** Defendant's next contention is that in questioning defendant's expert witness Coleman, the trial court improperly expressed an opinion that her evidence was deficient or suspect as to proof of mitigation. We disagree.

Dr. Coleman was accepted by the court as an expert in clinical psychology specializing in neuropsychology and forensic psychology. On direct examination she testified at length about her examination of defendant. The court's first question which defendant complains of came only after testimony consuming about twenty-six pages in the transcript. Defense counsel asked Dr. Coleman about an opinion she furnished before trial, and the following exchange took place:

> A. [Reading from letter] "It is my opinion that each of these factors meets the criteria for mitigation and I note that their combined presence is even more significant. There are interactive effects among them which result in an exacerbation of cognitive intellectual and behavioral deficits. Such as, lower judgment, decreased ability to evaluate, problem solve and consider consequences, and heightened disinhibition (sic). Thus the overall

effect on cognitive processing and behavior, is much greater than would be the case with any single factor."

THE COURT: I'm a little bit lost, ma'am, would you tell me specifically what mitigation this points to?

WITNESS: In terms of, I think, lower cognitive process and mental disease or defect and . . .

THE COURT: (Interjected) Wait just a minute. What?

WITNESS/DR. COLEMAN: Mental disease or defect.

THE COURT: All right.

WITNESS/DR. COLEMAN: Secondary to alcohol and drug abuse . . .

THE COURT: All right.

WITNESS/DR. COLEMAN: . . . history of head injury . . .

THE COURT: All right.

WITNESS/DR. COLEMAN: . . . and borderline intelligence. The combination of those three things.

THE COURT: Amount to what?

WITNESS/DR. COLEMAN: In my opinion it's a mitigating factor.

THE COURT: All right. Thank you.

Defendant argues that the trial court knew what mitigation Dr. Coleman's testimony pointed to and amounted to. Hence, the court had no need to engage in a sufficiency inquiry before the jury and the inquiry "was a display of the judge's negative assessment of the evidence" which was not lost on the jury. We do not find these arguments persuasive.

The Criminal Procedure Act provides, "The judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988). Nevertheless, "[t]he court may interrogate witnesses, whether called by itself or by a party." N.C.G.S. § 8C-1, Rule 614 (1992). Fulfilling the duty "to supervise and control the course of a trial so as to insure justice to all parties, the judge may question a witness in order to clarify confusing or contradictory testimony." *State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986). In a capital sentencing proceeding the trial court has the duty of deciding which instructions on mitigating circumstances are warranted by the evidence. N.C.G.S. § 15A-2000(b) (1988).

In our view, the questions did not denigrate either defendant's witness or her evidence. Instead, the questions helped to develop testimony favorable to the defense and assist the trial court in its task of deciding whether mitigating circumstances which might later be requested by the defense were in fact supported by the evidence. Considering all the circumstances, we conclude the court did not err in asking the questions; and we overrule this assignment of error.

**[8]** Defendant next contends that by turning his back during defendant's testimony, the trial judge expressed contempt which prejudiced defendant. Again, we disagree.

The only record reference to the court's action appears on a page entitled "Appearance of Counsel in Superior Court." The last paragraph of a section entitled "Trial Testimony, Exhibits, and Matters Not Appearing in the Trial Transcript" reads as follows: "During the examination of the defendant, the trial judge, sitting at the bench, turned his chair so that his back was to the defendant. This occurred only upon the examination of the defendant and no other witness." In addition, the Certificate of Settlement indicates the record on appeal was settled by expiration of the time for the appellee to respond. Nothing of record indicates where, in relation to the judge's position, the defendant was sitting, whether the judge's back was partially or fully turned, or how long his back might have been turned. Moreover, the transcript is devoid of any indication that the court in fact took such action. During the first part of defendant's testimony, the court ruled on five objections made by the State. Shortly after the fifth ruling, the court instructed the jury to take its midafternoon recess. After court was reconvened, cross-examination began, and the court ruled on numerous objections by defense counsel, overruling some and sustaining others. In addition, one bench conference took place, and once the court sent the jury out and conducted a lengthy *voir dire*. These record facts suggest that the judge could not have had his back to defendant more than a few minutes. Even assuming that the trial judge may have turned his back for a few minutes during defendant's direct examination, the record does not clearly show any prejudice to defendant. For this reason, we overrule this assignment of error.[1]

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1. This case is clearly distinguishable from *State v. Jenkins*, 115 N.C. App. 520, 445 S.E.2d 622, *disc. rev. denied*, 337 N.C. 804, 449 S.E.2d 752 (1994), in which the trial judge turned his back to the jury for forty-five minutes during the defendant's testimony on direct examination, and the Court of Appeals awarded a new trial.

**[9]** Defendant's next two contentions relate to the parties' closing arguments. Defendant first contends the trial court erred by failing to intervene ex mero motu during the State's closing arguments. We agree that some of the prosecutors' statements were improper but find no prejudice.

In a capital sentencing proceeding "counsel is permitted wide latitude in his argument to the jury." *State v. Sanderson*, 336 N.C. 1, 15, 442 S.E.2d 33, 42 (1994). In *Sanderson*, the Court also discussed limitations on such arguments:

> As we stated in *Britt*: " 'The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu*.' " 288 N.C. at 712, 220 S.E.2d at 291 (quoting *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975)).

*Id.* In *Sanderson* the prosecutor's argument (i) misstated evidence, (ii) suggested personal knowledge of inflammatory facts not of record, and (iii) placed before the jury an aggravating circumstance which the trial court had declined to submit. *Id.* For these and other abuses, this Court concluded defendant was deprived "of his due process right to a fair sentencing proceeding." *Id.* at 20, 442 S.E.2d at 44. Nevertheless, this Court has also said that

> prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the ultimate penalty.

*State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221-22 (citations omitted), *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), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), and by *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994). With these principles in mind, we turn to defendant's arguments.

In closing, Assistant District Attorney Turner argued to the jury that it should not find as a mitigating circumstance that defendant suffered from a personality disorder with dependency traits, stating as follows:

> Now, first of all, what is that anyway? A personality disorder is not a mental illness, first of all. It's just a personality trick [sic], everybody's got their own little personality traits. But he suffers from one, a dependency trait. Did you hear what the doctor based that opinion on? I heard the lawyer come up and ask Dr. Coleman if [defendant] had a dependency trait. And I heard her say, "Oh, oh yes, he does." But did you hear what she based it on? Did you hear what she got that from? I submit to you, ladies and gentlemen, she's getting paid three thousand dollars to work on this case, she'll say anything he wants her to say. "Oh, yes, he's got one." Anything else? What did she base it on, a dependency trait. Is that a mitigating factor? Does that somehow lessen what [defendant] did to Beatrice Williams that night? If it does, ladies and gentlemen, if that is a mitigating factor, then only God can help the women in Northampton County.

In addition, District Attorney Beard argued against the jury's finding as a mitigating circumstance that defendant suffered from chronic seizure disorder. Attempting to distinguish seizures from blackout spells, Beard said as follows:

> [T]here's no evidence whatsoever that [defendant's] ever had a blackout spell where it wasn't a seizure. Do you recall m[y] asking Dr. Groce, Dr. Groce, and I'll come back to that in a moment, Dr. Groce, did you ever ask this defendant, did you ever ask him and that's—wouldn't that make sense to you, each one of you, wouldn't that make sense to you, ladies and gentlemen of the jury, reason and common sense, that if someone claims that they've had a blackout spell on April first of 1984, when he couldn't—didn't know anything that was going on, wouldn't you, you don't have to be a psychologist or a psychiatrist, wouldn't you say, well, gee, if that's true, then let's see if he had one before when he says he was doing all this dope everyday [sic]. Let's ask one simple question. One simple question. Has he ever had a blackout spell before, doctor? Doctor, did you ask that question? Well, no, I can't remember that I did. You know darn well he did. You know, he's been paid, you know darn well he did. [Defendant] just didn't have any other blackout spells, and didn't have anything to report, so, he didn't write it down. If [defendant had] had three other blackout spells, I'm not talking about—I'm talking about not where—I'm talking about not epilepsy spells, but blackout spells as of April first, then you might think there might be something to it, but there isn't.

Defendant has cited only one case, *State v. Vines*, 105 N.C. App. 147, 412 S.E.2d 156 (1992), in support of his argument that these remarks were grossly improper. In *Vines*, the court found gross impropriety where a prosecutor attacked an expert witness by arguing, "You can get a doctor to say just about anything these days." 105 N.C. App. at 156, 412 S.E.2d at 162. The court also said the prosecutor elaborated on this theme and implied or suggested that the doctor's testimony was motivated by "pay." *Id.* Although improper, the argument was not prejudicial "in light of the strong and convincing case against defendant." *Id.* at 156, 412 S.E.2d at 163.

In the instant case, assuming arguendo that the prosecutors' statements were improper and should have been condemned by the trial court, they do not entitle defendant to a new sentencing proceeding. As shown from the passages quoted above, the thrust of the lengthy arguments was not that the witnesses had been paid, but that their testimony did not provide a factual basis for finding (i) personality disorder or (ii) blackout spells independent of seizures arising from a disorder. In addition, the statements are nothing like those made by the prosecutor in *Sanderson.*

**[10]** Defendant also argues that the prosecutors' references to the victim and her lifestyle constituted gross improprieties. We disagree.

In *Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991), the Court said as follows:

> [A] state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."

*Id.* at ---, 115 L. Ed. 2d at 735 (quoting *Booth v. Maryland*, 482 U.S. 496, 517, 96 L. Ed. 2d 440, 457 (1987) (White, J., dissenting)). Before *Booth* was overruled by *Payne*, this Court held several times that prosecutors' de minimus references to victims' rights or those of their families did not constitute gross impropriety. *E.g.*, *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406

S.E.2d 827 (1991). Since in the instant case the prosecutors' remarks were indistinguishable from those in *Artis*, we conclude the trial court did not err in failing to intervene ex mero motu.

**[11]** Defendant also argues that the prosecutors made improper attacks on defendant by arguing that he (i) had enjoyed stalking and killing the victim; (ii) was a "hound of hell," lay in wait for the victim "like a durned snake," and changed "like a lizard changes colors"; (iii) took notes during the arguments; (iv) attempted to lay blame for the murder on his father; (v) perjured himself in testifying that he had not been convicted of possession of stolen property; (vi) colluded with his attorneys to present himself as remorseful; and (vii) chose to affirm rather than swear to tell the truth. We have carefully reviewed the entire arguments and find they fall within the wide latitude permitted by *Sanderson* and *Britt*.

**[12]** Defendant also argues that he was prejudiced by the prosecutor's comment, made during defense counsel's closing argument, about parole. Again, we disagree.

Defense counsel argued to the jury that defendant's prison record, despite some fights and other problems, showed that he had adjusted well to incarceration and was not a problem inmate. The context of the prosecutor's remark was as follows:

> MR. HARVEY: . . . He's shown that he can live in a structured environment. He's shown that he can live for long periods of time, eight or nine years, in a very restricted structured environment, and perform very well. Remember what the [c]haplain said about him. Remember what the guard, Sergeant Humphr[ey] said. He says he sits there eight hours a day in that control booth and he can see him. He can see inside the cells, he can see through the day room, he can see almost this entire area, and he described [defendant's] conduct and behavior as being good. I'll ask you to find that to be a mitigating factor. I'll argue to you this: That's a good reason to give him life. He's shown you that he knows how to comport himself in prison. And all we're really asking you to do is put him in prison for the rest of his life and not to kill him.
>
> MR. BEARD: Objection to "the rest of his life," Your Honor, that's not what happens.
>
> THE COURT: Sir?
>
> MR. WARMACK: Objection.

MR. HARVEY: Objection.

MR. BEARD: I object to counsel saying put him in jail for the rest of his life. That's not what happens.

MR. HARVEY: Objection to the comment, Judge.

THE COURT: Well, Solicitor, your objection is overruled, and Mr. Harvey[,] your objection is sustained. Go ahead.

MR. HARVEY: Thank you very much, Judge. But that's what these last eight years have shown you. That's what all these 8 x 10 color gloss[i]es (indicated) that Mr. Bread [sic] brought in to you and showed you of the jail. That's what it shows, that [defendant] is able to live in a structured environment of the prison and perform and function well. It's another reason not to take his life, not to kill him.

As discussed above, this Court has consistently held that parole and parole eligibility are not proper matters for consideration by the jury in a capital sentencing. Although at the time of defendant's offense, North Carolina was not a state in which a defendant could receive a sentence of life imprisonment without parole, if during deliberations the jurors asked about the meaning of a life sentence, they were instructed that a life sentence means life in prison.[2] In the instant case, defense counsel was permitted to argue in accord with this practice. Since the prosecutor's objection lacked a legal basis, it was improper; and the trial court properly overruled it.

As *Britt* makes clear, when objection is made to the argument of counsel, the trial court has a duty to censor any remarks not warranted by evidence or law. *Cf. Simmons v. South Carolina*, — U.S. at —, 129 L. Ed. 2d. at 148 (Souter, J., concurring) ("[O]n matters of law, arguments of counsel do not effectively substitute for statements by the court."); *State v. Brock*, 305 N.C. 532, 540, 290 S.E.2d 566, 572 (1982) (emphasizing duty of court to instruct the jury). However, defendant has not cited, and our research has not revealed, any case holding that when overruling an objection during argument, the court must instruct the jury to disregard the objection.

In the instant case, after the prosecutor's objection was overruled and defense counsel's objection to the objection was sustained,

2. Pursuant to a statutory amendment, North Carolina now has life without parole, N.C.G.S. § 15A-1380.5 (Supp. 1994). For offenses occurring after 1 October 1994, the judge is required to instruct the jury that a sentence of life imprisonment means a sentence of life without parole. N.C.G.S. § 15A-2002 (Supp. 1994).

defense counsel was permitted to argue again that defendant's adjustment to prison was a reason not to take his life. On these facts, this Court cannot find that defendant was prejudiced by the prosecutor's objection.

For all the foregoing reasons, we conclude that all the prosecutors' statements complained of did not result in a denial of " 'that fundamental fairness essential to the very concept of justice.' " *Donnelly v. De Christoforo*, 416 U.S. 637, 642, 40 L. Ed. 2d 431, 436 (1974) (quoting *Lisenba v. California*, 314 U.S. 219, 236, 86 L. Ed. 166, 180 (1941)). Therefore, we overrule these assignments of error.

**[13]** Defendant next contends the trial court erred in its instruction on the statutory mitigating circumstance that the defendant had "no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (1988). Defendant argues that in its wording of the instruction, the court presented the evidence relating to this circumstance in the light most favorable to the State, thereby erroneously expressing an opinion on the evidence. We disagree.

The court instructed as follows:

> First, consider whether the defendant has no significant history of prior criminal activity. Significant means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all of the facts and circumstances which you find from the evidence. However you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Rather you should consider the nature and quality of the defendant's history, if any, in determining whether it is significant.
>
> You would find this mitigating circumstance if you find that on the first of December, 1983, the defendant pled guilty to misdemeanor possession of stolen property. That on the 12th of December, 1983, the defendant pled guilty to one count of assault on a female and one count of communicating threats to Beatrice Williams; that at some time in the past the defendant was convicted of driving while his license was suspended; that in the middle of March, 1984, the defendant cut Beatrice Williams with a knife; that sometime around 1978, the defendant choked Barbara Spruill, his wife and that this is not a significant history of prior criminal activity.

Defendant argues further that this instruction did not indicate that evidence relating to his alleged unadjudicated misconduct towards the victim and his former wife was contested. However, since defendant failed to object to the instruction, our review is for plain error. *State v. Gibbs*, 335 N.C. 1, 49, 436 S.E.2d 321, 349 (1993). To constitute plain error, an error in jury instructions must be so fundamental as to have (i) amounted to a miscarriage of justice or (ii) probably resulted in the jury's reaching a different verdict than it would have reached without the error. *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993).

We find it significant that the court first reminded the jurors that they were to find the facts and circumstances from the evidence. Only then did the court instruct the jurors that they should consider the nature and quality of the defendant's history, *if any*, and would find the circumstance *if* they found that defendant had cut the victim and choked his former wife. Reading the instruction in its entirety, we are persuaded that it did not constitute an improper expression of opinion which probably resulted in the jury's reaching a different verdict. Therefore, we hold the instruction did not amount to plain error.

**[14]** Defendant next contends that the trial court erred in its instructions on two other statutory mitigating circumstances, that the murder "was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and that defendant's capacity to appreciate the criminality of his conduct or conform it to law was impaired, N.C.G.S. § 15A-2000(f)(6). Again, we disagree.

The court instructed as follows:

> 2. Consider whether this murder was committed while the defendant was under the influence of mental or emotional disturbance. A defendant is under such influence if he is *in any way affected or influence by* a mental or emotional disturbance at the time he kills.
>
> Being under the influence of mental or emotional disturbance is similar to but not the same as being in a heat of passion upon adequate provocation. A person may be under the influence of mental or emotional disturbance even if he had no adequate provocation and even if his disturbance was not so strong as to constitute heat of passion or preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's

> mind or emotions were disturbed, *from any cause*, and that he was under the influence of the disturbance when he killed the victim.
>
> You would find this mitigating circumstance if you find that the defendant suffered from a mental disorder and had poor reality orientation and borderline intelligence and a personality disorder with inadequate and dependent features, and that, as a result, the defendant was under the influence of mental disturbance when he killed the victim.

(Emphasis added.)

Defendant argues that the court's use of "and" meant that a juror's failure to find any one of the factual elements meant consideration of the circumstance was entirely precluded. However, since defendant failed to object to the instruction, our review is for plain error.

In light of the court's preliminary directive that the defendant was under such an influence if he was in any way affected or if his mind or emotions were disturbed from any cause, we do not find defendant's argument persuasive. Reading the instruction in its entirety, we do not believe the jurors could have applied it in a way that prevented "consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990).

Defendant also argues that by its similar use of "and" in stating the factual predicates which could support the finding of mitigating circumstance (f)(6), the trial court precluded the jurors from finding the existence of this circumstance unless they first found the existence of every fact recited by the court. Again, we disagree.

Before restating the facts tending to support a finding of this circumstance, the court instructed the jury that "for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated." In addition, the court instructed that "the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of his impairment is lessened or diminished because of such impairment."

Again, since defendant failed to object, our review is for plain error. Reading the instruction in its entirety, we do not believe the jury was misled into reaching a result different from the one it would have reached had the instruction not contained the word "and." In

sum, for all the foregoing reasons, we find that the challenged instructions did not amount to plain error.

**[15]** Defendant's next contention is that the trial court erred by instructing the jurors that each could exercise his discretion in deciding whether to consider any mitigating circumstance found in Sentencing Issue Two when answering Issues Three and Four. Again we disagree.

The Criminal Procedure Act provides in pertinent part:

> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
>
> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
>
> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

N.C.G.S. § 15A-2000(b) (1988). Under this statute, each juror must be

> permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence in deciding Issues Three and Four: whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death.

*McKoy v. North Carolina*, 494 U.S. 433, 442-43, 108 L. Ed. 2d 369, 381 (1990).

In the instant case, the trial court first instructed as follows:

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

> If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstance against the mitigating circumstances. When deciding this issue, each juror must consider each—strike that, each juror—When deciding this issue, each juror *may consider any mitigating circumstance or circumstances that the juror determined to exist by a preponderance of the evidence in Issue Two.*

Thereafter the court also instructed as follows:

> Issue Four is, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance you found is sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances *found by one or more of you?*"
>
> In deciding this issue, you are not to consider the aggravating circumstance standing alone. You *must consider it in connection with any mitigating circumstances found by one or more of you.* When making this comparison, each juror may consider any mitigating circumstance or circumstances that—strike that. *When making this comparison, each juror may consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence.*

(Emphasis added.)

Again, since defendant did not object to the instructions, our review is for plain error. Instead of precluding any individual juror from considering any mitigating circumstance or circumstances she or he found at Issue II, these instructions plainly directed that the evidence in mitigation, if found by one or more jurors, had to be weighed against the evidence in aggravation. In our view, the instructions are in accord with the dictates of *McKoy* and could not have been misapplied by the jury. Since there was no error, this Court cannot find plain error, *State v. Torain*, 316 N.C. 111, 123, 340 S.E.2d 465, 468 (1986); and we overrule this assignment of error.

Defendant also contends the trial court erred in denying his request for an instruction on parole. However, in light of our earlier discussion of *Simmons* and case law prohibiting the jury from considering this matter, we overrule this assignment of error.

**[16]** Defendant next contends he is entitled to a new sentencing proceeding because the trial court failed to submit to the jury the statu-

tory mitigating circumstance of his age at the time of the crime. N.C.G.S. § 15A-2000(f)(7) (1988). Defendant argues that (i) chronological age is not the determining factor and (ii) the circumstance was supported by evidence that he was an immature and dependent person who had borderline intelligence. While we agree that chronological age is not determinative, we do not agree that the trial court erred.

We note first that defendant did not request that the trial court submit this mitigating circumstance to the jury. In addition, evidence showed that he was thirty-one years old, had worked as an automobile mechanic and in a shipyard, moved on to a better position, attended church, and functioned quite well in the community.

In *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), the Court reiterated that the statutory mitigating circumstance of age is based on a "flexible and relative concept of age." *Id.* at 393, 346 S.E.2d at 624. Nevertheless, evidence showing emotional immaturity is not viewed in isolation, particularly where other evidence shows "more mature qualities and characteristics." *Id.* Where evidence of emotional immaturity is counterbalanced by a chronological age of twenty-three years, apparently normal physical and intellectual development, and experience, the trial court is not required to submit the mitigating circumstance of age. Following *Johnson*, we conclude that in the instant case the court did not err in failing to submit this circumstance.

**[17]** Defendant's next contention is that the trial court erred in refusing to submit to the jury certain nonstatutory mitigating circumstances requested by defendant and supported by the evidence. Defendant argues that the jury was precluded from considering some mitigating aspects of his character or record, in violation of *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978). We disagree with this contention.

Defendant first argues that the trial court erred in failing to submit that prior to 1 April 1984 defendant had never been involved in a felony. However, the statutory mitigating circumstance that defendant had no significant history of criminal activity was submitted. Moreover, the instruction on this circumstance included an accurate summary of the evidence presented, which showed defendant's prior criminal activity included some offenses resulting in charges and convictions and other offenses which had not resulted in charges or convictions. Since the jury was not precluded from considering any aspect of defendant's record, we conclude the trial court did not vio-

late the rule of *Lockett* by refusing to submit an additional nonstatutory circumstance relating thereto.

**[18]** Defendant next argues that the trial court erred by combining into one circumstance two aspects of defendant's educational background, that he (i) did poorly in school and dropped out before completing eleventh grade and (ii) was placed in special education classes in ninth grade. Defendant also argues that the court erred in combining into one circumstance that he (i) was struck with a poker by his father, (ii) suffered a head injury, and (iii) suffered from chronic seizure disorder. However, this Court has previously held that combining separately-proffered statements of mitigation relating to a single aspect of a defendant's character or record does not violate a defendant's federal constitutional rights. *State v. Greene*, 324 N.C. 1, 21, 376 S.E.2d 430, 442 (1989) (approving combining and submitting within the context of two separate statutory mitigating circumstances defendant's independently proffered mitigation statements), *death sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990); *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991). For all the foregoing reasons, we conclude the trial court did not err by precluding the jury from considering mitigation proffered by defendant.

## PRESERVATION ISSUES

**[19-24]** Defendant raises six additional issues which he concedes have been decided against him by this Court: (i) the trial court erred in denying his motion for individual jury *voir dire*; (ii) the court erred in denying him the right to examine each juror challenged by the State during death qualification; (iii) the court erred in admitting hearsay statements of the victim relating to her state of mind; (iv) the court erred in denying defendant's request for an instruction defining "mitigation"; (v) the court erred in instructing the jurors that it was for them to determine whether the nonstatutory mitigating circumstances in fact possessed mitigating value; and (vi) the especially heinous, atrocious, or cruel aggravating circumstance is unconstitutionally vague.

We have carefully considered defendant's arguments on these issues and find no compelling reason to depart from our prior holdings. Therefore, we overrule these assignments of error.

## PROPORTIONALITY

**[25]** Having found defendant's capital sentencing proceeding free of prejudicial error, we are required by statute to review the record and

determine whether (i) the record supports the jury's finding of the aggravating circumstance on which the court based its death sentence, (ii) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (iii) the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

Record evidence which supports the jury's finding that the murder was especially heinous, atrocious, or cruel included that the defendant assaulted, harassed, stalked, and threatened the victim prior to killing her. Moreover, his presence and actions at the nightclub reduced her to a state of terror, as shown by her crying, shifting her weight from one foot to the other, and wringing her hands. Other evidence showed that defendant's slashing of the victim's throat was especially brutal, since cartilage in her throat had been cut through and through. In addition, the victim drowned in her own blood, and State's expert medical witness testified that this process may take from five to ten minutes. Taken together, these facts show that (i) the murder was physically agonizing to the victim and (ii) left her, in her last moments "aware but helpless to prevent impending death." *State v. Oliver*, 309 N.C. 326, 346, 307 S.E.2d 304, 318 (1983). Therefore, we conclude the record supports the jury's finding of the sole aggravating circumstance upon which the death sentence was based. We further conclude that nothing of record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

We turn to our final statutory duty, proportionality review. We first compare similar cases from a pool of all cases arising after 1 June 1977, the effective date of the capital punishment statute. We consider cases tried capitally and found free of error on direct appeal to this Court and in which the jury recommended death or life imprisonment or the trial court imposed life imprisonment after the jurors failed within a reasonable period of time to agree on a sentencing recommendation. *State v. Syriani*, 333 N.C. 350, 400, 428 S.E.2d 118, 146 (1993). The pool includes only those cases which this Court has found to be free of error in both phases of the trial." *State v. Stokes*, 319 N.C. 1, 19-20, 352 S.E.2d 653, 663 (1987). In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542, *petition for cert. denied*, — U.S. —, 130 L. Ed. 2d 1083 (1994), this Court clarified the composition of the pool so as to account for post-conviction relief awarded to death-sentenced defendants:

> Because the "proportionality pool" is limited to cases involving first-degree murder convictions, a post-conviction proceeding which holds that the State may not prosecute the defendant for first-degree murder or results in a retrial at which the defendant is acquitted or found guilty of a lesser included offense results in the removal of that case from the "pool." When a post-conviction proceeding results in a new capital trial or sentencing proceeding, which, in turn, results in a life sentence for a "death-eligible" defendant, the case is treated as a "life" case for purposes of proportionality review. The case of a defendant sentenced to life imprisonment at a resentencing proceeding ordered in a post-conviction proceeding is similarly treated. Finally, the case of a defendant who is either convicted of first-degree murder and sentenced to death at a new trial or sentenced to death in a resentencing proceeding ordered in a post-conviction proceeding, which sentence is subsequently affirmed by this Court, is treated as a "death-affirmed" case.

*Id.* at 107, 446 S.E.2d at 564. "[A] conviction and death sentence affirmed on direct appeal is presumed to be without error, and . . . a post-conviction decision granting relief to a convicted first-degree murderer is not final until the State has exhausted all available appellate remedies." *Id.* at 107 n.6, 446 S.E.2d at 564 n.6.

Our consideration is also limited to cases roughly similar as to the crime and the defendant, but we are not bound to cite every case used for comparison. *Syriani*, 333 N.C. at 400, 428 S.E.2d at 146. If juries have consistently returned death sentences in those similar cases, a strong basis exists for concluding that the sentence under consideration is not excessive or disproportionate. However, if juries have consistently returned life sentences in similar cases, a strong basis exists for concluding that the sentence under consideration is disproportionate. *Id.* at 401, 428 S.E.2d at 146.

Characteristics distinguishing the instant case include (i) a murder preceded by physical and mental abuse, including assaults and threats, (ii) a senseless and brutal public stabbing found to be especially heinous, atrocious, or cruel by the jury, and (iii) a distinct failure of the defendant to show remorse after the killing. Further, of twenty-three mitigating circumstances submitted, the jury rejected twenty-two, finding the existence of only one nonstatutory circumstance, that the defendant suffered from a personality disorder with dependency traits.

"Of the cases in which this Court has found the death penalty disproportionate, only two involved the 'especially heinous, atrocious, or cruel' aggravating circumstance." *Id.* at 401, 428 S.E.2d at 146-47 (citing *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983)). Significant dissimilarities between *Stokes* and the instant case include that (i) defendant Stokes was only seventeen years old, but defendant Spruill was thirty-one and (ii) in *Stokes* no evidence showed who was the ringleader, but defendant Spruill alone was responsible for his crime. Defendant's case is also significantly different from *Bondurant*, wherein the defendant immediately exhibited remorse and concern for the victim's life by helping him get medical treatment. By contrast, defendant Spruill (i) immediately said that he meant to kill the victim, (ii) fled the scene, and (iii) soon thereafter suggested to Trooper Harris that medical help would not arrive in time to save her.

In *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), this Court reviewed defendant's first capital trial and sentencing proceeding and considered whether the death sentence he received was disproportionate. We noted that the distinguishing characteristics of the earlier case were as follows:

> (1) it is a case of first degree murder, preceded by prior physical and mental abuse of the victim; (2) it is a case in which a single aggravating factor [sic] was found, "that the killing was especially heinous, atrocious or cruel," N.C.G.S. § 15A-2000(e)(9); (3) it is a case in which no mitigating factors were found, although five were submitted to the jury; and (4) it is a case in which defendant showed no remorse for his actions, and appeared in full control of his mental and physical condition.

320 N.C. at 701, 360 S.E.2d at 674. In reaching the conclusion that defendant's sentence was not disproportionate, we reviewed many cases. The only significant difference between defendant's two cases is that the present case is more egregious, the jury having considered and rejected many more mitigating circumstances. For this reason, we do not consider it necessary to review those cases which formed the basis for our conclusion that the earlier sentence was not disproportionate. *See Syriani*, 333 N.C. at 400, 428 S.E.2d at 146. Instead, we consider cases which have come into the pool since our previous review.

There are now in the pool five cases involving murder by stabbing of a spouse or intimate friend of the opposite sex. *State v. Lynch*, 337

N.C. 415, 445 S.E.2d 581 (1994); *State v. Fisher*, 336 N.C. 684, 445 S.E.2d 866 (1994); *State v. Bearthes*, 329 N.C. 149, 405 S.E. 2d 170 (1991); *State v. Clark*, 324 N.C. 146, 327 S.E.2d 54 (1989); *State v. Tidwell*, 323 N.C. 668, 374 S.E.2d 577 (1989).

In every case but *Lynch*, the jury found that the murder was especially heinous, atrocious, or cruel. Given the importance of this statutory aggravating circumstance in capital cases, we conclude that defendant's case is dissimilar to *Lynch*. *Clark* also is distinguishable because the victim was the defendant's husband, but defendant's boyfriend wielded the knife. Of the remaining three cases, one resulted in a death sentence, *Fisher*; and two resulted in life sentences, *Bearthes*; *Tidwell*. In all three cases, however, the juries found mitigation both quantitatively and qualitatively greater than in the instant case.[3] For this reason, and because the jury found the murder was especially heinous, atrocious, or cruel, we cannot say that the death sentence herein is disproportionate. We hold defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that the death penalty is not disproportionate.

NO ERROR.

3. In *Fisher*, the jury found eight mitigating circumstances, including two statutory circumstances, that the defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (1988), and was under the influence of mental or emotional disturbance, § 15A-2000(f)(2). 336 N.C. at 709, 445 S.E. 2d at 880. A review of the record in *Bearthes* shows that the jury found seven mitigating circumstances, including two statutory circumstances, no significant history of prior criminal activity and mental or emotional disturbance. In *Tidwell* the jury found twelve mitigating circumstances, including no significant history, mental or emotional disturbance, and diminished capacity. 323 N.C. at 672 n.1, 374 S.E.2d at 579 n.1.

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| NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF<br><br>v.<br><br>VALERIE B. SCOTTON AS GAL OF MONICE L. BURNETTE; THE ESTATE OF JASON BAILEY, MARY BAILEY OLDHAM, ADMINISTRATRIX; RICKY H. NETTLES, CECILIA DIANA MANESS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF TANEA HORTON; PAM ROBERTS AS GAL OF WESLEY HORTON; SHIRLEY DARK AS GAL OF TRACIA D. HEADEN, DEFENDANTS | ) | ORDER |

No. 603P94

(Filed 15 December 1994)

It appearing to the Court that this Petition raises a matter of Court administration appropriately handled by the Chief Justice;

NOW, THEREFORE, IT IS ORDERED That the Petition be, and hereby is, dismissed.

By order of the Court in Conference, this 15th day of December, 1994.

s/Parker, J.
For the Court

ALLISON v. N.C. DEPT. OF HUMAN RESOURCES

No. 462P94

Case below: 116 N.C.App. 137

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

BUDD v. DAVIE COUNTY

No. 508P94

Case below: 116 N.C.App. 168

Petition by defendants (Virginia Walker and Frank Walker) for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

COMMUNITY BANK v. WHITLEY

No. 559P94

Case below: 116 N.C.App. 731

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

EMPLOYMENT SECURITY COMM. v. PEACE

No. 481PA94

Case below: 115 N.C.App. 486

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 December 1994.

FORREST v. PITT COUNTY BD. OF EDUC.

No. 404P94

Case below: 115 N.C.App. 397

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

GOODMAN v. CONNOR

No. 581P94

Case below: 117 N.C.App. 113

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

HENDREN v. HENDREN

No. 331P94

Case below: 115 N.C.App. 565

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

HENKE v. FIRST COLONY BUILDERS

No. 555P94

Case below: 116 N.C.App. 137

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 or in the alternative petition for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 December 1994.

ORTEGA v. HART

No. 443P94

Case below: 115 N.C.App. 729

Petition by plaintiff for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 December 1994.

POOLE v. MILLER

No. 525PA94

Case below: 116 N.C.App. 435

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 December 1994.

PRIDGEN v. SHORELINE DISTRIBUTORS, INC.

No. 222P94

Case below: 114 N.C.App. 94

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

RAINTREE HOMEOWNERS ASSN. v. BLEIMANN

No. 572PA94

Case below: 116 N.C.App. 561

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 December 1994.

REASON v. NATIONWIDE MUTUAL INS. CO.

No. 547PA94

Case below: 116 N.C.App. 491

Petition by defendant (State Farm) for discretionary review pursuant to G.S. 7A-31 allowed 29 December 1994.

RICHARDSON v. GRUBER

No. 588P94

Case below: 117 N.C.App. 139

Motion by defendant to dismiss the appeal for lack of substantial constitutional question allowed 29 December 1994. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

SHARP v. SHARP

No. 582P94

Case below: 116 N.C.App. 513

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

SIDNEY v. ALLEN

No. 211A94

Case below: 114 N.C.App. 138

Petition by defendant 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 denied 29 December 1994.

STATE v. BROWN

No. 597A94

Case below: 117 N.C.App. 239

Motion by Attorney General for temporary stay allowed 16 December 1994. Petition by Attorney General for writ of supersedeas allowed 29 December 1994.

STATE v. GRIFFIN

No. 558P94

Case below: 116 N.C.App. 737

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

STATE v. HILL

No. 573P94

Case below: 116 N.C.App. 573

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

STATE v. RAMSEY

No. 580P94

Case below: 112 N.C.App. 546

Petition pro se by defendant for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 29 December 1994.

STATE v. SLOAN

No. 577P94

Case below: 116 N.C.App. 736

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

STATE v. WESTALL

No. 574P94

Case below: 116 N.C.App. 534

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

UNIVERSAL UNDERWRITERS INS. CO. v. PHOENIX INS. CO.

No. 479P94

Case below: 116 N.C.App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

WINTERS v. LEE

No. 435P94

Case below: 115 N.C.App. 692

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

WOLBARSHT v. BD. OF ADJUSTMENT OF CITY OF DURHAM

No. 576P94

Case below: 116 N.C.App. 638

Petition by petitioner for discretionary review pursuant to G.S. 7A-31 denied 29 December 1994.

PETITION TO REHEAR

HARGETT v. HOLLAND

No. 377PA93

Case below: 337 N.C. 651

Petition by plaintiffs to rehear pursuant to Rule 31 denied 29 December 1994.

# APPENDIXES

ORDER AMENDING THE
SUPREME COURT FEE SCHEDULE

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RECODIFICATION OF THE
RULES AND REGULATIONS OF THE
NORTH CAROLINA STATE BAR

## IN THE SUPREME COURT OF NORTH CAROLINA

### ORDER AMENDING THE SUPREME COURT FEE SCHEDULE

Because copies of decisions and other matters of record are no longer being made in the Clerk's Office, and litigants are no longer assessed fees for such copies, the following portion of the Court's Fee Schedule, 287 N.C. 781, adopted in 1975 is deleted:

> Furnishing copies of decisions or other matters of record to publishing houses, litigants, or any other person or corporation, per page . . . . . . . . . . . . . . . . . . . . . . . . . . . . $.20

By order of the Court in conference this the 5th day of October, 1994. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court.

Parker, J.
For the Court

# RECODIFICATION OF THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

The following recodification of the Rules, Regulations, and the Certification of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 1994.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar be repealed in their entirety and that the attached recodification of the Rules and Regulations of the North Carolina State Bar be substituted in lieu thereof.

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# TITLE 27—THE NORTH CAROLINA STATE BAR

# CHAPTER 1

# RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

## SUBCHAPTER A

## ORGANIZATION OF THE NORTH CAROLINA STATE BAR

### Section .0100 Functions

#### .0101 Purpose

The North Carolina State Bar shall foster the following purposes, namely:

(1) to cultivate and advance the science of jurisprudence;
(2) to promote reform in the law and in judicial procedure;
(3) to facilitate the administration of justice;
(4) to uphold and elevate the standards of honor, integrity and courtesy in the legal profession;
(5) to encourage higher and better education for membership in the profession;
(6) to promote a spirit of cordiality and unity among the members of the Bar;
(7) to perform all duties imposed by law.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

#### .0102 Division of Work

(a) To facilitate the work for the accomplishment of the above enumerated purposes, the council may, from time to time, classify such work under appropriate sections and committees, either standing or special, of the North Carolina State Bar.

(b) The council shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee.

(c) Any committee may, at the discretion of the appointing or electing authority, be composed of council members or members of the North Carolina State Bar who are not members of the council or of lay persons or of any combination.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

### .0103 Cooperation with Local Bar Association Committees

The sections and committees so appointed may secure the cooperation of like sections and committees of the North Carolina Bar Association and all local bar associations of the state.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0104 Organization of Local Bar Associations

The council shall encourage and foster the organization of local bar associations.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1995

### .0105 Annual Program

The council shall provide a suitable program for each annual meeting of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1995

### .0106 Reports Made to Annual Meeting

The reports of the several sections and committees, with their recommendations, shall be delivered to the secretary of the North Carolina State Bar at least 30 days before the annual meeting. Such reports, together with any reports from special committees that the council desires to present to the annual meeting, may be printed and sent to each member of the North Carolina State Bar at least 20 days before such meeting. Nothing herein shall preclude any section, committee or the council from presenting a report of recommendation that has not been so printed and mailed.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .0200. Membership—Annual Membership Fees

### .0201 Classes of Membership

(a) Two Classes of Membership

Members of the North Carolina State Bar shall be divided into two classes: active members and inactive members.

(b) Active Members

The active members shall be all persons who have obtained a license entitling them to practice law in North Carolina, including persons serving as a justice or judge of any state or federal court in this state, unless classified as an inactive member by the council. All active members must pay the annual membership fee.

(c) Inactive Members

The inactive members shall include all persons who have been admitted to the practice of law in North Carolina but who the council has found are not engaged in the practice of law or holding themselves out as practicing attorneys and who do not occupy any public or private position in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document or law. Inactive members of the North Carolina State Bar may not practice law and are exempt from payment of membership dues during the period in which they are inactive members.

For purposes of the State Bar's membership records, the category of inactive members shall be further divided into the following subcategories:

(1) Retired/nonpracticing

This subcategory includes those members who are not engaged in the practice of law or holding themselves out as practicing attorneys and who are retired, hold positions unrelated to the practice of law, or practice law in other jurisdictions.

(2) Disability inactive status

This subcategory includes members who suffer from a mental or physical condition which significantly impairs the professional judgment, performance or competence of an attorney, as determined by the courts, the council or the Disciplinary Hearing Commission.

(3) Disciplinary suspensions/disbarments

This subcategory includes those members who have been suspended from the practice of law or who have been disbarred by the courts, the council or the Disciplinary Hearing Commission for one or more violations of the Rules of Professional Conduct.

(4) Administrative suspensions

This subcategory includes those members who have been suspended from the practice of law for failure to comply with the

regulations regarding mandatory continuing legal education, payment of membership fees, or payment of late fees pursuant to these rules.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23
Readopted Effective December 8, 1995

**.0202 Register of Members**

(a) Initial Registration with State Bar

Every member shall register by completing and returning to the North Carolina State Bar a signed registration card containing the following information:

(1) name and address;

(2) date;

(3) date passed examination to practice in North Carolina;

(4) date and place sworn in as an attorney in North Carolina;

(5) date and place of birth;

(6) list of all other jurisdictions where the member has been admitted to the practice of law and date of admission;

(7) whether suspended or disbarred from the practice of law in any jurisdiction or court, and if so, when and where, and when readmitted.

(b) Membership Records of State Bar

The secretary shall keep a permanent register for the enrollment of members of the North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the council may from time to time require.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34
Readopted Effective December 8, 1994

**.0203 Annual Membership Fees**

(a) Amount and Due Date

The annual membership fee shall be in the amount as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year and the same shall become delinquent if not paid on or before July 1 of each year.

(b) Waiver of All or Part of Dues

No part of the annual membership fee shall be prorated or apportioned to fractional parts of the year, and no part of the membership

fees shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination or comity shall not be liable for dues during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues so long as the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status before December 31 of a given year shall not be liable for the membership fee for the following year if the petition is granted.

History Note: Statutory Authority G.S. 84-23; G.S. 83-34
Readopted Effective December 8, 1994

## Section .0300. Election and Succession of Officers

### .0301 Officers

(a) The officers of the North Carolina State Bar and the council shall consist of a president, a president-elect, a vice-president, and an immediate past president. These officers shall be deemed members of the council in all respects.

(b) There shall be a secretary who shall also have the title of executive director. The secretary shall not be a member of the council.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

### .0302 Eligibility for Office

The president, president-elect, and vice-president need not be members of the council at the time of their election.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

### .0303 Term of Office

(a) The term of each office shall be one year beginning at the conclusion of the annual meeting. Each officer will hold office until a successor is elected and qualified.

(b) The president shall assume the office of immediate past president at the conclusion of the term as president. The president-elect

shall assume the office of president at the conclusion of the annual meeting following the term as president-elect.

History Note: Statutory Authority G.S. 84-21; G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

**.0304 Elections**

(a) A president-elect, vice-president and secretary shall be elected annually by the council at an election to take place at the council meeting held during the annual meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

(b) If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

**.0305 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.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

**.0306 Vacancies and Succession**

(a) If the office of president becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the president-elect shall become president for the unexpired term and the next term. If the office of the president-elect becomes vacant because the president-elect must assume the presidency under the foregoing provision of this section, then the vice-president shall

become the president-elect for the unexpired term and at the end of the unexpired term to which the vice-president ascended the office will become vacant and an election held in accordance with Rule .0304 of this subchapter; if the office of president-elect becomes vacant for any other reason, the vice-president shall become the president-elect for the unexpired term following which said officer shall assume the presidency as if elected president-elect. If the office of vice-president or secretary becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of president or president-elect becomes vacant without an available successor under these provisions then the office will be filled by election by the council at a special meeting of the council with such notice as required by Rule .0602 of this subchapter or at the next regularly scheduled meeting of the council.

(b) If the president is absent or unable to preside at any meeting of the North Carolina State Bar or the council, the president-elect shall preside, or if the president-elect is unavailable, then the vice-president shall preside. If none are available, then the council shall elect a member to preside during the meeting.

(c) If the president is absent from the state or for any reason is temporarily unable to perform the duties of office, the president-elect shall assume those duties until the president returns or becomes able to resume the duties. If the president-elect is unable to perform the duties, then the council may select one of its members to assume the duties for the period of inability.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0307 Removal from Office**

The council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the council to have engaged in misconduct or to have a disability, including misconduct not related to the office but so infamous as to render the offender unfit for the office, misconduct amounting to noncriminal misconduct in office and misconduct which is both criminal and misconduct in office.

History Note: Statutory Authority G.S. 84-21; 84-23
Readopted Effective December 8, 1994

## Section .0400. Duties of Officers

### .0401 Compensation of Officers

The secretary shall receive a salary fixed by the council. All other officers shall serve without compensation except the per diem allowances fixed by statute for members of the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0402 President

The president shall preside over meetings of the North Carolina State Bar and the council. The president shall sign all resolutions and orders of the council in the capacity of president. The president shall execute, along with the secretary, all contracts ordered by the council. The president will perform all other duties prescribed for the office by the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0403 President-Elect, Vice-President, and Immediate Past President

The president-elect, vice-president, and immediate past president will perform all duties prescribed for the office by the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0404 Secretary

The secretary shall attend all meetings of the council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. The secretary shall, with the president, president-elect or vice-president, execute all contracts ordered by the council. He or she shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the council or certified as emanating from the council. The secretary shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the council; he or she shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the council, the secretary shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstand-

ing obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31 of each year and the secretary shall publish same in the annual reports as referred to above. He or she shall perform such other duties as may be imposed upon him or her, and shall give bond for the faithful performance of his or her duties in an amount to be fixed by the council with surety to be approved by the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .0500. Meetings of the North Carolina State Bar

### .0501 Annual Meetings

The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina, after such notice (but not less than 30 days) as the council may determine.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0502 Special Meetings

(a) Special meetings of the North Carolina State Bar may be called upon 30 days' notice, as follows:

(1) by the secretary, upon direction of the council.

(2) by the secretary, upon the call addressed to the council, of not less than 25% of the active members of the North Carolina State Bar.

(b) At special meetings no subjects shall be dealt with other than those specified in the notice.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33
Readopted Effective December 8, 1994

### .0503 Notice of Meetings

Notice of all meetings shall be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33
Readopted Effective December 8, 1994

**.0504 Quorum**

At all annual and special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum, and there shall be no voting by proxy.

History Note: Statutory Authority G.S. 84-23; G.S. 84-33
Readopted Effective December 8, 1994

**.0505 Parliamentary Rules**

Proceedings at any meeting of the North Carolina State Bar shall be governed by Roberts' Rules of Order.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Section .0600. Meetings of the Council**

**.0601 Regular Meetings**

Regular meetings of the council shall be held on the first Friday after the second Monday in each of the months of January, April and July, at such time and place after such notice (but not less than 30 days) as the council may determine; and on the day before the annual meeting of the North Carolina State Bar, at the location of said annual meeting. The hour of meeting shall in each case be at 10 o'clock A.M. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0602 Special Meetings**

The president in his or her discretion may call special meetings of the council. Upon written request of eight councilors, filed with the secretary requesting the president to call a special meeting of the council, the secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than 10 days from the date of such call.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0603 Notice of Called Special Meetings**

Notice of called special meetings shall be signed by the secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for con-

sideration at such special meeting. Such notice must be given to each councilor unless waived by him or her. A written waiver signed by any councilor shall be equivalent to notice as herein provided. Notice to councilors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said councilors at his or her law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0604 Quorum at Meeting of Council**

At meetings of the council the presence of 10 councilors shall constitute a quorum.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Section .0700 Standing Committees of the Council**

**.0701 Standing Committees**

Within 20 days after his or her election, the president of the council shall select the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election, provided that the Boards of Continuing Legal Education, Legal Specialization, the Client Security Fund, and the Interest on Lawyers' Trust Accounts program shall be appointed by the council.

(1) An Executive Committee of not less than five councilors. It shall be the duty of the Executive Committee to perform such duties as the council shall designate, including, however, the auditing of the books and records of the secretary at each regular meeting of the council.

(2) Committee on Legal Ethics and Professional Conduct of not less than three councilors. It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study the Rules of Professional Conduct and make such recommendations from time to time to the council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the Rules of Professional Conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the Rules of Professional Conduct as it may

be requested to perform by the council of the North Carolina State Bar.

(3) Committee on Grievances. The Grievance Committee will consist of not less than 15 members, one of whom will be designated as chairperson. At least one vice-chairperson will be designated. The committee will have as members at least three councilors from each of the judicial divisions of the state. The Grievance Committee will have the powers and duties set forth in Section .0100 of subchapter B of these rules and will report on the status of grievances, investigations, and complaints at regular or special meetings of the council as the Executive Committee may direct.

(4) Committee on Legislation and Law Reform of not less than three councilors. It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the council of the North Carolina State Bar. The Committee on Legislation and Law Reform shall not appear before committees of the legislature, except upon the approval of the council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the council.

(5) Committee on Consumer Protection of not less than three councilors.

(6) Committee on Membership and Fees of not less than three councilors.

(7) Committee on Legal Aid to Indigents and Referrals consisting of not less than five councilors. The committee shall aid and assist the judicial districts of the North Carolina State Bar in establishing plans for the representation of indigents in certain criminal cases and lend assistance and advise in the carrying out of these programs in accordance with the laws of the state of North Carolina and the ethics of the legal profession.

(8) Professional Organizations Committee of not less than five nor more than seven councilors.

(9) Positive Action for Lawyers Committee of not less than seven members, one of whom shall be designated as chairperson and one as vice-chairperson, for the purpose of implementing a program of intervention for lawyers with substance abuse problems which

affects their professional conduct; provided, no member of the Grievance Committee shall be a member of the Positive Action for Lawyers Committee. Such committee's creation shall not be construed so as to hinder, limit or otherwise affect the disciplinary process.

(10) IOLTA Board of Trustees composed of nine members appointed by the Council of the North Carolina State Bar, at least six of whom must be attorneys in good standing and authorized to practice law in North Carolina. This committee shall carry out the provisions of the Plan for Disposition of Funds received by the North Carolina State Bar from Interest on Trust Accounts.

(11) Board of Legal Specialization composed of nine members appointed by the Council of the North Carolina State Bar. Specialization shall be a voluntary endeavor and not mandatory, and shall not be funded by membership fees of the North Carolina State Bar.

(12) Client Security Fund Board of Trustees composed of five members, four of whom must be attorneys in good standing and authorized to practice law in North Carolina, and one who must not be a licensed attorney.

(a) The Client Security Fund Board of Trustees of the North Carolina State Bar is a standing committee of the State Bar Council, established by the council pursuant to an order of the Supreme Court of North Carolina dated August 29, 1984. Its purpose is to reimburse, subject to certain limitations, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina.

(b) The Client Security Fund Board of Trustees shall have the powers and duties set forth in the Rules of the North Carolina State Bar Client Security Fund. The Council of the North Carolina State Bar is authorized, subject to approval of the court, to promulgate further regulations and rules of procedure for the board for the management of its funds and affairs, for the presentation of applications and their processing, for the payment of claims that are allowed, and for the subrogation or assignment of the rights of any reimbursed applicant.

(13) Committee on Professionalism. The Professionalism Committee of the North Carolina State Bar Council is the standing committee of the council established and authorized to consider means and methods of enhancing the degree of professionalism exhibited in the practice and conduct of North Carolina lawyers so as to reduce

the incidence of unethical conduct and promote the interests of the public by ensuring the competence, integrity, and conscientiousness of members of the Bar. "Professionalism" for these purposes means conduct characterized by integrity, adherence to the rules of professional conduct, allegiance to the system of justice and commitment to public service.

(14) Of Counsel Committee. A committee of at least nine members shall design and implement programs to enhance the competence and professionalism of lawyers through voluntary efforts of members of the Bar. These programs shall be designed to orient, counsel, educate, and advise fellow lawyers, educators, students, and persons in ancillary occupations regarding the practice of the profession and work related thereto.

(15) Legal Assistance for Military Personnel (LAMP) Committee. A committee of at least four councilors and nine noncouncilors to serve as a liaison group with lawyers serving military personnel in North Carolina. The purpose is to give improved legal service to military personnel and dependents stationed in North Carolina, to assist armed forces legal assistance officers with matters of North Carolina law, to provide representation for service personnel in the civilian courts of this state, and to provide a referral service for legal officers needing advice and assistance.

(16) Disaster Response Committee. A committee of not less than five councilors and noncouncilors who will implement a Disaster Response Plan adopted by the Council of the North Carolina State Bar. The purpose of the Disaster Response Committee is to provide for standing representatives of the North Carolina State Bar who will implement a disaster response plan and provide publicity and on-site representation to ensure that legal representation is available to victims of disasters and to prevent the improper solicitation of victims by attorneys at law or individuals acting on behalf of attorneys.

(17) Fee Arbitration Committee. A committee of five councilors and four noncouncilors to supervise the administration of a program of fee arbitration which is to be administered by the several judicial district bars of the North Carolina State Bar. At least one councilor shall be appointed from each judicial division. The president shall also appoint a chairperson from among the nine members of the committee.

(18) Board of Continuing Legal Education. A committee of not less than nine members appointed as set forth in the Rules Governing the Administration of the Continuing Legal Education Program.

The Board of Continuing Legal Education shall have the responsibility for operating the continuing legal education program subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

(19) Lawyers' Trust Accounts Committee.

(20) Budget, Finance, and Audit Committee. A committee of not less than three members.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

## Section .0800. Election and Appointment of State Bar Councilors

### .0801 Purpose

The purpose of these rules is to promulgate fair, open, and uniform procedures to elect and appoint North Carolina State Bar councilors in all judicial district bars. These rules should encourage a broader and more diverse participation and representation of all attorneys in the election and appointment of councilors.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0802 Election—When Held; Notice; Nominations

(a) Every judicial district bar, in any calendar year at the end of which the term of one of more of its councilors will expire, shall fill said vacancy or vacancies at an election to be held at a meeting during that year.

(b) The officers of the district bar shall fix the time and place of such election and shall give to each active member (as defined in G.S. 84-16) of the district bar a written notice thereof directed to him or her at his or her address on file with the North Carolina State Bar, which notice shall be placed in the United States mail, postage prepaid, at least 30 days prior to the date of the election.

(c) The district bar shall submit its written notice of the election to the North Carolina State Bar, at least six weeks before the date of the election.

(d) The North Carolina State Bar will, at its expense, mail these notices.

(e) The notice shall state the date, time and place of the election, give the number of vacancies to be filled, name a person or committee named by the local bar to which nominations may be made prior

to the meeting, advise that additional nominations may be made from the floor at the meeting itself, and advise that all elections must be by a majority of the votes cast by those present and voting.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23
Readopted Effective December 8, 1994

### .0803 Same—Voting Procedures

(a) All nominations made either before or at the meeting shall be voted on at the meeting by secret ballot of those present and voting.

(b) Cumulative voting shall not be permitted.

(c) Nominees receiving a majority of the votes cast shall be declared elected.

History Note: Statutory Authority G.S. 84-18; G.S. 84-23
Readopted Effective December 8, 1994

### .0804 Vacancies

The unexpired term of any councilor whose office has become vacant because of resignation, death, or any cause other than the expiration of a term, shall be filled within 90 days of the occurrence of the vacancy by an election conducted in the same manner as above provided.

History Note: Statutory Authority G.S. 84-18; 84-23
Readopted Effective December 8, 1994

### .0805 By-Laws Providing for Geographical Rotation or Division of Representation

Nothing contained herein shall prohibit the district bar of any judicial district from adopting by-laws providing for the geographical rotation or division of its councilor representation.

History Note: Statutory Authority G.S. 84-18; 84-23
Readopted Effective December 8, 1994

## Section .0900. Reserved

## Section .1000. Reserved

## Section .1100. Office of the North Carolina State Bar

### .1101 Office

Until otherwise ordered by the council, the office of the North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .1200. Filing Papers with and Serving the North Carolina State Bar

### .1201 When Papers Are Filed Under These Rules and Regulations

Whenever in these rules and regulation there is a requirement that petitions, notices or other documents be filed with or served on the North Carolina State Bar, or the council, the same shall be filed with or served on the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .1300. Seal

### .1301 Form and Custody of Seal

The North Carolina State Bar shall have a seal round in shape and having the words and figures, "The North Carolina State Bar July 1, 1933," with the word "Seal" in the center. The seal shall remain in the custody of the secretary at the office of the North Carolina State Bar, unless otherwise ordered by the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

# Subchapter B

# DISCIPLINE AND DISABILITY RULES

## Section .0100 Discipline and Disability of Attorneys

### .0101 General Provisions

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts, and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, or when done at other times, or that it has not been made the subject of earlier disciplinary proceedings, will not be a defense to any charge of misconduct by a member.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0102 Procedure for Discipline**

(a) The procedure to discipline members of the bar of this state will be in accordance with the provisions hereinafter set forth.

(b) District bars will not conduct separate proceedings to discipline members of the bar but will assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of its members.

(c) Concurrent Jurisdiction of State Bar and Courts

(1) The Council of the North Carolina State Bar is vested, as an agency of the state, with the control of the discipline, disbarment, and restoration of attorneys practicing law in this state.

(2) The courts of this state have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the court exercising disciplinary authority.

(3) The authority of the North Carolina State Bar and the courts to discipline attorneys is separate and distinct, the North Carolina State Bar having derived its jurisdiction by legislative act and the courts from the inherent power of the courts themselves.

(4) Neither the North Carolina State Bar nor the courts are authorized or empowered to act for or in the name of the other, and the disciplinary action taken by either entity should be clearly delineated as to the source or basis for the action being taken.

(5) It is the position of the North Carolina State Bar that no trial court has the authority to preempt a North Carolina State Bar disciplinary proceeding with a pending civil or criminal court proceeding involving attorney conduct, or to dismiss a disciplinary proceeding pending before the North Carolina State Bar.

(6) Whenever the North Carolina State Bar learns that a court has initiated an inquiry or proceeding regarding alleged improper or unethical conduct of an attorney, the North Carolina State Bar may defer to the court and stay its own proceeding pending completion of the court's inquiry or proceeding. Upon request, the North Carolina State Bar will assist in the court's inquiry or proceeding.

(7) If the North Carolina State Bar finds probable cause and institutes disciplinary proceedings against an attorney for con-

duct which subsequently becomes an issue in a criminal or civil proceeding, the court may, in its discretion, defer its inquiry pending the completion of the North Carolina State Bar's proceedings.

(8) Upon the filing of a complaint by the North Carolina State Bar, the North Carolina State Bar will send a copy of the complaint to the chief resident superior court judge and to all superior court judges regularly assigned to the district in which the attorney maintains his or her law office. The North Carolina State Bar will send a copy of the complaint to the district attorney in the district in which the attorney maintains a law office if the complaint alleges criminal activity by the attorney.

(9) The North Carolina State Bar will encourage judges to contact the North Carolina State Bar to determine the status of any relevant complaints filed against an attorney before the court takes disciplinary action against the attorney.

History Note: Statutory Authority G.S. 84-23; G.S. 84-36
Readopted Effective December 8, 1994

**.0103 Definitions**

Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) Admonition—a written form of discipline imposed in cases in which an attorney has committed a minor violation of the Rules of Professional Conduct.

(2) Appellate division—the appellate division of the general court of justice.

(3) Board—the Board of Continuing Legal Education.

(4) Board of Continuing Legal Education—a standing committee of the council responsible for the administration of a program of mandatory continuing legal education and law practice assistance.

(5) Censure—a written form of discipline more serious than a reprimand issued in cases in which an attorney has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the attorney's license.

(6) Certificate of conviction—a certified copy of any judgment wherein a member of the North Carolina State Bar is convicted of a criminal offense.

(7) Chairperson of the Grievance Committee—councilor appointed to serve as chairperson of the Grievance Committee of the North Carolina State Bar.

(8) Commission—the Disciplinary Hearing Commission of the North Carolina State Bar.

(9) Commission chairperson—the chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar.

(10) Complainant or complaining witness—any person who has complained of the conduct of any member of the North Carolina State Bar to the North Carolina State Bar.

(11) Complaint—a formal pleading filed in the name of the North Carolina State Bar with the commission against a member of the North Carolina State Bar after a finding of probable cause.

(12) Consolidation of cases—a hearing by a hearing committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

(13) Council—the Council of the North Carolina State Bar.

(14) Councilor: a member of the Council of the North Carolina State Bar.

(15) Counsel—the counsel of the North Carolina State Bar appointed by the council.

(16) Court or courts of this state—a court authorized and established by the constitution or laws of the state of North Carolina.

(17) Defendant—a member of the North Carolina State Bar against whom a finding of probable cause has been made.

(18) Disabled or disability—a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney.

(19) Grievance—alleged misconduct.

(20) Grievance Committee—the Grievance Committee of the North Carolina State Bar.

(21) Hearing committee—a hearing committee designated under Rule .0108(a)(2), .0114(d), .0114(x), .0118(b)(2), .0125(a)(6), .0125(b)(7) or .0125(c)(2) of this subchapter.

(22) Illicit drug—any controlled substance as defined in the North Carolina Controlled Substances Act, section 5, chapter 90, of the North Carolina General Statutes, or its successor, which is used or possessed without a prescription or in violation of the laws of this state or the United States.

(23) Incapacity or incapacitated—condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(24) Investigation—the gathering of information with respect to alleged misconduct, alleged disability, or a petition for reinstatement.

(25) Investigator—any person designated to assist in the investigation of alleged misconduct or facts pertinent to a petition for reinstatement.

(26) 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.

(27) Letter of notice—a communication to a respondent setting forth the substance of a grievance.

(28) Letter of warning—written communication from the grievance committee or the commission to an attorney stating that past conduct of the attorney, while not the basis for discipline, is an unintentional, minor, or technical violation of the Rules of Professional Conduct and may be the basis for discipline if continued or repeated.

(29) Member—a member of the North Carolina State Bar.

(30) Office of the Counsel—the office and staff maintained by the counsel of the North Carolina State Bar.

(31) Office of the Secretary—the office and staff maintained by the secretary-treasurer of the North Carolina State Bar.

(32) PALS Committee—Positive Action for Lawyers Committee of the North Carolina State Bar.

(33) Party—after a complaint has been filed, the North Carolina State Bar as plaintiff or the member as defendant.

(34) Plaintiff—after a complaint has been filed, the North Carolina State Bar.

(35) Preliminary hearing—hearing by the Grievance Committee to determine whether probable cause exists.

(36) 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.

(37) Reprimand—a written form of discipline more serious than an admonition issued in cases in which a defendant has violated one or more provisions of the Rules of Professional Conduct and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure.

(38) Respondent—a member of the North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(39) Secretary—the secretary-treasurer of the North Carolina State Bar.

(40) Serious crime—the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

(41) Supreme Court—the Supreme Court of North Carolina.

(42) Will—when used in these rules, means a direction or order which is mandatory or obligatory.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0104 State Bar Council: Powers and Duties in Discipline and Disability Matters

The Council of the North Carolina State Bar will have the power and duty

(1) to supervise and conduct disciplinary proceedings in accordance with the provisions hereinafter set forth;

(2) to appoint members of the commission as provided by statute;

(3) to appoint a counsel. The counsel will serve at the pleasure of the council. The counsel will be a member of the North Carolina State Bar but will not be permitted to engage in the private practice of law;

(4) to order the transfer of a member to disability inactive status when such member has been judicially declared incompetent or has been involuntarily committed to institutional care because of incompetence or disability;

(5) to accept or reject the surrender of the license to practice law of any member of the North Carolina State Bar;

(6) to order the disbarment of any member whose resignation is accepted or to refer the matter of discipline to the commission for hearing and determination;

(7) to review the report of any hearing committee upon a petition for reinstatement of a disbarred attorney and to make final determination as to whether the license will be restored.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0105 Chairperson of the Grievance Committee: Powers and Duties**

(a) The chairperson of the Grievance Committee will have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Grievance Committee that an investigation be initiated;

(3) to recommend to the Grievance Committee that a grievance be dismissed;

(4) to direct a letter of notice to a respondent;

(5) to issue, at the direction and in the name of the Grievance Committee, a letter of caution, letter of warning, an admonition, a reprimand, or a censure to a member;

(6) to notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with Rule .0121 of this subchapter;

(7) to call meetings of the Grievance Committee.

(8) to issue subpoenas in the name of the North Carolina State Bar or direct the secretary to issue such subpoenas;

(9) to administer or direct the administration of oaths or affirmations to witnesses;

(10) to sign complaints and petitions in the name of the North Carolina State Bar;

(11) to determine whether proceedings should be instituted to activate a suspension which has been stayed;

(12) to enter orders of reciprocal discipline in the name of the Grievance Committee;

(13) to direct the counsel to institute proceedings in the appropriate forum to determine if an attorney is in violation of an order of the Grievance Committee, the commission, or the council;

(14) to rule on requests for reconsideration of decisions of the Grievance Committee regarding grievances;

(15) to tax costs of the disciplinary procedures against any defendant against whom the grievance committee imposes discipline, including a minimum administrative cost of $50;

(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to the Board of Continuing Legal Education in accordance with Rule .0112(h) of this subchapter and to so notify the complainant.

(17) to dismiss a grievance upon request of the complainant, where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct and where counsel consents to the dismissal;

(18) to dismiss a grievance where it appears that the grievance has not been filed within the time period set out in Rule .0111(e).

(b) The president, vice-chairperson, or senior council member of the Grievance Committee may perform the functions of the chairperson of the Grievance Committee in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0106 Grievance Committee—Powers and Duties**

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

(2) to hold preliminary hearings, find probable cause and direct that complaints be filed;

(3) to dismiss grievances upon a finding of no probable cause;

(4) to issue a letter of caution to a respondent in cases wherein misconduct is not established but the activities of the respondent are unprofessional or not in accord with accepted professional practice. The letter of caution will recommend that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified;

(5) to issue a letter of warning to a respondent in cases wherein no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct. The letter of warning will advise the attorney that he or she may be subject to discipline if such conduct is continued or repeated. The warning will specify in one or more ways the conduct or practice for which the respondent is being warned. A copy of the letter of warning will be maintained in the office of the counsel for three years subject to the confidentiality provisions of Rule .0129 of this subchapter;

(6) to issue an admonition in cases wherein the defendant has committed a minor violation of the Rules of Professional Conduct;

(7) to issue a reprimand in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct, and has caused harm or potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require a censure;

(8) to issue a censure in cases wherein the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or potential significant harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license;

(9) to direct that a petition be filed seeking a determination whether a member of the North Carolina State Bar is disabled;

(10) to include in any order of admonition, reprimand, or censure a provision requiring the defendant to complete a reasonable amount of continuing legal education in addition to the minimum amount required by the North Carolina Supreme Court;

(11) in its discretion, to refer grievances primarily attributable to unsound law office management to the Board of Continuing Legal Education in accordance with Rule .0112(h) of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0107 Counsel: Powers and Duties**

The counsel will have the power and duty

(1) to investigate all matters involving alleged misconduct whether initiated by the filing of a grievance or otherwise;

(2) to recommend to the chairperson of the Grievance Committee that a matter be dismissed, that a letter of caution, or a letter of warning be issued, or that the grievance committee hold a preliminary hearing;

(3) to prosecute all disciplinary proceedings before the Grievance Committee, hearing committees, and the courts;

(4) to represent the North Carolina State Bar in any trial, hearing, or other proceeding concerning the alleged disability of a member;

(5) to appear on behalf of the North Carolina State Bar at hearings conducted by the Grievance Committee, hearing committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding;

(6) to appear at hearings conducted with respect to petitions for reinstatement of license by suspended or disbarred attorneys or by attorneys transferred to disability inactive status, to cross-examine witnesses testifying in support of such petitions, and to present evidence, if any, in opposition to such petitions;

(7) to employ such deputy counsel, investigators, and other administrative personnel in such numbers as the council may authorize;

(8) to maintain permanent records of all matters processed and of the disposition of such matters;

(9) to perform such other duties as the council may direct;

(10) after a finding of probable cause by the Grievance Committee, to designate the particular violations of the Rules of Professional Conduct to be alleged in a formal complaint filed with the commission;

(11) to file amendments to complaints and petitions arising out of the same transactions or occurrences as the allegations in the original complaints or petitions, in the name of the North Carolina State Bar, with the prior approval of the chairperson of the Grievance Committee;

(12) after a complaint is filed with the commission, to dismiss any or all claims in the complaint or to negotiate and recommend consent orders of discipline to the hearing committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-31
Readopted Effective December 8, 1994

**.0108 Chairperson of the Hearing Commission: Powers and Duties**

(a) The chairperson of the Disciplinary Hearing Commission of the North Carolina State Bar will have the power and duty

(1) to receive complaints alleging misconduct and petitions alleging the disability of a member filed by the counsel; petitions requesting reinstatement of license by members who have been involuntarily transferred to disability inactive status, suspended, or disbarred; motions seeking the activation of suspensions which have been stayed; and proposed consent orders of disbarment;

(2) to assign three members of the commission, consisting of two members of the North Carolina State Bar and one nonlawyer, to hear complaints, petitions, motions, and posthearing motions pursuant to Rule .0114(z)(2) of this subchapter. The chairperson will designate one of the attorney members as chairperson of the hearing committee. No committee member who hears a disciplinary matter may serve on the committee which hears the attorney's reinstatement petition. The chairperson of the commission may designate himself or herself to serve as one of the attorney members of any hearing committee and will be chairperson of any hearing committee on which he or she serves. Posthearing motions filed pursuant to Rule .0114(z)(2) of this subchapter will be considered by the same hearing committee assigned to the original trial proceeding. Hearing committee members who are ineligible or unable to serve for any reason will be replaced with members selected by the commission chairperson;

(3) to set the time and place for the hearing on each complaint or petition;

(4) to subpoena witnesses and compel their attendance and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The chairperson may designate the secretary to issue such subpoenas;

(5) to consolidate, in his or her discretion for hearing, two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint;

(6) to enter orders disbarring members by consent.

(b) The vice-chairperson of the Disciplinary Hearing Commission may perform the function of the chairperson in any matter when the chairperson is absent or disqualified.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0109 Hearing Committee: Powers and Duties**

Hearing committees of the Disciplinary Hearing Commission of the North Carolina State Bar will have the following powers and duties:

(1) to hold hearings on complaints alleging misconduct, or petitions seeking a determination of disability or reinstatement, or motions seeking the activation of suspensions which have been stayed;

(2) to enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the committee will designate;

(3) to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Subpoenas will be issued by the chairperson of the hearing committee in the name of the commission. The chairperson may direct the secretary to issue such subpoenas;

(4) to administer or direct the administration of oaths or affirmations to witnesses at hearings;

(5) to make findings of fact and conclusions of law;

(6) to enter orders dismissing complaints in matters before the committee;

(7) to enter orders of discipline against or letters of warning to defendants in matters before the committee;

(8) to tax costs of the disciplinary proceedings against any defendant against whom discipline is imposed, provided, however, that such costs will not include the compensation of any member of the council, committees, or agencies of the North Carolina State Bar;

(9) to enter orders transferring a member to disability inactive status;

(10) to report to the council its findings of fact and recommendations after hearings on petitions for reinstatement of disbarred attorneys;

(11) to grant or deny petitions of attorneys seeking transfer from disability inactive status to active status;

(12) to enter orders reinstating suspended attorneys or denying reinstatement. An order denying reinstatement may include additional sanctions in the event violations of the petitioner's order of suspension are found;

(13) to enter orders activating suspensions which have been stayed or continuing the stays of such suspensions.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28; G.S. 84-28.1
Readopted Effective December 8, 1994

**.0110 Secretary: Powers and Duties in Discipline and Disability Matters**

The secretary will have the following powers and duties in regard to discipline and disability procedures:

(1) to receive grievances for transmittal to the counsel, to receive complaints and petitions for transmittal to the commission chairperson, and to receive affidavits of surrender of license for transmittal to the council;

(2) to issue summonses and subpoenas when so directed by the president, the chairperson of the Grievance Committee, the chairperson of the commission, or the chairperson of any hearing committee;

(3) to maintain a record and file of all grievances not dismissed by the Grievance Committee;

(4) to perform all necessary ministerial acts normally performed by the clerk of the superior court in complaints filed before the commission;

(5) to enter orders of reinstatement where petitions for reinstatement of suspended attorneys are unopposed by the counsel;

(6) to dismiss reinstatement petitions based on the petitioner's failure to comply with the rules governing the provision and transmittal of the record of reinstatement proceedings;

(7) to determine the amount of costs assessed in disciplinary proceedings by the commission.

History Note—Statutory Authority G.S. 84-22; G.S. 84-23;
G.S. 84-32(c)
Readopted Effective December 8, 1994

**.0111 Grievances—Form and Filing**

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms will be available from the counsel, secretary, and the offices of the clerks of court in this state. Grievances reduced to writing on such standard forms will be transmitted by the complainant to the secretary.

(b) Upon the direction of the council or the Grievance Committee, the counsel will investigate such conduct of any member as may be specified by the council or Grievance Committee.

(c) The counsel may investigate any matter coming to the attention of the counsel involving alleged misconduct of a member upon receiving authorization from the chairperson of the Grievance Committee. If the counsel receives information that a member has used or is using illicit drugs, the counsel will follow the provisions of Rule .0130 of this subchapter.

(d) The North Carolina State Bar may keep confidential the identity of an attorney or judge who reports alleged misconduct of another attorney pursuant to Rule 1.3 of the Rules of Professional Conduct and who requests to remain anonymous. Notwithstanding the foregoing, the North Carolina State Bar will reveal the identity of a reporting attorney or judge to the respondent attorney where such disclosure is required by law, or by considerations of due process or

where identification of the reporting attorney or judge is essential to preparation of the attorney's defense to the grievance and/or a formal disciplinary complaint.

(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a District Bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which has been prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina Bar Counsel, whichever is later.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0112 Investigations: Initial Determination**

(a) Subject to the policy supervision of the council and the control of the chairperson of the Grievance Committee, the counsel, or other personnel under the authority of the counsel, will investigate the grievance and submit to the chairperson of the Grievance Committee a report detailing the findings of the investigation.

(b) As soon as practicable after the receipt of the initial or any interim report of the counsel concerning any grievance, the chairperson of the Grievance Committee may

(1) treat the report as a final report;

(2) direct the counsel to conduct further investigation, including contacting the respondent in writing or otherwise; or

(3) send a letter of notice to the respondent.

(c) If a letter of notice is sent to the respondent, it will be by certified mail and will direct that a response be made within 15 days of receipt of the letter of notice. Such response will be a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

(d) The counsel may provide a copy of the respondent's response(s) to the letter of notice to the complaining party unless the respondent objects thereto in writing.

(e) After a response to a letter of notice is received, the counsel may conduct further investigation or terminate the investigation, subject to the control of the chairperson of the Grievance Committee.

(f) For reasonable cause, the chairperson of the Grievance Committee may issue subpoenas to compel the attendance of witnesses, including the respondent, for examination concerning the grievance and may compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena will be issued by the chairperson of the Grievance Committee, or by the secretary at the direction of the chairperson. The counsel, deputy counsel, investigator, or any members of the Grievance Committee designated by the chairperson may examine any such witness under oath or otherwise.

(g) As soon as practicable after the receipt of the final report of the counsel or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance.

(h) The investigation into the conduct of an attorney will not be abated by the failure of the complainant to sign a grievance, settlement or compromise with the complainant, or the payment of restitution to the complainant. The chair of the Grievance Committee may dismiss a grievance upon request of the complainant and with consent of counsel where it appears that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct.

(i) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to the Board of Continuing Legal Education. The respondent will then be required to complete, under the supervision of the board, a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. Upon the respondent's successful completion of the prescribed training, the board will report the same to the chairperson of the Grievance Committee, who will order the dismissal of the grievance. If the respondent fails to cooperate with the board or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

(j) No reference of a case pursuant to the procedure set forth in Rule .0112(h) above can be made unless the respondent expressly waives any right that he or she might otherwise have to confidential communications with persons acting under the supervision of the Board of Continuing Legal Education in regard to the prescribed course of training.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0113 Proceedings Before the Grievance Committee**

(a) The Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee.

(b) The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) The chairperson will keep a record of the grievance committee's determination concerning each grievance and file the record with the secretary.

(d) The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties. Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any

business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the defendant. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another

grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) A copy of the letter of warning will be served upon the respondent as provided in Rule 4 of the North Carolina Rules of Civil Procedure. Within 15 days after service the respondent may refuse the letter of warning and request a hearing before the commission to determine whether a violation of the Rules of Professional Conduct has occurred. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If a refusal and request are not served within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent for a hearing pursuant to Rule .0114 of this subchapter.

(k) Admonitions and Reprimands

(1) 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 an admonition or reprimand to the defendant, depending upon the seriousness of the violation of the Rules of Professional Conduct. A record of such admonition or reprimand will be maintained in the office of the secretary.

(2) A copy of the admonition or reprimand will be served upon the defendant as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(3) Within 15 days after service the defendant may refuse the admonition or reprimand and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition or reprimand is refused.

(4) In cases in which the defendant refuses an admonition or reprimand, the counsel will prepare and file a complaint against the defendant pursuant to Rule .0114 of this subchapter. If a refusal and request are not served upon the secretary within 15

days after service upon the defendant of the admonition or reprimand, the admonition or reprimand will be deemed accepted by the defendant. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(l) Censures

(1) If probable cause is found and the Grievance Committee determines that the defendant has violated one or more provisions of the Rules of Professional Conduct and has caused significant harm or significant potential harm to a client, the administration of justice, the profession, or a member of the public, but the misconduct does not require suspension of the defendant's license, the committee will issue a notice of proposed censure and a proposed censure to the defendant.

(2) A copy of the notice and the proposed censure will be served upon the defendant as provided in Rule 4 of the North Carolina Rules of Civil Procedure. The defendant must be advised that he or she may accept the censure within 15 days after service upon him or her or a formal complaint will be filed before the commission.

(3) The defendant's acceptance must be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. Once the censure is accepted by the defendant, the discipline becomes public and must be filed as provided by Rule .0123(a)(3) of this subchapter.

(4) If the defendant does not accept the censure, the counsel will file a complaint against the defendant pursuant to Rule .0114 of this subchapter.

(m) Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994

**.0114 Formal Hearing**

(a) Complaints will be filed with the secretary. The secretary will cause a summons and a copy of the complaint to be served upon the defendant and thereafter a copy of the complaint will be delivered to

the chairperson of the commission, informing the chairperson of the date service on the defendant was effected.

(b) Service of complaints and other documents or papers will be accomplished as set forth in Rule 4 of the North Carolina Rules of Civil Procedure.

(c) Complaints in disciplinary actions will allege the charges with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the complaint.

(d) Within 14 days of the receipt of return of service of a complaint by the secretary, the chairperson of the commission will designate a hearing committee from among the commission members. The chairperson will notify the counsel and the defendant of the composition of the hearing committee. Such notice will also contain the time and place determined by the chairperson for the hearing to commence. The commencement of the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the complaint upon the defendant, unless one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint. When one or more subsequent complaints have been served on the defendant within 90 days from the date of service of the first or a preceding complaint, the chairperson of the commission may consolidate the cases for hearing, and the hearing will be initially scheduled not less than 60 nor more than 90 days from the date of service of the last complaint upon the defendant.

(e) Within 20 days after the service of the complaint, unless further time is allowed by the chairperson of the hearing committee upon good cause shown, the defendant will file an answer to the complaint with the secretary and will serve a copy on the counsel.

(f) Failure to file an answer admitting, denying or explaining the complaint or asserting the grounds for failing to do so, within the time limited or extended, will be grounds for entry of the defendant's default and in such case the allegations contained in the complaint will be deemed admitted. The secretary will enter the defendant's default when the fact of default is made to appear by motion of the counsel or otherwise. The counsel may thereupon apply to the hearing committee for a default order imposing discipline, and the hearing committee will thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The hearing committee may, in its discretion, hear such additional evidence as it deems necessary prior to

entering the order of discipline. For good cause shown, the hearing committee may set aside the secretary's entry of default. After an order imposing discipline has been entered by the hearing committee upon the defendant's default, the hearing committee may set aside the order in accordance with Rule 60(b) of the North Carolina Rules of Civil Procedure.

(g) Discovery will be available to the parties in accordance with the North Carolina Rules of Civil Procedure. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended for good cause shown by the chairperson of the hearing committee. The chairperson of the hearing committee may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(h) The parties may meet by mutual consent prior to the hearing on the complaint to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing committee. If the committee rejects a proposed settlement, another hearing committee must be empaneled to try the case, unless all parties consent to proceed with the original committee. The parties may submit a proposed settlement to a second hearing committee, but the parties shall not have the right to request a third hearing committee if the settlement order is rejected by the second hearing committee. The second hearing committee shall either accept the settlement proposal or hear the disciplinary matter.

(i) At the discretion of the chairperson of the hearing committee, a conference may be ordered before the date set for commencement of the hearing, and upon five days' notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the committee designated by its chairperson. At any conference which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

(1) the simplification of the issues;

(2) the exchange of exhibits proposed to be offered in evidence;

(3) the stipulation of facts not remaining in dispute or the authenticity of documents;

(4) the limitation of the number of witnesses;

(5) the discovery or production of data;

(6) such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(j) The chairperson of the hearing committee, without consulting the other committee members, may hear and dispose of all pretrial motions except motions the granting of which would result in dismissal of the charges or final judgment for either party. All motions which could result in dismissal of the charges or final judgment for either party will be decided by a majority of the members of the hearing committee. Any pretrial motion may be decided on the basis of the parties' written submissions. Oral argument may be allowed in the discretion of the chairperson of the hearing committee.

(k) The initial hearing date as set by the chairperson in accordance with Rule .0114(d) above may be reset by the chairperson, and said initial hearing or reset hearing may be continued by the chairperson of the hearing committee for good cause shown.

(l) After a hearing has commenced, no continuances other than an adjournment from day to day will be granted, except to await the filing of a controlling decision of an appellate court, by consent of all parties, or where extreme hardship would result in the absence of a continuance.

(m) The defendant will appear in person before the hearing committee at the time and place named by the chairperson. The hearing will be open to the public except that for good cause shown the chairperson of the hearing committee may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing. No hearing will be closed to the public over the objection of the defendant. The defendant will, except as otherwise provided by law, be competent and compellable to give evidence for either of the parties. The defendant may be represented by counsel, who will enter an appearance.

(n) Pleadings and proceedings before a hearing committee will conform as nearly as practicable with requirements of the North Carolina Rules of Civil Procedure and for trials of nonjury civil causes in the superior courts except as otherwise provided herein.

(o) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing

by the secretary within the time limits, if any, for such filing. The date of receipt by the secretary, and not the date of deposit in the mails, is determinative.

(p) All papers presented to the commission for filing will be on letter size paper (8½ x 11 inches) with the exception of exhibits. The secretary will require a party to refile any paper that does not conform to this size.

(q) When a defendant appears in his or her own behalf in a proceeding, the defendant will file with the secretary, with proof of delivery of a copy to the counsel, an address at which any notice or other written communication required to be served upon the defendant may be sent, if such address differs from that last reported to the secretary by the defendant.

(r) When a defendant is represented by counsel in a proceeding, counsel will file with the secretary, with proof of delivery of a copy to the counsel, a written notice of such appearance which will state his or her name, address and telephone number, the name and address of the defendant on whose behalf he or she appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the counsel of record for such defendant at the stated address of the counsel in lieu of transmission to the defendant.

(s) The hearing committee will have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. Such process will be issued in the name of the committee by its chairperson, or the chairperson may designate the secretary of the North Carolina State Bar to issue such process. Both parties have the right to invoke the powers of the committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(t) In any hearing admissibility of evidence will be governed by the rules of evidence applicable in the superior court of the state at the time of the hearing. The chairperson of the hearing committee will rule on the admissibility of evidence, subject to the right of any member of the hearing committee to question the ruling. If a member of the hearing committee challenges a ruling relating to admissibility of evidence, the question will be decided by majority vote of the hearing committee.

(u) If the hearing committee finds that the charges of misconduct are not established by clear, cogent, and convincing evidence, it will enter an order dismissing the complaint. If the hearing committee finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing committee will enter an order of discipline. In either instance, the committee will file an order which will include the committee's findings of fact and conclusions of law.

(v) The secretary will ensure that a complete record is made of the evidence received during the course of all hearings before the commission as provided by G.S. 7A-95 for trials in the superior court. The secretary will preserve the record and the pleadings, exhibits, and briefs of the parties.

(w) If the charges of misconduct are established, the hearing committee will then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this state or any other jurisdiction and any evidence in aggravation or mitigation of the offense.

(1) The hearing committee may consider aggravating factors in imposing discipline in any disciplinary case, including the following factors:

(A) prior disciplinary offenses;

(B) dishonest or selfish motive;

(C) a pattern of misconduct;

(D) multiple offenses;

(E) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary agency;

(F) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(G) refusal to acknowledge wrongful nature of conduct;

(H) vulnerability of victim;

(I) substantial experience in the practice of law;

(J) indifference to making restitution;

(K) issuance of a letter of warning to the defendant within the three years immediately preceding the filing of the complaint.

(2) The hearing committee may consider mitigating factors in imposing discipline in any disciplinary case, including the following factors:

(A) absence of a prior disciplinary record;

(B) absence of a dishonest or selfish motive;

(C) personal or emotional problems;

(D) timely good faith efforts to make restitution or to rectify consequences of misconduct;

(E) full and free disclosure to the hearing committee or cooperative attitude toward proceedings;

(F) inexperience in the practice of law;

(G) character or reputation;

(H) physical or mental disability or impairment;

(I) delay in disciplinary proceedings through no fault of the defendant attorney;

(J) interim rehabilitation;

(K) imposition of other penalties or sanctions;

(L) remorse;

(M) remoteness of prior offenses.

(x) In any case in which a period of suspension is stayed upon compliance by the defendant with conditions, the commission will retain jurisdiction of the matter until all conditions are satisfied. If, during the period the stay is in effect, the counsel receives information tending to show that a condition has been violated, the counsel may, with the consent of the chairperson of the Grievance Committee, file a motion in the cause with the secretary specifying the violation and seeking an order requiring the defendant to show cause why the stay should not be lifted and the suspension activated for violation of the condition. The counsel will also serve a copy of any such motion upon the defendant. The secretary will promptly transmit the motion to the chairperson of the commission who, if he or she enters an order to show cause, will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, appointing the members of the hearing committee that originally heard the matter wherever practicable. The chairperson of the commission will also schedule a time and a place for a hearing and notify the counsel and the defendant of the composition of the hearing committee and the time and place for the hearing. After such a hearing, the hearing committee may enter an order lifting the stay and activating the suspension, or

any portion thereof, and taxing the defendant with the costs, if it finds that the North Carolina State Bar has proven, by the greater weight of the evidence, that the defendant has violated a condition. If the hearing committee finds that the North Carolina State Bar has not carried its burden, then it will enter an order continuing the stay. In any event, the hearing committee will include in its order findings of fact and conclusions of law in support of its decision.

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served by certified mail, return receipt requested. If the defendant's copy is returned as unclaimed or undeliverable, then service will be as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(z) Posttrial Motions

(1) Consent Orders After Trial—At any time after a disciplinary hearing and prior to the execution of the committee's final order pursuant to Rule .0114(y) above, the committee may, with the consent of the parties, amend its decision regarding the findings of fact, conclusions of law, or the disciplinary sanction imposed.

(2) New Trials and Amendment of Judgments

(A) As provided in Rule .0114(z)(2)(B) below, following a disciplinary hearing before the commission, either party may request a new trial or amendment of the hearing committee's final order, based on any of the grounds set out in Rule 59 of the North Carolina Rules of Civil Procedure.

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order of discipline upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

(C) The opposing party will have 20 days from service of the motion to file a written response, any reply affidavits, and a memorandum with supporting authorities.

(D) The hearing committee may rule on the motion based on the parties' written submissions or may, in its discretion, permit the parties to present oral argument.

(3) Relief from Judgment or Order

(A) Following a disciplinary proceeding before the commission, either party may file a motion for relief from the final judgment or order, based on any of the grounds set out in Rule 60 of the North Carolina Rules of Civil Procedure.

(B) Motions made under Rule .0114(z)(2)(B) above will be made no later than one year after the effective date of the order from which relief is sought. Motions pursuant to this section will be heard and decided in the same manner as motions submitted pursuant to Rule .0114(z)(2) above.

(4) Effect of Filing Motion—The filing of a motion under Rule .0114(z)(2) above or Rule .0114(z)(3) above will not automatically stay or otherwise affect the effective date of an order of the commission.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28;
G.S. 84-28.1; G.S. 84-29; G.S. 84-30; G.S. 84-32(a)
Readopted Effective December 1994

**.0115 Effect of a Finding of Guilt in Any Criminal Case**

(a) Any member convicted of or sentenced for the commission of a serious crime in any state or federal court, whether such a conviction or judgment results from a plea of guilty, no contest, or nolo contendere or from a verdict after trial, will, upon the conviction or judgment becoming final by affirmation on appeal or failure to perfect an appeal within the time allowed, be suspended from the practice of law as set out in Rule .0115(d) below.

(b) A certificate of the conviction of an attorney for any crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court will be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(c) Upon the receipt of a certificate of the conviction of a member of a serious crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, will authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. No hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(d) Upon the receipt of a certificate of conviction of a member of a serious crime or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the commission chairperson will enter an order suspending the member pending the disposition of the disciplinary proceeding against the member before the commission. The provisions of Rule .0124(c) of this subchapter will apply to the suspension.

(e) Upon the receipt of a certificate of conviction of a member or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court for a crime not constituting a serious crime, the Grievance Committee will take whatever action, including the filing of a complaint, it may deem appropriate.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994

**.0116 Reciprocal Discipline**

(a) All members who have been disciplined in any state or federal court for professional misconduct will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline.

(b) Except as provided in subsection (c) below, reciprocal discipline will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within 30 days from service of the notice of any claim by the member that the imposition of the identical discipline in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure.

(2) In the event the discipline imposed in the other jurisdiction has been stayed, any reciprocal discipline imposed in this state will be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline unless the member demonstrates

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(B) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(C) that the imposition of the same discipline would result in grave injustice.

(4) Where the Grievance Committee determines that any of the elements listed in Rule .0116(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) In the event the elements listed in Rule .0116(b)(3) above are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct will establish the misconduct for purposes of reciprocal discipline.

(c) Reciprocal discipline with certain federal courts will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined in a United States District Court in North Carolina, in the United States Fourth Circuit Court of Appeals, or in the United States Supreme Court, the chairperson of the Grievance Committee will forthwith issue a notice directed to the member. The notice will contain a copy of the order from the court and an order directing the member to inform the committee within 10 days from service of the notice whether the member will accept reciprocal discipline which is substantially similar to that imposed by the federal court. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure. The member will have 30 days from service of the notice to file a written challenge with the committee on the grounds that the imposition of discipline by the North Carolina State Bar would be unwarranted because the facts found in the federal disciplinary proceeding do not involve conduct which violates the North Carolina Rules of Professional Conduct. If the member notifies the North Carolina State Bar within 10 days after service of the notice that he or she accepts reciprocal discipline which is substantially similar to that imposed by the federal court, substantially similar discipline will be ordered as provided in Rule

.0116(c)(2) below and will run concurrently with the discipline ordered by the federal court.

(2) If the member notifies the North Carolina State Bar of his or her acceptance of reciprocal discipline as provided in Rule .0116(c)(1) above the chairperson of the Grievance Committee will execute an order of discipline which is of a type permitted by these rules and which is substantially similar to that ordered by the federal court and will cause said order to be served upon the member.

(3) If the discipline imposed by the federal court has been stayed, any reciprocal discipline imposed by the North Carolina State Bar will be deferred until such stay expires.

(4) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(c)(1) above, the chairperson of the Grievance Committee will enter an order of reciprocal discipline imposing substantially similar discipline of a type permitted by these rules to be effective throughout North Carolina unless the member requests a hearing before the Grievance Committee and at such hearing

(A) the member demonstrates that the facts found in the federal disciplinary proceeding did not involve conduct which violates the North Carolina Rules of Professional Conduct, in which event the case will be dismissed; or

(B) the Grievance Committee determines that the discipline imposed by the federal court is not of a type described in Rule .0123(a) of this subchapter and, therefore, cannot be imposed by the North Carolina State Bar, in which event the Grievance Committee may dismiss the case or direct that a complaint be filed in the commission.

(5) All findings of fact in the federal disciplinary proceeding will be binding upon the North Carolina State Bar and the member.

(6) Discipline imposed by any other federal court will be administered as provided in Rule .0116(b) above.

(d) If the member fails to accept reciprocal discipline as provided in Rule .0116(c) above or if a hearing is held before the Grievance Committee under either Rule .0116(b) above or Rule .0116(c) above and the committee orders the imposition of reciprocal discipline, such discipline will run from the date of service of the final order of the chairperson of the Grievance Committee unless the committee expressly provides otherwise.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994

**.0117 Surrender of License While Under Investigation**

(a) A member who is the subject of an investigation into allegations of misconduct, but against whom no formal complaint has been filed before the commission may tender his or her license to practice by delivering to the secretary for transmittal to the council an affidavit stating that the member desires to resign and that

(1) the resignation is freely and voluntarily rendered, is not the result of coercion or duress, and the member is fully aware of the implications of submitting the resignation;

(2) the member is aware that there is presently pending an investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which will specifically be set forth;

(3) the member acknowledges that the material facts upon which the grievance is predicated are true;

(4) the resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation, the member could not successfully defend against them.

(b) The council may accept a member's resignation only if the affidavit required under Rule .0117(a) above satisfies the requirements stated therein and the member has provided to the North Carolina State Bar all documents and financial records required to be kept pursuant to the Rules of Professional Conduct and requested by the counsel. If the council accepts a member's resignation, it will enter an order disbarring the member. The order of disbarment is effective on the date the council accepts the member's resignation.

(c) The order disbarring the member and the affidavit required under Rule .0117(a) above are matters of public record.

(d) If a defendant against whom a formal complaint has been filed wishes to consent to disbarment, the defendant may do so by filing an affidavit with the chairperson of the commission. If the chairperson determines that the affidavit meets the requirements set out above, the chairperson will accept the surrender and issue an order of disbarment. The order of disbarment becomes effective 30 days after service of the order upon the defendant. If the affidavit does not meet the requirements set out above, the consent to disbarment will

not be accepted and the disciplinary complaint will be heard pursuant to Rule .0114 of this subchapter.

(e) After a member tenders his or her license or consents to disbarment under this section the member may not undertake any new legal matters. The member may complete any legal matters which were pending on the date of the tender of the affidavit or consent to disbarment which can be completed within 30 days. The member has 30 days from the date on which the member tenders the affidavit of surrender or consent to disbarment in which to comply with all of the duties set out in Rule .0124 of this subchapter.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28;
G.S. 84-32(b)
Readopted Effective December 8, 1994

**.0118 Disability Hearings**

(a) Disability Proceedings Where Member Involuntarily Committed or Judicially Declared Incompetent

Where a member of the North Carolina State Bar has been judicially declared incapacitated or mentally ill under the provisions of Chapter 122C of the General Statutes or similar laws of any jurisdiction, the secretary, upon proper proof of the fact, will enter an order transferring the member to disability inactive status effective immediately and for an indefinite period until further order of the commission. A copy of the order will be served upon the member, the member's guardian, or the director of the institution to which the member has been committed.

(b) Disability Proceedings Initiated by the North Carolina State Bar

(1) When the North Carolina State Bar obtains evidence that a member has become disabled, the Grievance Committee will conduct a hearing in a manner that will conform as nearly as is possible to the procedures set forth in Rule .0113 of this subchapter. The Grievance Committee will determine whether there is probable cause to believe that the member is disabled within the meaning of Rule .0103(18) of this subchapter. If the committee finds probable cause, a petition alleging disability will be filed in the name of the North Carolina State Bar by the counsel and signed by the chairperson of the Grievance Committee.

(2) Whenever the counsel files a petition alleging the disability of a member, the chairperson of the commission will appoint a

hearing committee as provided in Rule .0108(a)(2) of this subchapter to determine whether such member is disabled. The hearing committee will conduct a hearing on the petition in the same manner as a disciplinary proceeding under Rule .0114 of this subchapter. The hearing will be open to the public.

(3) The hearing committee may require the member to undergo psychiatric, physical, or other medical examination or testing by qualified medical experts selected by the hearing committee.

(4) In any proceeding seeking a transfer to disability inactive status under this rule, the North Carolina State Bar will have the burden of proving by clear, cogent, and convincing evidence that the member is disabled within the meaning of Rule .0103(18) of this subchapter.

(5) The hearing committee may appoint an attorney to represent the member in a disability proceeding, if the hearing committee concludes that justice so requires.

(6) If the hearing committee finds that the member is disabled, the committee will enter an order transferring the member to disability inactive status. The order of transfer will become effective immediately. A copy of the order will be served upon the member or the member's guardian or attorney.

(c) Disability Proceedings Where Defendant Alleges Disability in Disciplinary Proceeding

(1) If, during the course of a disciplinary proceeding, the defendant contends that he or she is disabled within the meaning of Rule .0103(18) of this subchapter, the disciplinary proceeding will be stayed pending a determination by the hearing committee whether such disability exists. The defendant will be immediately transferred to disability inactive status pending the conclusion of the disability hearing.

(2) The hearing committee scheduled to hear the disciplinary charges will hold the disability proceeding. The hearing will be conducted pursuant to the procedures outlined in Rule .0118(b)(3) and (5)-(6) above.

(3) The defendant will have the burden of proving by clear, cogent, and convincing evidence that he or she is disabled within the meaning of Rule .0103(18) of this subchapter. If the hearing committee concludes that the defendant is disabled, the disciplinary proceedings will be stayed as long as the defendant remains in disability inactive status.

(4) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(d) Disability Hearings Initiated by a Hearing Committee

(1) If, during the pendency of a disciplinary proceeding a majority of the members of the hearing committee find reason to believe that the defendant is disabled, the committee will enter an order staying the disciplinary proceeding until the question of disability can be determined by the committee in accordance with the procedures set out in Rules .0118(b)(2)-(6) above. The State Bar will have the burden of proving by clear, cogent, and convincing evidence that the defendant is disabled within the meaning of Rule .0103(18) of this subchapter.

(2) If the hearing committee determines that the defendant is not disabled, the chairperson of the hearing committee will set a date for resumption of the disciplinary proceeding.

(3) If the hearing committee determines that the defendant is disabled, the disciplinary proceeding will be stayed as long as the defendant remains in disability inactive status. If the defendant is returned to active status by the commission, the disciplinary proceeding will be rescheduled by the chairperson of the commission.

(e) Fees and Costs

The hearing committee may direct the member to pay the costs of the disability proceeding, including the cost of any medical examination and the fees of any attorney appointed to represent the member.

(f) Preservation of Evidence

In any case in which disciplinary proceedings against a defendant have been stayed by reason of the defendant's disability, counsel may continue to investigate allegations of misconduct and may seek orders from the chairperson of the commission to preserve evidence of any alleged professional misconduct by the disabled defendant, including orders which permit the taking of depositions. The chairperson may order appointment of counsel to represent the disabled defendant when necessary to protect the interests of the disabled defendant.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(g);
G.S. 84-28.1; G.S. 84-29; G.S. 84-30
Readopted Effective December 8, 1994

### .0119 Enforcement of Powers

In addition to the other powers contained herein, in proceedings before any committee or subcommittee of the Grievance Committee or the commission, if any person refuses to respond to a subpoena, refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, refuses to obey any order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing, the counsel or secretary may apply to the appropriate court for an order directing that person to comply by taking the requisite action.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)
Readopted Effective December 1994

### .0120 Notice to Member of Action and Dismissal

In every disciplinary case wherein the respondent has received a letter of notice and the grievance has been dismissed, the respondent will be notified of the dismissal by a letter by the chairperson of the Grievance Committee. The chairperson will have discretion to give similar notice to the respondent in cases wherein a letter of notice has not been issued but the chairperson deems such notice to be appropriate.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0121 Notice to Complainant

(a) If the Grievance Committee finds probable cause and imposes discipline, the chairperson of the Grievance Committee will notify the complainant of the action of the committee.

(b) If the Grievance Committee finds probable cause and refers the matter to the commission, the chairperson of the Grievance Committee will advise the complainant that the grievance has been received and considered and has been referred to the commission for hearing.

(c) If final action on a grievance is taken by the grievance committee in the form of a letter of caution or letter of warning or is dismissed, the chairperson of the Grievance Committee will advise the complainant that following its deliberations, the committee did not find probable cause to justify imposing discipline and dismissed the grievance.

(d) If a grievance is referred to the Board of Continuing Legal Education, the chairperson of the Grievance Committee will advise

the complainant of that fact and the reason for the referral. If the respondent successfully completes the prescribed training and the grievance is dismissed, the chairperson of the Grievance Committee will advise the complainant. If the respondent does not successfully complete the prescribed course of training, the chairperson of the Grievance Committee will advise the complainant that investigation of the original grievance has resumed.

History Note: Statutory Authority G.S. 84-23;
Readopted Effective December 8, 1994

### .0122 Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies, or Is Transferred to Disability Inactive Status

(a) Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner or other member of the North Carolina State Bar capable of protecting the interests of the attorney's clients is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

(b) Any member so appointed will not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom such files relate except as necessary to carry out the order of the court which appointed the attorney to make such inventory.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(j)
Readopted Effective December 8, 1994

### .0123 Imposition of Discipline; Findings of Incapacity or Disability; Notice to Courts

(a) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions will be taken:

(1) Admonition—An admonition will be prepared by the chairperson of the Grievance Committee or the chairperson of the hearing committee depending upon the agency ordering the admonition. The admonition will be served upon the defendant. The admonition will not be recorded in the judgment docket of

the North Carolina State Bar. Where the admonition is imposed by the Grievance Committee, the complainant will be notified that the defendant has been admonished, but will not be entitled to a copy of the admonition. An order of admonition imposed by the commission will be a public document.

(2) Reprimand—The chairperson of the Grievance Committee or chairperson of the hearing committee depending upon the body ordering the discipline, will file an order of reprimand with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant.

(3) Censure, suspension, or disbarment—The chairperson of the hearing committee will file the order of censure, suspension, or disbarment with the secretary, who will record the order on the judgment docket of the North Carolina State Bar and will forward a copy to the complainant. The secretary will also cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the defendant's last known address. A copy of the order of censure, suspension, or disbarment will also be sent to the clerk of the superior court in any county where the defendant maintains an office, to the North Carolina Court of Appeals, to the North Carolina Supreme Court, to the United States District Courts in North Carolina, to the Fourth Circuit Court of Appeals, and to the United States Supreme Court. Orders of censure imposed by the Grievance Committee will be filed by the committee chairperson with the secretary. Notice of the censure will be given to the complainant and to the courts in the same manner as orders of censure imposed by the commission.

(b) Upon the final determination of incapacity or disability, the chairperson of the hearing committee or the secretary, depending upon the agency entering the order, will file with the secretary a copy of the order transferring the member to disability inactive status. The secretary will cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county of the disabled member's last address on file with the North Carolina State Bar and will forward a copy of the order to the courts referred to in Rule .0123(a)(3) above.

History Note: Statutory Authority G.S. 84-23; G.S. 84-32(a)
Readopted Effective December 8, 1994

### .0124 Obligations of Disbarred or Suspended Attorneys

(a) A disbarred or suspended member of the North Carolina State Bar will promptly notify by certified mail, return receipt requested, all clients being represented in pending matters of the disbarment or suspension, the reasons for the disbarment or suspension, and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and will advise such clients to seek legal advice elsewhere. The disbarred or suspended attorney will take reasonable steps to avoid foreseeable prejudice to the rights of his or her clients, including promptly delivering all file materials and property to which the clients are entitled to the clients or the clients' substituted attorney. No disbarred or suspended attorney will transfer active client files containing confidential information or property to another attorney, nor may another attorney receive such files or property, without prior written permission from the client.

(b) The disbarred or suspended member will withdraw from all pending administrative or litigation matters before the effective date of the suspension or disbarment and will follow all applicable laws and disciplinary rules regarding the manner of withdrawal.

(c) In cases not governed by Rule .0117 of this subchapter, orders imposing suspension or disbarment will be effective 30 days after being served upon the defendant. In such cases, after entry of the disbarment or suspension order, the disbarred or suspended attorney will not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, between the entry date of the order and its effective date, the member may complete, on behalf of any client, matters which were pending on the entry date and which can be completed before the effective date of the order.

(d) Within 10 days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney will file with the secretary an affidavit showing that he or she has fully complied with the provisions of the order, with the provisions of this section, and with the provisions of all other state, federal, and administrative jurisdictions to which he or she is admitted to practice. The affidavit will also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(e) The disbarred or suspended member will keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section

and with the disbarment or suspension order will be available. Proof of compliance with this section will be a condition precedent to consideration of any petition for reinstatement.

(f) A suspended or disbarred attorney who fails to comply with Rules .0124(a)-(e) above may be subject to an action for contempt instituted by the appropriate authority. Failure to comply with the requirements of Rule .0124(a) above will be grounds for appointment of counsel pursuant to Rule .0122 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0125 Reinstatement**

(a) After disbarment

(1) No person who has been disbarred may have his or her license restored but upon order of the council after the filing of a verified petition for reinstatement and the holding of a hearing before a hearing committee as provided herein. No such hearing will commence until security for the costs of such hearing has been deposited with the secretary in an amount not to exceed $500.00.

(2) No disbarred attorney may petition for reinstatement until the expiration of at least five years from the effective date of the disbarment.

(3) The petitioner will have the burden of proving by clear, cogent, and convincing evidence that

(A) not more than six months or less than 60 days before filing the petition for reinstatement, a notice of intent to seek reinstatement has been published by the petitioner in an official publication of the North Carolina State Bar. The notice will inform members of the Bar about the application for reinstatement and will request that all interested individuals file notice of their opposition or concurrence with the secretary within 60 days after the date of publication;

(B) not more than six months or less than 60 days before filing the petition for reinstatement, the petitioner has notified the complainant(s) in the disciplinary proceeding which led to the lawyer's disbarment of the notice of intent to seek reinstatement. The notice will specify that each complainant has 60 days from the date of publication in which to raise objections or support the lawyer's petition;

(C) the petitioner has reformed and presently possesses the moral qualifications required for admission to practice law in this state taking into account the gravity of the misconduct which resulted in the order of disbarment;

(D) permitting the petitioner to resume the practice of law within the state will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest, taking into account the gravity of the misconduct which resulted in the order of disbarment;

(E) the petitioner's citizenship has been restored if the petitioner has been convicted of or sentenced for the commission of a felony;

(F) the petitioner has complied with Rule .0124 of this subchapter;

(G) the petitioner has complied with all applicable orders of the commission and the council;

(H) the petitioner has complied with the orders and judgments of any court relating to the matters resulting in the disbarment;

(I) the petitioner has not engaged in the unauthorized practice of law during the period of disbarment;

(J) the petitioner has not engaged in any conduct during the period of disbarment constituting grounds for discipline under G.S. 84-28(b);

(K) the petitioner understands the current Rules of Professional Conduct. Participation in continuing legal education programs in ethics and professional responsibility for each of the three years preceding the petition date may be considered on the issue of the petitioner's understanding of the Rules of Professional Conduct. Such evidence creates no presumption that the petitioner has met the burden of proof established by this section;

(L) the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(M) the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(4) Petitions filed less than seven years after disbarment

(A) If less than seven years have elapsed between the effective date of the disbarment and the filing date of the petition for reinstatement, the petitioner will also have the burden of proving by clear, cogent, and convincing evidence that the petitioner has the competency and learning in the law required to practice law in this state.

(B) Factors which may be considered in deciding the issue of competency include

(i) experience in the practice of law;

(ii) areas of expertise;

(iii) certification of expertise;

(iv) participation in continuing legal education programs in each of the three years immediately preceding the petition date;

(v) certification by three attorneys who are familiar with the petitioner's present knowledge of the law that the petitioner is competent to engage in the practice of law.

(C) The factors listed in Rule .0125(a)(4)(B) above are provided by way of example only. The petitioner's satisfaction of one or all of these factors creates no presumption that the petitioner has met the burden of proof established by this section.

(D) The attainment of a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners and taken voluntarily by the petitioner shall be conclusive evidence on the issue of the petitioner's competence to practice law.

(5) If seven years or more have elapsed between the effective date of disbarment and the filing of the petition for reinstatement, reinstatement will be conditioned upon the petitioner's attaining a passing grade on a regularly scheduled written bar examination administered by the North Carolina Board of Law Examiners.

(6) Verified petitions for reinstatement of disbarred attorneys will be filed with the secretary. Upon receipt of the petition, the secretary will transmit the petition to the chairperson of the commission and serve a copy on the counsel. The chairperson will within 14 days

appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter and schedule a time and place for a hearing to take place within 60 to 90 days after the filing of the petition with the secretary. The chairperson will notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing, which will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(7) As soon as possible after the conclusion of the hearing, the hearing committee will file a report containing its findings, conclusions, and recommendations with the secretary. This report will be promptly transmitted to the council.

(8) Record to the Council

(A) The petitioner will provide a record of the proceedings before the hearing committee, including a legible copy of the complete transcript, all exhibits introduced into evidence, and all pleadings, motions, and orders, unless the petitioner and the counsel agree in writing to shorten the record. The petitioner will provide the record to the counsel not later than 90 days after the hearing before the hearing committee, unless an extension of time is granted by the secretary for good cause shown. Any agreement regarding the record will be in writing and will be included in the record transmitted to the council.

(B) The petitioner will transmit a copy of the record to each member of the council no later than 30 days before the council meeting at which the petition is to be considered.

(C) The petitioner will bear the costs of transcribing, copying, and transmitting the record to the council.

(D) If the petitioner fails to comply with any of the subsections of Rule .0125(a)(8) above, the counsel may petition the secretary to dismiss the petition.

(9) The council will review the report of the hearing committee and the record and determine whether, and upon what conditions, the petitioner will be reinstated.

(10) No person who has been disbarred and has unsuccessfully petitioned for reinstatement may reapply until the expiration of one year from the date of the last order denying reinstatement.

(b) After suspension

(1) No attorney who has been suspended may have his or her license restored but upon order of the commission or the secretary after the filing of a verified petition as provided herein.

(2) No attorney who has been suspended is eligible for reinstatement until the expiration of the period of suspension and, in no event, until 30 days have elapsed from the date of filing the petition for reinstatement. Petitions for reinstatement may be filed no sooner than 90 days prior to the expiration of the period of suspension.

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. The petitioner must have satisfied the following requirements to be eligible for reinstatement, and will set forth facts demonstrating the following in the petition:

(A) compliance with Rule .0124 of this subchapter;

(B) compliance with all applicable orders of the commission and the council;

(C) abstention from the unauthorized practice of law during the period of suspension;

(D) attainment of a passing grade on a regularly scheduled North Carolina bar examination, if the suspended attorney applies for reinstatement of his or her license more than seven years after the effective date of the suspension;

(E) abstention from conduct during the period of suspension constituting grounds for discipline under G.S. 84-28(b);

(F) reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment;

(G) reimbursement of all sums which the Disciplinary Hearing Commission found in the order of suspension were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

(4) The counsel will conduct any necessary investigation regarding the compliance of the petitioner with the requirements set forth in Rule .0125(b)(3) above, and the counsel may file a response to the petition with the secretary prior to the date the petitioner is first eli-

gible for reinstatement. The counsel will serve a copy of any response filed upon the petitioner.

(5) If the counsel does not file a response to the petition before the date the petitioner is first eligible for reinstatement, then the secretary will issue an order of reinstatement.

(6) If the counsel files a timely response to the petition, such response must set forth specific objections supported by factual allegations sufficient to put the petitioner on notice of the events at issue.

(7) The secretary will, upon the filing of a response to the petition, refer the matter to the chairperson of the commission. The chairperson will within 14 days appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter, schedule a time and place for a hearing, and notify the counsel and the petitioner of the composition of the hearing committee and the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for nonjury trials insofar as possible and the rules of evidence applicable in superior court.

(8) The hearing committee will determine whether the petitioner's license should be reinstated and enter an appropriate order which may include additional sanctions in the event violations of the petitioner's order of suspension are found. In any event, the hearing committee must include in its order findings of fact and conclusions of law in support of its decision and tax such costs as it deems appropriate for the necessary expenses attributable to the investigation and processing of the petition against the petitioner.

(c) After transfer to disability inactive status:

(1) No member of the North Carolina State Bar transferred to disability inactive status may resume active status until reinstated by order of the commission. Any member transferred to disability inactive status will be entitled to apply to the commission for reinstatement to active status once a year or at such shorter intervals as are stated in the order transferring the member to disability inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to disability inactive status will be filed with the secretary. Upon receipt of the petition the secretary will refer the petition to the commission chairperson. The chairperson will appoint a hearing committee as provided in Rule .0108(a)(2) of this subchapter. A hearing will be conducted pursuant to the procedures set out in Rule .0114 of this subchapter.

(3) The member will have the burden of proving by clear, cogent, and convincing evidence that he or she is no longer disabled within the meaning of Rule .0103(18) of this subchapter and that he or she is fit to resume the practice of law.

(4) Within 10 days of filing the petition for reinstatement, the member will provide the secretary with a list of the name and address of every psychiatrist, psychologist, physician, hospital, and other health care provider by whom or in which the member has been examined or treated or sought treatment while disabled. At the same time, the member will also furnish to the secretary a written consent to release all information and records relating to the disability.

(5) Where a member has been transferred to disability inactive status based solely upon a judicial finding of incapacity, and thereafter a court of competent jurisdiction enters an order adjudicating that the member's incapacity has ended, the chairperson of the commission will enter an order returning the member to active status upon receipt of a certified copy of the court's order. Entry of the order will not preclude the North Carolina State Bar from bringing an action pursuant to Rule .0118 of this subchapter to determine whether the member is disabled.

(6) The hearing committee may direct the member to pay the costs of the reinstatement hearing, including the cost of any medical examination ordered by the committee.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28.1;
G.S. 84-29; G.S. 84-30
Readopted Effective December 8, 1994

**.0126 Address of Record**

Except where otherwise specified, any provision herein for notice to a respondent, member, petitioner, or a defendant will be deemed satisfied by appropriate correspondence addressed to that attorney by mail to the last address maintained by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0127 Disqualification Due to Interest**

No member of the council or hearing commission will participate in any disciplinary matter involving the member, any partner, or asso-

ciate in the practice of law of the member, or in which the member has a personal interest.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0128 Trust Accounts; Audit**

(a) For reasonable cause, the chairperson of the grievance committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel. For the purposes of this rule, any of the following will constitute reasonable cause:

(1) any sworn statement of grievance received by the North Carolina State Bar alleging facts which, if true, would constitute misconduct in the handling of a client's funds or property;

(2) any facts coming to the attention of the North Carolina State Bar, whether through random review as contemplated by Rule .0128(b) below or otherwise, which if true, would constitute a probable violation of any provision of the Rules of Professional Conduct concerning the handling of client funds or property; or

(3) any finding of probable cause, indictment, or conviction relative to a criminal charge involving moral turpitude.

The grounds supporting the issuance of any such subpoena will be set forth upon the face of the subpoena.

(b) The chairperson of the Grievance Committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or any auditor appointed by the counsel to determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. The auditor may report any violation of the Rules of Professional Conduct discovered during random audit to the Grievance Committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the Grievance Committee. The auditor shall have authority under the original subpoena for ran-

dom audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

(c) No subpoena issued pursuant to this rule may compel production within five days of service.

(d) The rules of evidence applicable in the superior courts of the state will govern the use of any material subpoenaed pursuant to this rule in any hearing before the commission.

(e) No assertion of attorney-client privilege or confidentiality will prevent an inspection or audit of a trust account as provided in this rule.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0129 Confidentiality**

(a) Except as otherwise provided in this rule and G.S. 84-28(f), all proceedings involving allegations of misconduct by or alleged disability of a member will remain confidential until

(1) a complaint against a member has been filed with the secretary after a finding by the Grievance Committee that there is probable cause to believe that the member is guilty of misconduct justifying disciplinary action or is disabled;

(2) the member requests that the matter be made public prior to the filing of a complaint;

(3) the investigation is predicated upon conviction of the member of or sentencing for a crime;

(4) a petition or action is filed in the general courts of justice; or

(5) the member files an affidavit of surrender of license.

(b) The previous issuance of a letter of warning, formerly known as a letter of admonition, or an admonition to a member may be revealed in any subsequent disciplinary proceeding.

(c) This provision will not be construed to prohibit the North Carolina State Bar from providing a copy of an attorney's response to a grievance to the complaining party where such attorney has not objected thereto in writing or to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, to other jurisdictions investigating qualifications for admission to practice, or to law enforcement agencies investigating quali-

fications for government employment or allegations of criminal conduct by attorneys. In addition, the secretary will transmit notice of all public discipline imposed and transfers to disability inactive status to the National Discipline Data Bank maintained by the American Bar Association. The secretary may also transmit any relevant information to the Client Security Fund Board of Trustees to assist the Client Security Fund Board in determining losses caused by dishonest conduct of members of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0130 Disciplinary Amnesty in Illicit Drug Use Cases**

(a) The North Carolina State Bar will not treat as a grievance information that a member has used or is using illicit drugs except as provided in Rules .0130(c), (d) and (e) below. The information will be provided to the chairperson of the Positive Action for Lawyers Committee (PALS).

(b) If the PALS Committee concludes after investigation that a member has used or is using an illicit drug and the member participates with the PALS Committee and successfully complies with any prescribed course of treatment, whether or not the initial referral to the PALS Committee came from the North Carolina State Bar, the member will not be disciplined by the North Carolina State Bar for illicit drug use occurring prior to the prescribed course of treatment.

(c) If a member under Rule .0130(b) above fails to cooperate with the PALS Committee or fails to successfully complete any treatment prescribed for the member's illicit drug use, the chairperson of the PALS Committee will report such failure to participate in or complete the PALS program to the chairperson of the Grievance Committee. The chairperson of the Grievance Committee will then treat the information originally received as a grievance.

(d) A member charged with a crime relating to the use or possession of illicit drugs will not be entitled to amnesty from discipline by the North Carolina State Bar relating to the illicit drug use or possession.

(e) If the North Carolina State Bar receives information that a member has used or is using illicit drugs and that the member has violated some other provision of the Rules of Professional Conduct, the information regarding the member's alleged illicit drug use will be referred to the chairperson of the PALS Committee pursuant to Rule .0130(a) above. The information regarding the member's alleged

additional misconduct will be reported to the chairperson of the Grievance Committee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .0200 Rules Governing Judicial District Grievance Committees

### .0201 Organization of Judicial District Grievance Committees

(a) Judicial Districts Eligible to Form District Grievance Committees

(1) Any judicial district which has more than 100 licensed attorneys as determined by the North Carolina State Bar's records may establish a judicial district grievance committee (hereafter, "district grievance committee") pursuant to the rules and regulations set out herein. A judicial district with fewer than 100 licensed attorneys may establish a district grievance committee with consent of the Council of the North Carolina State Bar.

(2) One or more judicial districts, including those with fewer than 100 licensed attorneys, may also establish a multi-district grievance committee, as set out in Rule .0201(b)(2) below. Such multi-district grievance committees shall be subject to all of the rules and regulations set out herein and all references to district grievance committees in these rules shall also apply to multi-district grievance committees.

(b) Creation of District Grievance Committees

(1) A judicial district may establish a district grievance committee at a duly called meeting of the judicial district bar, at which a quorum is present, upon the affirmative vote of a majority of the active members present. Within 30 days of the election, the president of the judicial district bar shall certify in writing the establishment of the district grievance committee to the secretary of the North Carolina State Bar.

(2) A multi-district grievance committee may be established by affirmative vote of a majority of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. Within 30 days of the election, the chairperson of the multi-district grievance committee shall certify in writing the establishment of the district grievance committee to the secretary of

the North Carolina State Bar. The active members of each participating judicial district may adopt a set of by-laws not inconsistent with these rules by majority vote of the active members of each participating judicial district present at a duly called meeting of each participating judicial district bar, at which a quorum is present. The chairperson of the multi-district grievance committee shall promptly provide a copy of any such bylaws to the secretary of the North Carolina State Bar.

(c) Appointment of District Grievance Committee Members

(1) Each district grievance committee shall be composed of not fewer than five nor more than 13 members, all of whom shall be active members in good standing both of the judicial district bar to which they belong and of the North Carolina State Bar. In addition to the attorney members, each district grievance committee may also include one to three public members who have never been licensed to practice law in any jurisdiction. Public members shall not perform investigative functions regarding grievances but in all other respects shall have the same authority as the attorney members of the district grievance committee.

(2) The chairperson of the district grievance committee shall be selected by the president of the judicial district and shall serve at his or her pleasure. Alternatively, the chairperson may be selected and removed as provided in the district bar bylaws.

(3) The attorney and public members of the district grievance committee shall be selected by and serve at the pleasure of the president of the judicial district bar and the chairperson of the district grievance committee. Alternatively, the district grievance committee members may be selected and removed as provided in the district bar bylaws.

(4) The members of the district grievance committee, including the chairperson, shall be appointed for staggered three-year terms, except that the president and chairperson shall appoint some of the initial committee members to terms of less than three years, to effectuate the staggered terms. No member shall serve more than one term, without first having rotated off the committee for a period of at least one year between three-year terms. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced by appointment by the president of the judicial district bar and the chairperson of the committee or as provided in the district bar bylaws as soon as practicable.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0202 Jurisdiction & Authority of District Grievance Committees

(a) District Grievance Committees Are Subject to the Rules of the North Carolina State Bar—The district grievance committee shall be subject to the rules and regulations adopted by the Council of the North Carolina State Bar.

(b) Grievances Filed With District Grievance Committee—A district grievance committee may investigate and consider grievances filed against attorneys who live or maintain offices within the judicial district and which are filed in the first instance with the chairperson of the district grievance committee. The chairperson of the district grievance committee will immediately refer to the State Bar any grievance filed locally in the first instance which

(1) alleges misconduct against a member of the district grievance committee;

(2) alleges that any attorney has embezzled or misapplied client funds; or

(3) alleges any other serious violation of the Rules of Professional Conduct which may be beyond the capacity of the district grievance committee to investigate.

(c) Grievances Referred to District Grievance Committee—The district grievance committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

(d) Grievances Involving Fee Disputes

(1) Notice to Complainant of Fee Arbitration—If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chairperson of the district grievance committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the complainant may elect to participate in the North Carolina State Bar Fee Dispute Arbitration Program. If the grievance consists solely of a fee dispute, the letter to the complainant shall follow the format set out in Rule .0208 of this subchapter. If the grievance consists in part of matters other than a fee dispute, the letter to the complainant shall follow the format set out in Rule .0209 of this subchapter. A respondent attorney shall not have the right to elect to participate in fee arbitration.

(2) Handling Claims Not Involving Fee Dispute—Where a grievance alleges multiple claims, the allegations not involving a fee dispute will be handled in the same manner as any other grievance filed with the district grievance committee.

(3) Handling Claims Not Submitted to Arbitration by Complainant—If the complainant elects not to participate in the State Bar's Fee Dispute Arbitration Program, or fails to notify the chairperson that he or she elects to participate within 20 days following mailing of the notice referred to in Rule .0202(d)(1) above, the grievance will be handled in the same manner as any other grievance filed with the district grievance committee.

(4) Referral to Fee Dispute Arbitration Program—Where a complainant timely elects to participate in fee arbitration, and the judicial district in which the respondent attorney maintains his or her principal office has a fee arbitration committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee arbitration committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Arbitration Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in arbitration, no grievance file will be established.

(e) Authority of District Grievance Committees—The district grievance committee shall have authority to

(1) assist a complainant who requests assistance to reduce a grievance to writing;

(2) investigate complaints described in Rule .0202(b) and (c) above by interviewing the complainant, the attorney against whom the grievance was filed and any other persons who may have relevant information regarding the grievance and by requesting written materials from the complainant, respondent attorney, and other individuals;

(3) explain the procedures of the district grievance committee to complainants and respondent attorneys;

(4) find facts and recommend whether or not the State Bar's Grievance Committee should find that there is probable cause to believe that the respondent has violated one or more provisions

of the Rules of Professional Conduct. The district grievance committee may also make a recommendation to the State Bar regarding the appropriate disposition of the case, including referral to the Lawyers' Management Assistance Program;

(5) draft a written report stating the grounds for the recommended disposition of a grievance assigned to the district grievance committee;

(6) notify the complainant and the respondent attorney where the district grievance committee recommends that the State Bar find that there is no probable cause to believe that the respondent has violated the Rules of Professional Conduct. Where the district grievance committee recommends that the State Bar find that there is probable cause to believe that the respondent has violated one or more provisions of the Rules of Professional Conduct, the committee shall notify the respondent attorney of its recommendation and shall notify the complainant that the district grievance committee has concluded its investigation and has referred the matter to the State Bar for final resolution. Where the district grievance committee recommends a finding of no probable cause, the letter of notification to the respondent attorney and to the complainant shall follow the format set out in Rule .0210 of this subchapter. Where the district grievance committee recommends a finding of probable cause, the letter of notification to the respondent attorney shall follow the format set out in Rule .0211 of this subchapter. The letter of notification to the complainant shall follow the format set out in Rule .0212 of this subchapter;

(7) maintain records of grievances investigated by the district grievance committee for at least one year from the date on which the district grievance committee makes its final recommendation regarding a grievance to the State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0203 Meetings of the District Grievance Committees**

(a) Notice of Meeting—The district grievance committee shall meet at the call of the chairperson upon reasonable notice, as often as is necessary to dispatch its business and not less than once every 60 days, provided the committee has grievances pending.

(b) Confidentiality—The district grievance committee shall meet in private. Discussions of the committee, its records and its actions

shall be confidential. The names of the members of the committee shall not be confidential.

(c) Quorum—A simple majority of the district grievance committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required for the motion to pass or the action to be taken.

(d) Appearances by Complainants and Respondents—No complainant nor any attorney against whom a grievance has been filed may appear before the district grievance committee, present argument to or be present at the committee's deliberations.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0204 Procedure Upon Institution of a Grievance**

(a) Receipt of Grievance—A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance must be in writing and signed by the complaining person. A district grievance committee may, however, investigate matters which come to its attention during the investigation of a grievance, whether or not such matters are included in the original written grievance.

(b) Acknowledgment of Receipt of Grievance from State Bar—The chairperson of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance from the State Bar, acknowledging that a grievance file has been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter. A copy of the letter shall be sent contemporaneously to the office of counsel of the State Bar.

(c) Notice to State Bar of Locally Filed Grievances

(1) Where a grievance is filed in the first instance with the district grievance committee, the chairperson of the district grievance committee shall notify the office of counsel of the State Bar of the name of the complainant, respondent attorney, file number and nature of the grievance within 10 working days of receipt of the grievance.

(2) The chairperson of the district grievance committee shall send a letter to the complainant within 10 working days of receipt of the grievance, acknowledging that a grievance file has

been set up. The acknowledgment letter shall include the name of the district grievance committee member assigned to investigate the matter and shall follow the format set out in Rule .0213 of this subchapter.

(3) Grievances filed initially with the district grievance committee shall be assigned a local file number which shall be used to refer to the grievance. The first two digits of the file number shall indicate the year in which the grievance was filed, followed by the number of the judicial district, the letters GR, and ending with the number of the file. File numbers shall be assigned sequentially during the calendar year, beginning with the number 1. For example, the first locally filed grievance set up in the 10th judicial district in 1994 would bear the following number: 9410GR001.

(d) Assignment to Investigating Member—Within 10 working days after receipt of a grievance, the chairperson shall appoint a member of the district grievance committee to investigate the grievance and shall forward the relevant materials to the investigating member. The letter to the investigating member shall follow the format set out in Rule .0214 of this subchapter.

(e) Investigation of the Grievance

(1) The investigating member shall attempt to contact the complainant as soon as possible but no later than 15 working days after receiving notice of the assignment. If the initial contact with the complainant is made in writing, the letter shall follow the format set out in Rule .0215 of this subchapter.

(2) The investigating member shall have the authority to contact other witnesses or individuals who may have information about the subject of the grievance, including the respondent.

(3) The failure of the complainant to cooperate shall not cause a grievance to be dismissed or abated. Once filed, grievances shall not be dismissed or abated upon the request of the complainant.

(f) Letter of Notice to Respondent Attorney and Responses

(1) Within 10 working days after receipt of a grievance, the chairperson of the district grievance committee shall send a copy of the grievance and a letter of notice to the respondent attorney. The letter to the respondent attorney shall follow the form set out in Rule .0216 of this subchapter and shall be sent by U.S. Mail to the attorney's last known address on file with the State Bar. The letter of notice shall request the respondent to reply to the

investigating attorney in writing within 15 days after receipt of the letter of notice.

(2) A substance of grievance will be provided to the district grievance committee by the State Bar at the time the file is assigned to the committee. The substance of grievance will summarize the nature of the complaint against the respondent attorney and cite the applicable provisions of the Rules of Professional Conduct, if any.

(3) The respondent attorney shall respond in writing to the letter of notice from the district grievance committee within 15 days of receipt of the letter. The chairperson of the district grievance committee may allow a longer period for response, for good cause shown.

(4) If the respondent attorney fails to respond in a timely manner to the letter of notice, the chairperson of the district grievance committee may seek the assistance of the State Bar to issue a subpoena or take other appropriate steps to ensure a proper and complete investigation of the grievance. District grievance committees do not have authority to issue a subpoena to a witness or respondent attorney.

(5) Unless necessary to complete its investigation, the district grievance committee should not release copies of the respondent attorney's response to the grievance to the complainant. The investigating attorney may summarize the response for the complainant orally or in writing.

(g) District Grievance Committee Deliberations

(1) Upon completion of the investigation, the investigating member shall promptly report his or her findings and recommendations to the district grievance committee in writing.

(2) The district grievance committee shall consider the submissions of the parties, the information gathered by the investigating attorney and such other material as it deems relevant in reaching a recommendation. The district grievance committee may also make further inquiry as it deems appropriate, including investigating other facts and possible violations of the Rules of Professional Conduct discovered during its investigation.

(3) The district grievance committee shall make a determination as to whether or not it finds that there is probable cause to

believe that the respondent violated one or more provisions of the Rules of Professional Conduct.

(h) Report of Committee's Decision

(1) Upon making a decision in a case, the district grievance committee shall submit a written report to the office of counsel, including its recommendation and the basis for its decision. The original file and grievance materials of the investigating attorney shall be sent to the State Bar along with the report. The letter from the district bar grievance committee enclosing the report shall follow the format set out in Rule .0217 of this subchapter.

(2) The district grievance committee shall submit its written report to the office of counsel no later than 180 days after the grievance is initiated or received by the district committee. The State Bar may recall any grievance file which has not been investigated and considered by a district grievance committee within 180 days after the matter is assigned to the committee. The State Bar may also recall any grievance file for any reason.

(3) Within 10 working days of submitting the written report and returning the file to the office of counsel, the chairperson of the district grievance committee shall notify the respondent attorney and the complainant in writing of the district grievance committee's recommendation, as provided in Rule .0202(d)(6) of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0205 Record Keeping**

The district grievance committee shall maintain records of all grievances referred to it by the State Bar and all grievances initially filed with the district grievance committee for at least one year. The district grievance committee shall provide such reports and information as are requested of it from time to time by the State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0206 Miscellaneous**

(a) Assistance and Questions—The office of counsel, including the staff attorneys and the grievance coordinator, are available to answer questions and provide assistance regarding any matters before the district grievance committee.

(b) Missing Attorneys—Where a respondent attorney is missing or cannot be located, the district grievance committee shall promptly return the grievance file to the office of counsel for appropriate action.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0207 Conflicts of Interest**

(a) No district grievance committee shall investigate or consider a grievance which alleges misconduct by any current member of the committee. If a file is referred to the committee by the State Bar or is initiated locally which alleges misconduct by a member of the district grievance committee, the file will be sent to the State Bar for investigation and handling within 10 working days after receipt of the grievance.

(b) A member of a district grievance committee shall not investigate or participate in deliberations concerning any of the following matters:

(1) alleged misconduct of an attorney who works in the same law firm or office with the committee member;

(2) alleged misconduct of a relative of the committee member;

(3) a grievance involving facts concerning which the committee member or a partner or associate in the committee member's law firm acted as an attorney.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0208 Letter to Complainant Where Local Grievance Alleges Fee Dispute Only**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [] district grievance committee has received your complaint against above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a

means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, no grievance file will be opened and the [] district bar grievance committee will take no other action against the attorney.

If you do not wish to participate in fee arbitration program, you may elect to have your complaint investigated by the [] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your complaint like any other grievance. However, the [] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[] Chairperson
[] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0209 Letter to Complainant Where Local Grievance Alleges Fee Dispute and Other Violations

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [] district grievance committee has received your complaint against above-listed attorney. Based upon our initial review of the

materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute Arbitration Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee arbitration program, please complete and return the form to me within 20 days of the date of this letter. If you decide to go through arbitration, the fee arbitration committee will handle those portions of your complaint which involve an apparent fee dispute. The remaining parts of your complaint which do not involve a fee dispute will be investigated by the [] district grievance committee.

If you do not wish to participate in fee arbitration program, you may elect to have your entire complaint investigated by the [] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee arbitration, and we will handle your entire complaint like any other grievance. However, the [] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,

[] Chairperson
[] District Bar Grievance Committee

cc: PERSONAL & CONFIDENTIAL
Director of Investigations
The N. C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0210 Letter to Complainant/Respondent Where District Committee Recommends Finding of No Probable Cause

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. []

Dear Mr. Smith:

The [] district grievance committee has completed its investigation of your grievance. Based upon its investigation, the committee does not believe that there is probable cause to find that the attorney has violated any provisions of the Rules of Professional Conduct. The committee will forward a report with its recommendation to the North Carolina State Bar Grievance Committee. The final decision regarding your grievance will be made by the North Carolina State Bar Grievance Committee. You will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [] district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[] Respondent Attorney

PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0211 Letter to Respondent Where District Committee Recommends Finding of Probable Cause**

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No. []

Dear Ms. Doe:

The [] district grievance committee has completed its investigation of Mr. Smith's grievance and has voted to recommend that the North Carolina State Bar Grievance Committee find probable cause to believe that you violated one or more provisions of the Rules of Professional Conduct. Specifically, the [] district grievance committee found that there is probable cause to believe that you may have violated [set out brief description of rule allegedly violated and pertinent facts].

The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision. The complainant has been notified that the [] district grievance committee has concluded its investigation and that the grievance has been sent to the North Carolina State Bar for final resolution, but has not been informed of the [] district committee's specific recommendation.

If you have any questions or wish to communicate further regarding this grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611
Tel. 919-828-4620

Thank you very much for your cooperation.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0212 Letter to Complainant Where District Committee Recommends Finding of Probable Cause

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. []

Dear Mr. Smith:

The [] district grievance committee has completed its investigation of your grievance and has forwarded its file to the North Carolina State Bar Grievance Committee in Raleigh for final resolution. The final decision in this matter will be made by the North Carolina State Bar Grievance Committee and you will be notified in writing of the State Bar's decision.

If you have any questions or wish to communicate further regarding your grievance, you may contact the North Carolina State Bar at the following address:

The North Carolina State Bar
Grievance Committee
P.O. Box 25908
Raleigh, N.C. 27611

Neither I nor any member of the [] district grievance committee can give you any advice regarding any legal rights you may have regarding the matters set out in your grievance. You may pursue any questions you have regarding your legal rights with an attorney of your choice.

Thank you very much for your cooperation.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[] Respondent Attorney

PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0213 Letter to Complainant Acknowledging Grievance**

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. []

Dear Mr. Smith:

I am the chairperson of the [] district grievance committee. Your grievance against [respondent attorney] [was received in my office]/[has been forwarded to my office by the North Carolina State Bar] on [date]. I have assigned [investigator's name], a member of the [] district grievance committee, to investigate your grievance. []'s name, address and telephone number are as follows: [].

Please be sure that you have provided all information and materials which relate to or support your complaint to the [] district grievance committee. If you have other information which you would like our committee to consider, or if you wish to discuss your complaint, please contact the investigating attorney by telephone or in writing as soon as possible.

After []'s investigation is complete, the [] district grievance committee will make a recommendation to the North Carolina State Bar Grievance Committee regarding whether or not there is probable cause to believe that [respondent attorney] violated one or more provisions of the Rules of Professional Conduct. Your complaint and the results of our investigation will be sent to the North Carolina State Bar at that time. The [] district grievance committee's recommendation is not binding upon the North Carolina State Bar Grievance Committee, which will make the final determination. You will be notified in writing when the [] district grievance committee's investigation is concluded.

Neither the investigating attorney nor any member of the [] district grievance committee can give you any legal advice or represent you regarding any underlying legal matter in which you may be involved. You may pursue any questions you have about your legal rights with an attorney of your own choice.

Thank you very much for your cooperation.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0214 Letter to Investigating Attorney Assigning Grievance**

James Roe
[] District Grievance Committee Member
Anywhere, N.C.

Re: Grievance of John Smith against Jane Doe
Our File No. []

Dear Mr. Roe:

Enclosed you will find a copy of the grievance which I recently received regarding the above-captioned matter. Please investigate the complaint and provide a written report with your recommendations by [deadline].

Thank you very much.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Director of Investigations
The N.C. State Bar

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0215 Letter to Complainant from Investigating Attorney

John Smith
Anywhere, N.C.

Re: Your complaint against Jane Doe
Our File No. []

Dear Mr. Smith:

I am the member of the [] district grievance committee assigned to investigate your grievance against [respondent attorney]. It is part of my job to ensure that you have had a chance to explain your complaint and that the [] district grievance committee has copies of all of the documents which you believe relate to your complaint.

If you have other information or materials which you would like the [] district grievance committee to consider, or if you would like to discuss this matter, please contact me as soon as possible.

If you have already fully explained your complaint, you do not need to take any additional action regarding your grievance. The [] district grievance committee will notify you in writing when its investigation is complete. At that time, the matter will be forwarded to the North Carolina State Bar Grievance Committee in Raleigh for its final decision. You will be notified in writing of the North Carolina State Bar's decision.

Thank you very much for your cooperation.

Sincerely yours,

[] Investigating Member
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
Chairperson, [] District Grievance Committee

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0216 Letter of Notice to Respondent Attorney

Ms. Jane Doe
Anywhere, N.C.

Re: Grievance of John Smith
Our File No. []

Dear Ms. Doe:

Enclosed you will find a copy of a grievance which has been filed against you by [complainant] and which was received in my office on [date]. As chairperson of the [] district grievance committee, I have asked [investigating attorney], a member of the committee, to investigate this grievance.

Please file a written response with [investigating attorney] within 15 days from receipt of this letter. Your response should provide a full and fair disclosure of all of the facts and circumstances relating to the matters set out in the grievance.

Thank you.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

cc: PERSONAL AND CONFIDENTIAL
[] Investigating member
[] District Grievance Committee

PERSONAL AND CONFIDENTIAL
Director of Investigations
N.C. State Bar

PERSONAL AND CONFIDENTIAL
[] Complainant

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0217 Letter Transmitting Completed File to North Carolina State Bar

Director of Investigations
N.C. State Bar
P.O. Box 25908
Raleigh, N.C. 27611

Re: Grievance of John Smith
File No. []

Dear Director:

The [] district grievance committee has completed its investigation in the above-listed matter. Based upon our investigation, the committee determined in its opinion that there is/is not probable cause to believe that the respondent violated one or more provisions of the Rules of Professional Conduct for the reasons set out in the enclosed report.

We are forwarding this matter for final determination by the North Carolina State Bar Grievance Committee along with the following materials:

1. The original grievance of [complainant]

2. A copy of the file of the investigating attorney.

3. The investigating attorney's report, which includes a summary of the facts and the reason(s) for the committee's decision.

Please let me know if you have any questions or if you need any additional information. Thank you.

Sincerely yours,

[] Chairperson
[] District Grievance Committee

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## SUBCHAPTER C

## RULES GOVERNING THE BOARD OF LAW EXAMINERS AND THE TRAINING OF LAW STUDENTS

### Section .0100 Board of Law Examiners

#### .0101 Election

(a) At the first meeting of the council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected, and such members shall serve for a term of three years or until their successors are elected and qualified.

Beginning with the year 1935 and every third year thereafter the council shall elect three members for a term of three years or until their successors are elected and qualified.

(b) No member of the council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the council.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

#### .0102 Examination of Applicants for License

All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that board.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

#### .0103 Admission to Practice

Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

### .0104 Approval of Rules and Regulations of Board of Law Examiners

The council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the council shall be the subject of further study and action, and for the purpose of study, the council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the council.

History Note: Statutory Authority G.S. 84-24
Readopted Effective December 8, 1994

## Section .0200 Rules Governing Practical Training of Law Students

### .0201 Purpose

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0202 General Definition

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

(1) Legal aid clinic—An established or proposed department, division, program or course in a law school under the supervision of at least one full-time member of the school's faculty or staff who has been admitted and licensed to practice law in this state and conducted regularly and systematically to render legal services to indigent persons.

(2) Indigent persons—A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a judge of the General Court of Justice.

(3) Legal aid—Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

(4) Supervising attorney—Supervising attorney means sole practitioner, one or more attorneys sharing offices but not partners, one or more attorneys practicing together in a partnership or in a professional organization.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0203 Eligibility**

In order to engage in activities permitted by these rules, a law student must

(1) be duly enrolled in a law school approved by the Council of the North Carolina State Bar;

(2) be a student regularly enrolled and in good standing in a law school who has satisfactorily completed the equivalent of three semesters of the requirements for a first professional degree in law (J.D. or its equivalent);

(3) be certified by the dean of his or her law school, on forms provided by the North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the dean without a hearing or any showing of cause and for any reason;

(4) be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court;

(5) neither ask for nor receive any compensation or remuneration of any kind from any client for whom he or she renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the state from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require;

(6) certify in writing that he or she has read and is familiar with the North Carolina Rules of Professional Conduct and the opinions interpretive thereof.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0204 Form and Duration of Certification**

(a) A certification of a student by the law school dean

(1) shall be filed with the secretary of the North Carolina State Bar in the office of the North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first bar examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he or she is admitted to the Bar;

(2) may be withdrawn by the dean at any time without a hearing and without any showing of cause and shall be withdrawn by the dean if the student ceases to be duly enrolled as a student prior to graduation, by mailing a notice to that effect to the secretary of the North Carolina State Bar at the office of the North Carolina State Bar in Raleigh, to the supervising attorney, and to the student;

(3) may be withdrawn by any resident superior court judge or judge holding court in any judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's dean, and to the secretary of the North Carolina State Bar at the office of the North Carolina State Bar in Raleigh.

(b) Forms to be used for certification and withdrawal of certification shall be adopted by the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0205 Supervision**

(a) A supervising attorney shall

(1) be an active member of the North Carolina State Bar and before supervising the activities specified in Rule .0206 of this subchapter shall have actively practiced law as a full-time occupation for at least two years;

(2) supervise no more than five students concurrently, unless such attorney is a full-time member of a law school's faculty or staff whose primary responsibility is supervising students in a clinical program;

(3) assume personal professional responsibility for any work undertaken by the student while under his or her supervision;

(4) assist and counsel with the student in the activities mentioned in these rules and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client;

(5) read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared by such student for execution by any person or persons not a member or members of the North Carolina State Bar prior to the submission thereof for execution;

(6) as to any of the activities specified by Rule .0206 of this subchapter

(A) file with the secretary of the North Carolina State Bar in Raleigh, before commencing supervision of any student, a signed notice in writing stating the name of such student, the period or periods during which he or she expects to supervise the activities of such student, and that he or she will adequately supervise such student in accordance with these rules;

(B) notify the secretary of the North Carolina State Bar in the office of the North Carolina State Bar in Raleigh in writing promptly whenever his or her supervision of such student shall cease.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0206 Activities**

(a) A properly certified student may engage in the activities provided in this rule under the supervision of an attorney qualified and acting in accordance with the provisions of Rule .0205 of this subchapter.

(b) Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that the student is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

(c) Without being physically accompanied by the supervising attorney, a student may represent indigent persons or the state in the following hearings or proceedings:

(1) administrative hearings and proceedings before federal, state, and local administrative bodies;

(2) civil litigation before courts or magistrates, provided the case is one which could be assigned to a magistrate under G.S. 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate;

(3) in any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute or rule of court.

(d) Without being physically accompanied by the supervising attorney, a student may represent the state in the prosecution of all misdemeanors with the consent of the district attorney.

(e) When physically accompanied by the supervising lawyer who has read, approved and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the court, a student may represent indigent clients or the state in the following hearings or proceedings, provided however, the approval of the presiding judge is first secured:

(1) all juvenile proceedings;

(2) the presentation of a brief and oral argument in any civil or criminal matter in the district or superior court;

(3) all misdemeanor cases;

(4) preliminary hearings in all criminal cases;

(5) all post-conviction proceedings;

(6) all civil discovery.

(f) A student may accompany the supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding judge.

(g) In all cases under this rule in which a student makes an appearance in court or before an administrative agency on behalf of a client, the student shall have the written consent in advance of the client and the supervising attorney. The client shall be given a clear explanation, prior to the giving of his or her consent, that the student is not an attorney. This consent shall be filed with the court and made a part of the record in the case.

(h) In all cases under this rule in which a student is permitted to make an appearance in court or before an administrative agency on behalf of a client, the student may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

(i) Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless the student is under the direct and physical supervision of the supervising attorney.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0207 Use of Student's Name**

(a) A student's name may properly (1) be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising attorney, provided the student is clearly identified as a student certified under these rules, and provided further that the student shall not sign his or her name to such briefs, pleadings, or other similar documents; (2) be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his or her signature a clear identification that he or she is certified under these rules, such as "Certified Law Student under the Supervision of _______________" (supervising attorney).

(b) A student's name may not appear

(1) on the letterhead of a supervising attorney;

(2) on a business card bearing the name of a supervising attorney; or

(3) on a business card identifying the student as certified under these rules.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0208 Miscellaneous**

(a) Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of these rules.

(b) These rules are subject to amendment, modification, revision, supplementation, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0209 Dean's Certificate**

IN RE:
APPLICATION OF

______________________________________

______________________________________

______________________________________

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROGRAM PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

TO: THE NORTH CAROLINA STATE BAR:

The undersigned certifies as follows:

1. Name and address of person signing this certificate

   ________________________________________________

2. Name and address of law school and official connection with same __________________________________________

   ________________________________________________

   ________________________________________________

3. ____________________ is duly enrolled in a law school approved by the Council of the North Carolina State Bar and is in good standing in said law school and has satisfactorily completed the equivalent of three semesters of the requirements for a first professional degree in law (J.D. or its equivalent).

4. ________________________ is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules Governing Practical Training of Law Students.

Seal (of school) ________________________________________, Dean

____________________________________________
Name of School

________________, dean of ________________ Law School being first duly sworn on oath deposes and says that he or she has read the

foregoing certificate and knows the contents thereof; that the statements contained therein are true of his or her own knowledge, except as to those matters stated upon information and belief, and, as to those, he or she believes them to be true.

Sworn and subscribed to before me

this _____day of _________________, 19__

_______________________________Notary Public

My commission expires

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0210 Withdrawal of Dean's Certificate**

IN RE:
APPLICATION OF ____________________________________________

______________________________________________________________

______________________________________________________________

WITHDRAWAL OF ELIGIBILITY OF PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of the North Carolina State Bar as to the eligibility of the above named individual to participate in the Practical Training of Law Students Program promulgated by the North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify the

North Carolina State Bar that ________________________________
is no longer eligible to participate in said program.

Seal (of school) ____________________________________, Dean

_____________________________________________
Name of School

_____________________, dean of _____________________ Law School
being first duly sworn on oath deposes and says that he or she has read the foregoing certificate and knows the contents thereof; that the statements contained therein are true of his or her own knowledge, except as to those matters stated upon information and belief and, as to those, he or she believes them to be true.

Sworn and subscribed to before me this the ________ day of ________________, 19___ My commission expires

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## SUBCHAPTER D

## RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

### Section .0100 Procedures for Ruling on Questions of Legal Ethics

#### .0101 Definitions

(1) "Assistant executive director" shall mean the assistant executive director of the Bar.

(2) "Attorney" shall mean any active member of the Bar.

(3) "Bar" shall mean the North Carolina State Bar.

(4) "Chairperson" shall mean the chairperson, or in his or her absence, the vice-chairperson of the Ethics Committee of the Bar.

(5) "Citizen" shall mean any person, firm, or corporation residing in North Carolina who is not an attorney as above defined.

(6) "Committee" shall mean the Ethics Committee of the Bar.

(7) "Council" shall mean the council of the Bar.

(8) "Ethics advisory" shall mean an informal legal ethics ruling issued by the executive director or the assistant executive director under the supervision of the committee. The advisories shall be designated by the letters "EA," numbered, and kept on file at the Bar's headquarters.

(9) "Ethics decision" shall mean a ruling by the council in response to a request for a legal ethics opinion which, because of its special facts or for other reasons, does not warrant issuance of a published opinion. The decisions shall be designated by the letters "ED," numbered, and kept on file at the Bar's headquarters.

(10) "Executive director" shall mean the executive director of the Bar.

(11) "Grievance Committee" shall mean the Grievance Committee of the Bar.

(12) "Legal ethics opinion" shall mean an opinion issued by the council to provide ethical guidance for attorneys and to establish a principle of ethical conduct. Such opinions are published and designated by the letters "RPC" with a number to identify them as interpretations of the Rules of Professional Conduct.

(13) "President" shall mean the president of the Bar, or, in his or her absence, the presiding officer of the council.

(14) "Published" shall mean published in the North Carolina State Bar Newsletter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0102 Requests for Legal Ethics Opinions and Ethics Advisories (General Provisions)**

(a) Any attorney or citizen may request the Bar to rule on actual or contemplated professional conduct of an attorney in the form and manner provided hereinafter. The grant or denial of the request rests with the discretion of the executive director, assistant executive director, committee, or the council.

(b) Attorneys may initiate a request for an ethics advisory either in writing, by telephone, or in person regarding conduct which they contemplate and in good faith believe is either a routine matter or requires urgent action in order to protect some legal right, privilege, or interest. If the request is initiated verbally, the requesting attorney must promptly confirm the request in writing.

(c) A request for an ethics advisory, ethics decision, or legal ethics opinion shall present in detail to the executive director or assistant executive director all operative facts upon which the request is based. All requests for either a legal ethics opinion or an ethics decision shall be made in writing.

(d) Any citizen may request either a legal ethics opinion or an ethics decision through any councilor of the judicial district of his or her residence or principal place of business except when the request is regarding the propriety of said councilor's conduct, in which case the citizen may make the request through another councilor in the district or a councilor in an adjoining judicial district.

(e) Any attorney, including a councilor acting pursuant to paragraph (d) hereinabove, who requests either a legal ethics opinion or an ethics decision concerning acts or contemplated professional conduct of another attorney, shall state the name of that attorney and

identify all persons who the requesting attorney has reason to believe would be substantially affected by the question or questions advanced. The councilor shall exercise good faith in preparing the request on behalf of the citizen.

(f) If an attorney willfully fails to identify an attorney who the requesting attorney has reason to believe would be substantially affected by the requested ethics advisory, legal ethics opinion, or ethics decision, his or her willful failure may be treated as misconduct. The requesting attorney shall receive no right, benefit, or immunity under any opinion which has been issued under such circumstances, and the opinion shall be reexamined de novo under the procedures delineated in Rule .0104 of this subchapter.

**.0103 Ethics Advisories**

(a) An ethics advisory answers an inquiry by an attorney regarding his or her own contemplated conduct when the attorney needs an expeditious ethics ruling on either a routine matter or under exigent circumstances and has complied with Rule .0102 of this subchapter.

(b) Upon receipt of either a written or verbal request from an attorney for an ethics advisory, the executive director or the assistant executive director, acting under the supervision and direction of the committee, may either honor the request or deny it. If the executive director or assistant executive director honors the request, he or she shall communicate the ruling to the inquirer. The action on the request shall be either written or verbal with prompt confirmation in writing. Action on the request shall be taken within a reasonable time. Neither the denial nor issuance of an advisory nor the ruling itself shall be appealable.

(c) An ethics advisory issued by the executive director or assistant executive director shall be promulgated under the authority of the committee and in accordance with such guidelines as the committee may establish and prescribe from time to time.

(d) An ethics advisory shall sanction or disapprove only the matter in issue, not otherwise serve as precedent and not be published.

(e) Ethics advisories shall be reviewed periodically by the committee. If, upon review, a majority of the committee present and voting decides that an ethics advisory should be withdrawn, the requesting attorney shall be notified in writing of the committee's decision by the executive director or assistant executive director. Until such notification, the attorney shall be deemed to have acted ethically and in good faith if he or she acts pursuant to the ethics advisory which is later withdrawn.

(f) An attorney requesting a legal ethics opinion or ethics decision, subsequent to requesting an ethics advisory on the same question, shall state that an advisory was sought, specify the nature of the advisory provided, and attach copies of all relevant correspondence between the attorney and the Bar.

(g) If the executive director or the assistant executive director declines to issue an ethics advisory, or the requesting attorney disagrees with the issued advisory, or the advisory is withdrawn by the committee, an attorney has the right to proceed de novo under the procedures delineated in Rule .0104 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0104 Legal Ethics Opinions and Decisions**

(a) Requests for legal ethics opinions or ethics decisions shall be made in writing and submitted to the executive director or assistant executive director who, after determining that the request is in compliance with Rule .0102 of this subchapter, shall transmit the requests to the chairperson of the committee.

(b) If a legal ethics opinion or ethics decision is requested concerning contemplated or actual conduct of another attorney, the chairperson shall notify that attorney and provide him or her with the opportunity to be heard, along with the person who requested the opinion, under such guidelines as may be established by the committee. The chairperson shall notify any additional person or group he or she deems appropriate and provide them an opportunity to be heard.

(c) The committee shall prepare a written proposed legal ethics opinion or ethics decision which shall state its conclusion in respect to the question asked and the reasons therefor.

(d) The proposed legal ethics opinion or ethics decision shall be provided to the interested persons and shall be transmitted to the president for consideration by the council.

(e) At least 30 days prior to the next regularly scheduled meeting of the council, any interested person or group may submit a written request to be heard on the proposed opinion or decision. The council, under such guidelines as it may adopt, may in its discretion allow or deny such request. Any attorney, whether permitted to appear before the council or not, has the right to file a written brief with the council under such rules as may be fixed by the council. The president may, in his or her discretion, permit any additional person or group to file a written brief.

(f) The council's action on the proposed opinion shall be determined by vote of the majority of the council present and voting. Notice of such action shall be provided to the interested persons.

(g) The committee may on its own motion submit a proposed legal ethics opinion to the council for its consideration. Prior to action by the council, the proposed opinion shall be published and an opportunity shall be provided for interested persons to request to be heard before the council when the opinion is considered, subject to the provisions of Rule .0104(e) above.

(h) A legal ethics opinion or ethics decision may be reconsidered or withdrawn by the council pursuant to rules which it may establish from time to time. Those persons who participated in the original proceedings shall be given an opportunity to request to be heard in connection with the reconsideration in accordance with Rule .0104(e) above.

(i) When an ethics inquiry may amount to the statement of a grievance, the executive director, the assistant executive director, the chairperson, or the president may either consider the request as seeking an ethics ruling or refer the matter to the Grievance Committee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .0200 Procedures for the Consumer Protection Committee

### .0201 General Provisions

The purpose for establishing a committee on the unauthorized practice of law (the Consumer Protection Committee) and the reason for the prohibition against the practice of law by those who have not been examined, found qualified to practice law, and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the Rules of Professional Conduct, which in the public interest, lawyers are bound to observe.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

### .0202 Procedure

(a) The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.

(b) District bars shall not conduct separate proceedings into unauthorized practice of law matters but shall assist and cooperate with the North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

History Note: Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

**.0203 Definitions**

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this rule.

(1) Appellate division—the appellate division of the General Court of Justice.

(2) Chairperson of the Consumer Protection Committee—the councilor appointed to serve as chairperson of the Consumer Protection Committee of the North Carolina State Bar.

(3) Complainant or the complaining witness—any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint—a formal pleading filed in the name of the North Carolina State Bar in the superior court against a person, firm or corporation after a finding of probable cause.

(5) Council—the Council of the North Carolina State Bar.

(6) Councilor—a member of the Council of the North Carolina State Bar.

(7) Counsel—the counsel of the North Carolina State Bar appointed by the council.

(8) Court or courts of this state—a court authorized and established by the Constitution or laws of the state of North Carolina.

(9) Defendant—any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Investigation—the gathering of information with respect to alleged unauthorized practice of law.

(11) Investigator—any person designated to assist in investigation of alleged unauthorized practice of law.

(12) Letter of caution—a communication from the Consumer Protection Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(13) Letter of notice—a communication to an accused individual or corporation setting forth the substance of alleged conduct involving unauthorized practice of law.

(14) Office of the counsel—the office and staff maintained by the Counsel of the North Carolina State Bar.

(15) Office of the secretary—the office and staff maintained by the secretary of the North Carolina State Bar.

(16) Party—after a complaint has been filed, the North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(17) Plaintiff—after a complaint has been filed, the North Carolina State Bar.

(18) Preliminary Hearing—hearing by the Consumer Protection Committee to determine whether probable cause exists.

(19) Probable Cause—a finding by the Consumer Protection Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(20) Secretary—the secretary of the North Carolina State Bar.

(21) Supreme Court—the Supreme Court of North Carolina.

History Note—Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

**.0204 State Bar Council—Powers and Duties**

The Council of the North Carolina State Bar shall have the power and duty

(1) to supervise the administration of Consumer Protection Committee in accordance with the provisions hereinafter set forth;

(2) to appoint a counsel. The counsel shall serve at the pleasure of the council. The counsel shall be a member of the North Carolina State Bar but shall not be permitted to engage in the private practice of law.

History Note—Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

### .0205 Chairperson of the Consumer Protection Committee Powers and Duties

(a) The chairperson of the Consumer Protection Committee shall have the power and duty

(1) to supervise the activities of the counsel;

(2) to recommend to the Consumer Protection Committee that an investigation be initiated;

(3) to recommend to the Consumer Protection Committee that a complaint be dismissed;

(4) to direct a letter of notice to an accused person or corporation;

(5) to notify the accused and any complainant that a complaint has been dismissed;

(6) to call meetings of the Consumer Protection Committee for the purpose of holding preliminary hearings;

(7) to issue subpoenas in the name of the North Carolina State Bar or direct to the secretary to issue such subpoenas;

(8) to administer oaths or affirmations to witnesses;

(9) to file and verify complaints and petitions in the name of the North Carolina State Bar.

(b) The president, vice-chairperson or senior council member of the Consumer Protection Committee shall perform the functions of the chairperson of the Consumer Protection Committee in any matter when the chairperson is absent or disqualified.

History Note—Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

### .0206 Consumer Protection Committee—Powers and Duties

The Consumer Protection Committee shall have the power and duty

(1) to direct to the counsel to investigate any alleged unauthorized practice of law by any person, firm, or corporation in the State of North Carolina;

(2) to hold preliminary hearings, find probable cause, and direct that complaints be filed;

(3) to dismiss complaints upon a finding of no probable cause;

(4) to issue a letter of caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

(5) to issue avisory opinions in accordance with procedures adopted by the council as to whether the actual or contemplated conduct of nonlawyers would constitute the unauthorized practice of law in North Carolina.

History Note—Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

**.0207 Counsel—Powers and Duties**

The counsel shall have the power and duty

(1) to investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) to recommend to the chairperson of the Consumer Protection Committee that a matter be dismissed because the complaint is frivolous or falls outside the council's jurisdiction; that a letter of notice be issued; or that the matter be passed upon by the Consumer Protection Committee to determine whether probable cause exists;

(3) to prosecute all unauthorized practice of law proceedings before the Consumer Protection Committee and the courts;

(4) to represent the North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law;

(5) to appear on behalf of the North Carolina State Bar at hearings conducted by the Consumer Protection Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding;

(6) to employ assistant counsel, investigators, and other administrative personnel in such numbers as the council may from time to time authorize;

(7) to maintain permanent records of all matters processed and the disposition of such matters;

(8) to perform such other duties as the council may from time to time direct.

History Note—Statutory Authority G.S. 84-37
Readopted Effective December 8, 1994

## Section .0300 Disaster Response Plan

### .0301 The Disaster Response Team

(a) The disaster response team should be made up of the following:

(1) the president of the North Carolina State Bar, or in the event the president is unavailable, the president-elect;

(2) the counsel or his or her designee;

(3) the director of communications or his or her designee;

(4) the president of the Young Lawyers Division of the North Carolina Bar Association ("YLD") or his or her designee;

(5) other persons, such as the applicable local bar president(s), appointed by the president as appropriate and necessary for response in each individual situation.

(b) Implementation of the disaster response plan shall be the decision of the president or president-elect.

(c) The counsel, or his or her designee, shall be the coordinator of the disaster response team ("coordinator"). If the president or president-elect is unavailable to decide whether to implement the disaster response plan for a particular event, then and only then shall the coordinator be authorized to make the decision to implement the disaster response plan.

(d) It shall be the responsibility of the coordinator to conduct annual educational programs regarding the disaster response plan.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0302 General Policy and Objectives

(a) Rapid Response

(1) It is essential that the State Bar establish an awareness and sensitivity to disaster situations.

(2) The disaster response plan will be disseminated through the publications of the State Bar and continuing legal education programs.

(3) The disaster response team shall be properly trained to respond to initial inquiries and appear at the site.

(4) The disaster response team will provide victims and/or their families with written materials when requested.

(b) Effective Mobilization of Resources

(1) An appropriate press release shall be prepared and disseminated.

(2) The coordinator shall confirm the individuals who will make up the disaster response team.

(3) Individual assignments of responsibilities shall be made to members of the team by the coordinator.

(4) The coordinator shall arrange for the State Bar to be represented at any victims' assistance center established at the disaster site. The coordinator will request the YLD to assist the State Bar by providing additional staffing.

(5) The coordinator shall contact the local district attorney(s) and request that he or she prosecute any persons engaging in the unauthorized practice of law (N.C.G.S. 84-2.1, 84-4, 84-7 and 84-8); improper solicitation (N.C.G.S. 84-38); division of fees (N.C.G.S. 84-38); and/or the common law crime of barratry (frequently stirring up suits and quarrels between persons).

(c) Publicity

(1) It is important to focus on the fact that disaster response is a public service effort.

(2) The disaster response team shall ensure approval and dissemination of an even-handed press release.

(3) The director of communications will be utilized for press contacts.

(4) It is important to ensure that the press release indicates that the State Bar is a resource designed to assist victims, if requested.

(d) On-site Representation

(1) It is normally desirable for the disaster response team to arrive at the site of the disaster as soon as possible.

(2) Only the president or president-elect or their designee will conduct press interviews on behalf of the State Bar.

(3) The availability of the State Bar at the site of the disaster should be made known to victims.

(4) The disaster response team shall establish a liaison with the State Emergency Management Division, Red Cross, Salvation Army, and other such organizations to provide assistance to victims and furnish written materials to these organizations.

(5) It is crucial that the State Bar not become identified with either side of any potential controversy.

(6) All members of the disaster response team must avoid making comments on the merits of claims that may arise from the disaster.

(e) Dissemination of Information to Affected Individuals

(1) The team shall emphasize in all public statements that the State Bar's major and only legitimate concern is for those persons affected by the disaster and the public interest.

(2) The State Bar's role is limited to monitoring compliance with its disciplinary rules, to requesting reports of any violation needing investigation, and to informing victims of rules concerning client solicitation.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0303 Report on Results**

(a) The coordinator will convene as soon as possible a meeting to be attended by as many groups as were involved in the disaster to obtain input regarding the effectiveness of the plan in that particular disaster.

(b) The coordinator shall prepare a written report of all that occurred at the site of the disaster.

(c) The written report shall be submitted to the council of the State Bar as well as other involved organizations.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .0400. Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

### .0401 Authority

These rules and regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

### .0402 Determination of Indigency

(a) Prior to the appointment of counsel on grounds of indigency, the court shall require the defendant to complete and sign under oath an affidavit of indigency in a form approved by the director of the Administrative Office of the Courts.

(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the affidavit of indigency.

(c) The defendant's affidavit of indigency shall be filed in the records of the case.

(d) Upon the basis of the defendant's affidavit of indigency, his statements to the court on this subject, and such other information as may be brought to the attention of the court which shall be made a part of the record in the case, the court shall determine whether or not the defendant is in fact indigent.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

### .0403 Waiver of Counsel

(a) Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath a waiver of counsel in a form approved by the director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the court shall so certify in a form approved by the director of the Administrative Office of the Courts.

(b) Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his or her right to counsel.

(c) The judge, upon being so satisfied, shall accept the waiver of counsel executed by the defendant, sign the same, and cause it to be filed in the record of the case.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0404 Appointment of Counsel**

(a) The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and/or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

(b) Such plan or plans as adopted by the judicial district bar shall be certified to the council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the clerk of superior court of each county to which each plan is applicable by the secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his or her discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district who is or are not on the plan or list certified to the clerk of superior court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

(c) No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he or she resides or maintains an office except by consent of counsel so appointed.

(d) No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him or her.

(e) The clerk of superior court of each county shall file or record in his or her office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the secretary of the North Carolina State Bar.

(f) The clerk of superior court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him or her by the secretary of the North Carolina State Bar.

(g) Orders for the appointment of counsel shall be entered by the court in a form approved by the director of the Administrative Office of the Courts.

(h) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the state is seeking the death penalty.

(i) (1) Notwithstanding any other provisions of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided that the court or, where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the court or, where authorized, the public defender, appointing him to have a demonstrated proficiency in the field of criminal trial practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(j) (1) Notwithstanding any other provision of this section or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who does not have a minimum of five years of experience in the general practice of law, provided, that the court or,

where authorized, the public defender, may in its or his or her discretion appoint as assistant counsel an attorney who has less experience;

(B) who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any district attorney's office.

(3) Unless good cause is shown, an attorney representing the indigent defendant at the trial level shall represent him or her at the appellate level if the attorney is otherwise qualified under the provisions of this section.

(k) In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein.

(l) It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel.

(m) Nothing in these regulations or in the model plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the North Carolina State Bar.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0405 Withdrawal by Counsel**

(a) At any time during or pending the trial or retrial of a case, the trial judge, the appointing judge, or the resident judge of the district, upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

(b) At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the appellate court for permission to withdraw from the defense of the case upon the appeal.

(c) Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0406 Procedure for Payment of Compensation**

(a) Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application, enter an order allowing such compensation as is provided in G.S. 7A-458.

(b) Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

(c) Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the director of the Administrative Office of the Courts.

(d) Two certified copies of the order for the payment of fees shall be forwarded by the clerk of the superior court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

(e) Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the director of the Administrative Office of the Courts.

(f) Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the court.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

## Section .0500 Model Plan for Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

### .0501 Purpose

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

### .0502 Applicability

These regulations apply to any criminal case arising in the __________ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the singular shall, as appropriate, be construed to include the plural.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

### .0503 Lists of Attorneys

(a) Any attorney engaged in the private practice of law primarily in the judicial district who

(1) maintains an office in the judicial district;

(2) practices criminal law in the courts of the ________ Judicial District to an appreciable extent, or intends or desires to do so, may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

(b) Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

(c) Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

(d) Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he or she not

be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

(e) The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the ________ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.

(f) Subject to the exceptions contained in Rule .0503(e) above, requirements for inclusion on the three lists are as follows:

(1) an attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that

(A) the attorney is competent to represent criminal defendants charged with misdemeanors and felonies;

(B) two attorneys who have engaged in the practice of law in the ________ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with misdemeanors and felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(2) an attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that

(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;

(B) two attorneys who have engaged in the private practice of law in the ______ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent criminal defendants charged with felonies and that they recommend that he or she be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;

(C) the attorney is competent to represent criminal defendants charged with felonies.

(3) an attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that

(A) the attorney has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters;

(B) two attorneys who have engaged in the private practice of law in the ______ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he or she is competent to represent defendants charged with capital crimes and that they recommend that he or she be included on the third list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation;

(C) the attorney has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office;

(D) the attorney is competent to represent criminal defendants charged with capital crimes.

(g) The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and

that the attorneys whose names appear on the lists meet the qualifications set out herein.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0504 Committee on Indigent Appointments**

(a) A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

(b) All members of the committee shall be attorneys who

(1) are included on one of the appointment lists;

(2) have practiced criminal law in the judicial district, whether as a prosecutor or defense counsel, for not less than five years;

(3) are knowledgeable about practicing attorneys in the ______ Judicial District.

(c) The committee shall consist of members appointed by the president of the judicial district bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

(d) The president of the judicial district bar shall appoint one of the members as chairperson of the committee, who shall serve at the pleasure of the president as shall all other members of the committee.

(e) The committee shall meet at the call of the chairperson upon reasonable notice. The first meeting shall be on ____________. Thereafter, the committee shall meet as often as is necessary to dispatch its business.

(f) The committee shall have complete authority to accomplish the following:

(1) supervise the administration of these regulations;

(2) review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(3) approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;

(4) establish procedures with which to carry out its business;

(5) interview attorneys seeking placement on any list and witnesses for or against such placement.

(g) A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor of a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

(h) The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0505 Placement of Attorneys on List**

(a) Any attorney who wishes to have his or her name added to or deleted from any list, or to have his or her name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Rule .0503 above for placement on a certain list. The written statements of competency required by Rule .0503 above must be attached to the request.

(b) The administrator shall maintain records for the committee and shall advise each member of the committee of the name of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.

(c) The administrator shall assure that all district court judges, resident superior court judges, any special superior court judge with a permanent office in the judicial district, and the district attorney for the ________ Judicial District, and the district's public defender, if any, are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

(d) When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

(e) The committee shall determine whether an attorney requesting to be added to a list when he or she is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Rule .0503 above. The request shall be granted or the addition or transfer allowed if the committee finds that he or she does meet all the standards. Conversely, the request shall be denied if the committee does not find that he or she meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his or her request and is advised of the basis for denial if the request is not granted.

(f) If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Rule .0503 above for the list on which he or she is placed or that he or she can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he or she should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his or her name from the list he or she is on, or transferring him or her from a higher numbered list to a lower numbered list. Appropri-

ate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.

(g) An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident superior court judge of the ________ Judicial District. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney.

(h) Whenever an attorney who provides information to the committee, collectively or through any member, requests that his or her name not be used or that his or her information be treated confidentially, his or her request shall be granted unless doing so results in manifest unfairness.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0506 Appointment Procedure (Noncapital Cases)**

(a) The administrator shall provide the clerk in each courtroom in the district and superior criminal courts of the ________ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear and only in cases to be tried in counties in which they maintain offices unless they agree in advance to accept cases from other counties.

(b) Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he or she is on. The court shall proceed in alphabetical sequence in appointing attorneys. If an attorney's name is passed over because he or she is not on a list relating to a particular charge, the court shall return to his or her name for the next appointment consistent with his or her lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness, or other reasons.

(c) In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried.

(d) The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his or her attorney.

(e) The court may appoint an attorney to represent more than one defendant in a single case.

(f) In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Rule .0503 above and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys but may pass over the name of any attorney known to be unavailable because of vacation, illness, or other reasons, or, in his or her discretion, where justice so requires.

(g) If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0507 Appointments in Capital Cases**

(a) In addition to the provisions of Rule .0506 above, the provisions of this rule shall apply to the appointment of counsel in capital cases.

(b) A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the state is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys.

(c) (1) No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(A) who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(B) who has not been found by the court appointing him or her to have a demonstrated proficiency in the field of criminal trial practice.

(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0508 Appellate Appointments**

(a) If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he or she does not meet all the requirements of Rule .0503 above or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level.

(b) (1) No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(A) who has less than five years of experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may, as a matter of discretion, appoint as assistant counsel an attorney who has less experience; or

(B) who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

(2) For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0509 Administration**

(a) The senior resident superior court judge for the judicial district shall designate a person to serve as administrator of these regulations.

(b) The administrator will perform the duties described previously and particularly shall

(1) maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(2) keep current the three lists of attorneys;

(3) assist the courtroom clerks and the clerk of superior court in carrying out these regulations;

(4) attend meetings of the committee as appropriate;

(5) inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(6) perform other administrative tasks necessary to the implementation of these regulations.

(c) The administrator shall have such office, supplies, and equipment as can be provided by the senior resident superior court judge or the committee.

(d) The clerk of superior court of each county in the judicial district shall file and keep current these regulations for the assignment of counsel as certified to him or her by the secretary of the North Carolina State Bar.

(e) The clerk of superior court of each county in the __________ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his or her county.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

**.0510 Miscellaneous**

(a) These regulations are issued pursuant to Rule .0404, Subchapter D, Chapter 1, Title 27 of the North Carolina Administrative Code in accordance with G.S. 7A-459. Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

(b) It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best

served by appointing a particular lawyer to handle a particular case even though he or she is not next in sequence or does not maintain an office in the county where the case is to be tried.

(c) These regulations shall be construed liberally in order to carry out the purpose stated in Rule .0501 above.

(d) These regulations shall become effective on ________, and shall supersede any existing regulations or plan concerning the appointment of counsel in indigent cases.

APPROVED AND PROMULGATED THIS _____ DAY OF ____________________, 199__.

History Note: Statutory Authority G.S. 7A-459
Readopted Effective December 8, 1994

## Section .0600 Procedures for the Positive Action for Lawyers (PALS) Committee

### .0601 Investigation of Alleged Substance Abuse

The Positive Action for Lawyers Committee (the committee) shall have jurisdiction to investigate and evaluate allegations of substance abuse by lawyers. Among many other things, the committee may confer with any lawyer who is the subject of such allegations as to such allegations, and make recommendations to such lawyer, should it be determined that he or she in fact has a substance abuse problem, regarding sources of help for such problem.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

### .0602 Investigation of Cases Referred by Disciplinary Bodies

The committee may perform similar functions as to cases referred to it by a disciplinary body, reporting the results thereof to the referring body.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

### .0603 Confidentiality

Except as noted herein and otherwise required by law, results of investigations, conferences and the like shall be privileged and held in the strictest confidence between the lawyer involved and the committee. For good cause shown where the allegation of substance abuse is made by the lawyer's family, the committee may, in its dis-

cretion, release such information to such person or persons as in its judgment will be in the best interest of the lawyer involved.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

**.0604 Reference to the Grievance Committee**

Should investigation and evaluation clearly indicate that the lawyer involved is engaging in conduct detrimental to the public, the courts, or the legal profession, the committee shall take such action as may appear appropriate to the committee, including, if warranted, the filing of a grievance.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23; G.S. 84-28
Readopted Effective December 8, 1994

**.0605 District Committees**

The committee may, under appropriate rules and regulations promulgated by the council, establish district committees, which may exercise any or all of the functions set forth herein to the extent provided in any such rules and regulations.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

**.0606 Suspension for Impairment, Reinstatement**

If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the committee may petition any superior court judge to issue an order in the court's inherent authority suspending the attorney's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the attorney's impairment.

(b) The petition shall be signed by the executive director of the committee and the executive director of the North Carolina State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear within 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's

license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar will have the burden of proving by clear, cogent, and convincing evidence that the attorney's ability to practice law has been impaired by drug or alcohol use.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from filing of the petition, unless the suspended attorney agrees to a continuance. At the hearing, the suspended attorney will have the burden of establishing by clear, cogent, and convincing evidence that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being treated and/or managed to minimize the danger to the public from a reoccurrence of drug or alcohol impairment.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to

endorse an emergency order entered hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

(l) The North Carolina State Bar shall not be required to provide security for payment of costs or damages prior to entry of a suspension order with or without notice to the respondent attorney.

(m) No damages shall be awarded against the State Bar in the event that a restraining order entered with or without notice and a hearing is dissolved.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)
Readopted Effective December 8, 1994

**.0607 Consensual Suspension**

Notwithstanding the provisions of Rule .0606 of this subchapter, the court may enter an order suspending an attorney's license where the attorney consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.

History Note: Statutory Authority G.S. 84-23; G.S. 84-28(i)
Readopted Effective December 8, 1994

**.0608 Committee Members As Agents of the State Bar**

All members of the committee shall be deemed to be acting as agents of the North Carolina State Bar and within the course and scope of the agency relationship.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

### .0609 Judicial Subcommittee

A subcommittee to the committee shall be formed which shall consist of at least two members of the judiciary of this state. The purpose of this subcommittee will be to implement a program for intervention for members of the judiciary with substance abuse problems which affect their conduct as judges or justices. The subcommittee will be governed by the rules of the Positive Action for Lawyers Committee where applicable. Rules .0606 and .0607 of this subchapter will have no application to this rule.

History Note: Statutory Authority G.S. 84-22; G.S. 84-23
Readopted Effective December 8, 1994

## Section .0700 Procedures for the Fee Dispute Arbitration Committee

### .0701 Implementation of a Model Plan

The Fee Arbitration Committee (the committee) shall implement a model plan for fee arbitration approved by the council and shall ensure that a plan of fee arbitration not substantively inconsistent with the model plan is adopted by each district bar not later than January 1, 1994. It is contemplated that fee arbitration plans will differ somewhat from district to district as a function of local conditions and that some district bars may wish to jointly administer fee arbitration programs. All district bar fee arbitration plans must be approved by the committee on behalf of the council.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0702 Alternative to District Bar-Sponsored Arbitration

If at any time following January 1, 1994, a district bar does not have in operation a fee arbitration plan approved by the committee, the committee shall have the responsibility of providing fee arbitration services through its own membership, through a fee arbitration committee from another judicial district or through a fee arbitration committee appointed from among persons residing in the subject district. In any such case, the body providing fee arbitration services shall be subject to the procedural requirements set forth in the model plan.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0703 Coordinator of Fee Arbitration

The secretary-treasurer of the North Carolina State Bar shall designate a member of his or her staff to serve as coordinator of fee arbitration under the supervision of the committee. The coordinator of fee arbitration shall assist in seeing that fee arbitration services are available in every district of the state. The coordinator shall also develop and make available for use forms for the administration of district bar fee arbitration programs, such forms to be approved by the committee. The coordinator shall also be responsible for maintaining records and statistics relating to the administration of the program and shall assist the chairperson of the committee in developing an annual report concerning the fee arbitration program to the council and the North Carolina Supreme Court.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0704 Volunteer Committee Service

Except for the coordinator of fee arbitration, all persons acting on behalf of the committee, on either the state or district bar levels, shall be volunteers and shall be compensated for their services and reimbursed for their expenses as though they were councilors of the North Carolina State Bar engaged in official business of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .0800 Model Plan for District Bar Fee Arbitration

Note: For the purposes of this model plan, the constituent district bars of the North Carolina State Bar are referred to as "district bars."

### .0801 Appointment of Committee Members

(a) The Committee on Fee Arbitration (herein called the committee) shall consist of (not fewer than six nor more than eighteen) members to be appointed by the president of the district bar for three-year terms. At least one committee member shall be appointed from each county in the district. Initially, one-third of the members of the committee shall be appointed for a period of one year, one-third for a period of two years, and one-third for a period of three years. At least one-third but not more than one-half of the membership of the committee shall be responsible laypersons who reside within the district. All other persons serving on the committee shall be members of

this bar. As each member's term of office on the committee expires, his or her successor shall be appointed by the president for a period of three years. The term of a member which expires while an arbitration is pending before him or her or before a panel of which he or she is a member shall be extended until such arbitration is concluded, but such extension shall not interfere with the president's power to appoint a successor to the committee. The president shall appoint the chairperson of the committee each year from among the members, and the name of the chairperson shall be sent to the coordinator of fee arbitration with the North Carolina State Bar.

(b) To the extent reasonably possible, the composition of the committee should reflect the ethnic and cultural diversity of the population of the district and should include members of minority groups, women and senior citizens. Lawyer members should have practiced for at least five years.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0802 Chairperson**

The chairperson shall be charged with the responsibility of overseeing the work of the committee, reviewing recommendations for dismissal of cases, developing forms to implement the procedure prescribed herein, and formulating rules of procedure not inconsistent with these rules. The chairperson shall review recommendations for dismissal of cases within 30 days after any such recommendations are made.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0803 Jurisdiction**

The committee shall have jurisdiction over any disagreement concerning the fee paid, charged or claimed for legal services rendered by an attorney licensed to practice in this state and having his or her principal practice in the ________ District where there exists an express or implied contract establishing an attorney-client relationship. Disputes over which, in the first instance, a court or federal or state administrative agency or official has jurisdiction to establish the amount of the fee, or which involve services which constitute a violation of the Rules of Professional Conduct, are specifically excluded from the committee's jurisdiction, as are matters which are already the subject of litigation. Also excluded are disputes between lawyers concerning divisions of legal fees, disputes between lawyers and

other service providers such as court reporters and expert witnesses, and disputes between lawyers and other persons in regard to the provision of nonlegal services. It shall be the duty of the committee to encourage the amicable resolution of fee disputes falling within its jurisdiction and, in the event such resolution is not achieved, to arbitrate such disputes.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0804 Processing Requests for Arbitration**

(a) Any client may submit a request for arbitration of a fee dispute. Lawyers who are parties to fee disputes may not independently request arbitration but are encouraged to advise clients with whom they have fee disputes of the existence of this procedure and its purpose. Such lawyers must also refrain from filing suit to collect disputed fees until their clients have had a reasonable opportunity to request arbitration after having been notified of the existence of this plan.

(b) Requests for fee arbitration shall be submitted in writing to either the coordinator of fee arbitration addressed to the North Carolina State Bar, P.O. Box 25908, Raleigh, NC 27611, or the chairperson of the committee. In the event a request is submitted initially to the chairperson, the chairperson shall forward a copy of the request to the coordinator of fee arbitration to facilitate the maintenance of complete records and any necessary follow-up. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that prior to requesting arbitration a reasonable attempt was made to resolve the dispute by agreement, that the matter has not already been adjudicated, and that it is not presently the subject of litigation.

(c) Upon receipt, a request shall be immediately acknowledged. If received initially by the coordinator of fee arbitration, the request shall be immediately forwarded to the chairperson of the committee of the district wherein the dispute arose for referral to an "assigned member" for investigation. The assigned member shall be disqualified from participating in any manner in the arbitration proceedings.

(d) As soon as possible after receiving the case, the assigned member shall notify the subject lawyer of the request for arbitration and provide the lawyer with a copy of the request for arbitration. The assigned member shall personally contact both parties for the pur-

pose of explaining the arbitration procedure and exploring with the parties the possibility of resolving the dispute by agreement prior to a hearing. If settlement does not occur, the assigned member shall undertake to investigate the matter.

(e) Upon the completion of any preliminary investigation deemed appropriate, the assigned member shall determine whether a matter suitable for arbitration has been presented. If the assigned member determines that a matter should not be arbitrated because it appears to be frivolous or moot or because jurisdiction is or becomes unwarranted, he or she shall prepare a brief written report setting forth the facts and a recommendation of dismissal for submission to the chairperson.

(f) If the chairperson concurs in the assigned member's recommendation, the matter shall be closed and the parties so advised. If the chairperson disapproves the assigned member's recommendation, he or she may proceed as hereinafter provided.

(g) If, following the preliminary investigation, the assigned member concludes that a matter suitable for arbitration has been stated, he or she shall notify the parties that the committee has assumed jurisdiction but will delay any further steps until the expiration of a 30-day period during which the parties shall be urged to exert their best efforts to reach an amicable resolution of their dispute.

(h) If the parties do not themselves settle the dispute within the 30-day period, the assigned member shall invite the parties to execute a consent to binding arbitration. If either party desires not to execute such consent, the matter shall be arbitrated with the understanding that the result will be nonbinding. At any time thereafter the parties may agree that the results will be binding.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0805 Arbitration Proceedings**

(a) After ascertaining whether the arbitration will be binding or nonbinding, the chairperson shall assign the matter to a hearing panel composed of one [lawyer] member of the committee if the amount in dispute is $2,000 or less, or to a three-member panel, containing at least one lawyer and at least one layperson selected by the chairperson if the amount in dispute is more than $2,000. The chairperson shall designate a lawyer member of a panel to serve as chairperson of the panel.

(b) It shall be the obligation of any member so designated to serve as arbitrator to disclose to the chairperson of the committee any reasons why he or she cannot ethically or conscientiously serve. In the event that a member so designated to serve declines or is unable to serve, the chairperson shall select another committee member who may be eligible. In the designation of panel members, the chairperson shall strive to rotate selection of panel members in an equitable manner.

(c) If at the time set for a hearing before a three-member panel, all three members are not present, the chairperson of the panel, or in the event of his or her unavailability, the chairperson of the committee, in his or her sole discretion shall decide either to postpone the hearing, or, with the consent of the parties, to proceed with the hearing with one member of the panel as the sole arbitrator, in which case he or she shall also designate the member of the panel who will hear the case as sole arbitrator. In no event will a hearing be conducted by or proceed with two arbitrators.

(d) If any member of a three-member panel becomes unable to continue to act while the matter is pending and before a decision has been made, the proceedings to that point shall be declared null and void and the matter assigned to a new panel for rehearing unless the parties, with the consent of the panel chairperson, or in the event of his or her unavailability, the chairperson of the committee, consent to proceed with the hearing with one of the remaining members of the panel as the sole arbitrator.

(e) If the parties to a controversy agree, they may waive an oral hearing and submit their contentions in writing to the arbitrator(s) assigned who may then determine the controversy. However, the arbitrator(s) may require oral testimony from any party or witness after due notice to all parties.

(f) The members of the committee selected as arbitrator(s) of any dispute shall be vested with all the powers and shall assume all the duties granted and imposed upon neutral arbitrators by the Uniform Arbitrations Act as adopted in North Carolina (G.S. 1-561.1 et seq.) not in conflict with these rules.

(g) The single arbitrator or panel assigned shall hold a hearing within 30 days after the receipt of the assignment and shall render a decision within 30 days after the close of the hearing. The decision of the panel shall be made by a majority of the panel where heard by three members, or by the one member of the panel who was designated as sole arbitrator, as provided herein.

(h) The chairperson of the panel or the single arbitrator, as the case may be, shall fix a time and place for the hearing and shall cause written notice thereof to be sent to the other members of the panel and served personally or by registered or certified mail on the parties to the arbitration not less than seven days before the hearing. A party's appearance at a scheduled hearing shall constitute a waiver on his or her part of any deficiency with respect to the giving of notice of the hearing.

(i) The term "party" as used in these rules refers to a party to an arbitration and shall include the person(s) or entity requesting arbitration and any lawyer with whom that person(s) or entity is in disagreement regarding a legal fee.

(j) The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration has the right to be represented by an attorney at any stage of the arbitration proceeding. The chairperson of the committee shall have the discretion to appoint an attorney member of the committee to represent the nonlawyer party on a pro bono basis. Any party may also have a hearing reported by a court reporter at his or her expense by written request presented to the chairperson of the committee and other parties to the arbitration at least three days prior to the date of the hearing. In the event of such request, any other party to the arbitration shall be entitled to acquire at his or her own expense a copy of the reporter's transcript of the testimony by arrangements made directly with the reporter. It shall be the duty and responsibility of the party requesting that a hearing be reported to make the necessary arrangements to have the court reporter present at the hearing.

(k) All parties and counsel shall have an absolute right to attend all hearings. The exclusion of other persons or witnesses waiting to be heard shall rest in the discretion of the arbitrator(s).

(l) Adjourned dates for the continuation of any hearing which cannot be completed on the first day shall be fixed for such times and places as the arbitrator(s) may select with due regard to the circumstances of all the parties and the desirability of a speedy determination. Upon request of a party for good cause, or upon its own determination, the arbitrator(s) may postpone the hearing from time to time.

(m) The sole arbitrator or the chairperson of a panel, as the case may be, shall preside at the hearing. The sole arbitrator or the chairperson of the panel shall rule on the admission and exclusion of evi-

dence and on questions of procedure and shall exercise all powers relating to the conduct of the hearing. In conducting the hearing and in making rulings concerning evidence and procedure, the arbitrator(s) shall endeavor to afford all parties a fair and reasonably informal opportunity to be fully heard and shall disregard procedural and evidentiary rules or technicalities tending to frustrate that purpose.

(n) The arbitrator(s) may request opening statements and may prescribe the order of proof. In any event, all parties shall be afforded full opportunity for the presentation of any material evidence. In the interests of time and economy, the panel may examine witnesses and refuse to hear testimony which is deemed redundant or irrelevant.

(o) On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the sole arbitrator or the chairperson of the panel shall administer oaths to witnesses testifying at the hearing.

(p) If either party, having agreed to binding arbitration and having been duly notified of a hearing, fails to appear, the arbitrator(s) may hear and determine the controversy upon the evidence produced, notwithstanding such failure to appear, and enter a binding decision. If a party, not having agreed to binding arbitration, but having been duly notified of a hearing, fails to appear, the arbitrator(s) may terminate the arbitration. For good cause shown, the arbitrator(s) may also excuse a party's failure to appear and reschedule a hearing. If the lawyer/party's failure to appear results in termination, the chairperson of the committee shall report that fact to the coordinator of fee arbitration and the counsel of the North Carolina State Bar who may treat the matter as a grievance against the lawyer. If the client/party's failure to appear results in termination, the chairperson of the committee shall likewise inform the coordinator of fee arbitration and advise the lawyer that he or she may proceed, if desired, with other means of collecting the legal fee in question.

(q) Before closing the hearing, the arbitrator(s) shall specifically inquire of all parties whether they have further evidence to submit in whatever form. If the answer is negative, the hearing shall be declared closed and a notation to that effect made by the arbitrator(s) as well as the date for submission of memoranda or briefs if requested by the arbitrator(s).

(r) In the sole discretion of the arbitrator(s) and for good cause shown, the hearing may be reopened at any time before the decision is signed and filed.

(s) In the event of the death or incompetency of a party to the arbitration proceeding, prior to the close of the hearing, the proceeding shall abate without prejudice to either party to proceed in a court of proper jurisdiction to seek such relief as may be warranted. In the event of death or incompetency of a party after the close of the hearing but prior to a decision, a decision shall nevertheless be rendered. If the parties have agreed to binding arbitration, the decision shall be binding upon the heirs, administrators, or executors of the deceased and on the estate or guardian of the incompetent.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0806 The Decision**

(a) The purpose of arbitration under these rules is to resolve the underlying dispute by determining the proper charge for the legal services rendered. In making that determination the arbitrators may consider all factors they deem relevant, but should give special consideration to the intentions and understandings of the parties at the time the representation was undertaken, as well as the provisions of Rule 2.6 of the North Carolina Rules of Professional Conduct. Of particular significance should be any written fee agreement executed by the parties.

(b) The result of the arbitration shall be expressed in a written decision signed by a majority of the arbitrators. A dissent shall be signed separately. A decision may also be entered on consent of all the parties. Once a decision is signed and filed, the hearing may not be reopened except upon consent of all parties.

(c) While it is not required that a decision be in any particular form, it should in general consist of a preliminary statement reciting the jurisdictional facts and the decision. It shall include a determination of all questions submitted to the arbitrator(s), the decision of which is necessary in order to determine the controversy.

(d) The original and four copies of the decision shall be signed by the sole arbitrator or, if the matter is heard by a three-member panel, by the members of the panel concurring therein.

(e) The sole arbitrator or the chairperson of the panel shall forward the decision, together with the entire file, to the chairperson of the committee who shall thereupon, for and on behalf of the arbitrator(s), serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail. The chairperson shall also send a copy of the decision to the coordinator of fee arbitration.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0807 Enforcement of the Decision**

In any case in which both parties signed a consent to binding arbitration, any award rendered may be enforced by any court of competent jurisdiction. In all other cases, the parties are strongly encouraged to abide by the decision.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0808 Record Keeping**

The coordinator of fee arbitration shall keep a log of each request for arbitration filed, which log shall contain the following information:

(1) the client's name;

(2) date of the request;

(3) the lawyer's name;

(4) the district in which the lawyer resides;

(5) how the dispute was resolved (heard by panel, no merit, fee adjusted, attorney/client agreement, etc.);

(6) the time necessary to resolve the dispute.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Section .0900 Procedures for the Membership and Fees Committee**

**.0901 Transfer to Inactive Status**

(a) Petition for Transfer to Inactive Status

Any member who desires to be transferred to inactive status shall file a duly verified petition with the secretary addressed to the council setting forth fully

(1) the member's name and current address;

(2) the date of the member's admission to the North Carolina State Bar;

(3) the reasons why the member desires transfer to inactive status;

(4) that the member is at the time of filing the petition a member in good standing having paid all fees required and without any grievances or disciplinary complaints undisposed of against him or her;

(5) any other matters pertinent to the petition.

(b) Conditions Upon Transfer

No member may be voluntarily transferred to disability-inactive status or retired/nonpracticing inactive status until:

(1) the member has paid all membership fees, late fees and other costs assessed against the member by the North Carolina State Bar, and

(2) all grievances and disciplinary matters pending against the member have been finally resolved.

(c) Order Transferring Member to Inactive Status

Upon receipt of a petition which satisfies the provisions of Rule .0901(a) above, the council may, in its discretion, enter an order transferring the member to inactive status. The order shall become effective immediately upon entry by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23
Readopted Effective December 8, 1994

**.0902 Reinstatement from Inactive Status**

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in an application form prescribed by the council and has signed the form under oath;

(2) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of

the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest;

(3) that the member has paid a $125.00 reinstatement fee, the membership fees for the current year in which the application is filed and all costs incurred by the North Carolina State Bar in investigating and processing the application. The reinstatement fee and costs shall be retained by the North Carolina State Bar but the membership fees shall be refunded if the petition is denied.

(c) Service of Reinstatement Petition

The petitioner shall contemporaneously serve a copy of the petition on the secretary and upon each member of the Membership and Fees Committee. The secretary shall transmit a copy of the petition to the counsel.

(d) Response by Counsel

The counsel will conduct any necessary investigation regarding the petition. The counsel may file a response to the petition with the secretary within 15 days after service of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The counsel will serve a copy of any response upon the petitioner and the members of the Membership and Fees Committee.

(e) Response by Membership and Fees Committee

Any member of the Membership and Fees Committee may file:

(1) an objection to the petition with the secretary within 15 days after receipt of the petition. The response must set out specific objections sufficient to put the petitioner on notice of the facts or events at issue. The objecting member will serve a copy of any response filed upon the petitioner and upon the counsel. The objecting member shall not participate in any vote on the petition.

(2) a request for additional investigation of the petition within 15 days after the member receives the petition.

(f) Uncontested Petitions

If no timely objection to the petition is filed within the time set out herein by the counsel or a member of the Membership and Fees Committee, the Membership and Fees Committee will consider the

petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(g) Contested Petitions for Reinstatement

(1) Hearing Procedure

If a timely objection to the petition is filed by the counsel or a member of the Membership and Fees Committee, the secretary will refer the matter to the chairperson of the Membership and Fees Committee of the North Carolina State Bar for hearing. Within 14 days after the objection is filed, the chairperson will appoint three members of the Membership and Fees Committee to serve as a hearing panel. The chairperson may appoint him or herself as a member of a hearing panel. The chairperson will schedule a time and place for a hearing before the hearing panel and will notify the counsel and the petitioner of the time and place of the hearing. The hearing will be conducted in accordance with the North Carolina Rules of Civil Procedure for non-jury trials insofar as practicable and the Rules of Evidence applicable in superior court, unless the parties agree otherwise.

(2) Hearing Panel Recommendation

Following the hearing on a contested reinstatement petition, the hearing panel will make a written recommendation to the full Membership and Fees Committee regarding whether the petitioner's license should be reinstated. The recommendation shall include appropriate findings of fact and conclusions of law in support of its recommendation.

(3) Record to Membership and Fees Committee

(A) The petitioner will compile a record of the proceedings before the hearing panel to the Membership and Fees Committee, including a legible copy of the complete transcript, all exhibits introduced into evidence and all pleadings, motions and orders, unless the petitioner and counsel agree in writing to shorten the record. Any agreements regarding the record shall be included in the record transmitted to the Membership and Fees Committee.

(B) The petitioner shall provide a copy of the record to the counsel not later than 90 days after the hearing unless an extension is granted by the chairperson of the committee for good cause shown.

(C) The petitioner will transmit a copy of the record to each committee member who did not sit on the hearing panel no later than 30 days before the meeting at which the petition is to be considered.

(D) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the Membership and Fees Committee.

(E) If the petitioner fails to comply fully with any of the provisions of Rule .0902(g)(3)(A)-(D) above, the counsel may file a motion to the secretary to dismiss the petition.

(4) Committee Recommendation

(A) In his or her discretion, the chairperson of the Committee may permit counsel for the State Bar and the petitioner to present oral or written argument, but the committee will not consider additional evidence not in the record transmitted from the hearing panel, absent a showing that the ends of justice so require or that undue hardship will result if the additional evidence is not presented.

(B) After considering the record and the arguments of counsel, if any, the Membership and Fees Committee will make a written recommendation regarding whether the petition should be granted. The chairperson of the committee shall sign the recommendation for the committee members.

(5) Record to Council

(A) Following entry of the written recommendation of the Membership and Fees Committee, the petitioner will transmit a copy of the record of the proceedings before the hearing panel and the Membership and Fees Committee to each council member no later than 30 days before the council meeting at which the petition is to be considered.

(B) The petitioner shall bear all of the costs of transcribing, copying and transmitting the record to the council.

(6) Order by Council

The council will review the record and the recommendations of the hearing panel and the Membership and Fees Committee and will determine whether and upon what conditions the petitioner will be reinstated. The council may tax the costs attributable to the proceeding against the petitioner.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23
Readopted Effective December 8, 1994

### .0903 Failure to Pay Membership Fees

(a) Notice of Overdue Fees

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee, the secretary shall prepare a written notice

(1) directing the member to show cause within 60 days of the date of the notice why he or she should not be suspended from the practice of law, and

(2) demanding payment of a $75 late fee.

(b) Service of the Notice

The notice shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(c) Entry of Order of Suspension for Nonpayment of Dues

Whenever it appears that a member has failed to comply with the rules regarding payment of the annual membership fee and any late fees imposed pursuant to Rule .0903(a) above, and that more than 60 days have passed from service of the notice to show cause, the council may enter an order suspending the member from the practice of law. The order shall be effective when entered by the council. A copy of the order shall be served on the member pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Late Tender of Membership Fees

If a member tenders the annual membership fee and the $75 late fee to the North Carolina State Bar after July 1 of a given year, but before a suspension order is entered by the council, no order of suspension will be entered.

History Note: Statutory Authority G.S. 84-23; G.S. 84-34
Readopted Effective December 8, 1994

### .0904 Reinstatement After Suspension for Failure to Pay Fees

(a) Reinstatement Within 30 Days of Entry of Suspension Order

A member who has been suspended for nonpayment of annual membership fees and/or late fees may petition the secretary for an order of reinstatement of the member's license at any time up to 30

days after entry of the suspension order. The secretary shall enter an order reinstating the member to active status upon receipt of a timely petition and satisfactory showing by the member of payment of all membership fees, late fees and costs.

(b) Reinstatement More than 30 Days After Entry of Suspension Order

At any time more than 30 days after entry of an order of suspension, a member who has been suspended for nonpayment of dues and/or late fees may petition the council for an order of reinstatement. The petition will be filed with the secretary, who will transmit a copy to the counsel.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) that the member has provided all information requested in a form to be prescribed by the council and has signed the form under oath.

(2) that the member has the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest.

(3) that the member has paid a $125 reinstatement fee, a $75 late fee, all past and current membership fees, plus all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

(d) Procedure

The petition for reinstatement shall be handled as provided for in Rule .0902(c)-(g) of this subchapter, governing petitions for reinstatement from inactive status.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23; G.S. 84-34
Readopted Effective December 8, 1994

## Section .1000 Rules Governing Continuing Legal Education Hearings Before the Membership and Fees Committee

### .1001 Purpose of these Regulations

The Rules Governing the Administration of the Continuing Legal Education Program direct the Board of Continuing Legal Education

to refer two types of matters for determination by the State Bar Council after a hearing before the Membership and Fees Committee. The first type of matter is that in which the question is whether to suspend a member's license for the member's failing to comply with the requirements of the rules. When the board notifies a member of an apparent failure to meet the requirements, and the member responds, the board may determine that the member has failed to comply and that good cause for the failure has not been shown. The rules provide that, when the board reaches those conclusions, it "shall refer the matter to the council for determination after hearing by the Membership and Fees Committee." Rule .1523 of this subchapter.

The second type of matter referred by the board is that involving the question of whether to reinstate a member who has been suspended for noncompliance. When the board, in considering a petition for reinstatement, determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the rules provide that the board "shall refer the matter to the Membership and Fees Committee for hearing." Rule .1524 of this subchapter.

The purpose of these rules is to prescribe the standards and processes by which the Membership and Fees Committee shall conduct the hearings and make the determinations contemplated by the Rules Governing the Administration of the Continuing Legal Education Program.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1002 Definitions

(1) "Committee," unless otherwise indicated, shall mean the Membership and Fees Committee of the North Carolina State Bar.

(2) Other words and phrases shall have the meanings set forth in Rule .1501(b) of this subchapter.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1003 Referral from the Board

When the board refers a matter to the council for determination after a hearing by the committee, the board shall transmit to the committee

(1) a notice of referral from the board to the committee, clearly identifying the member whose license is in question and the nature of the matter being referred;

(2) copies of all relevant written materials accumulated or created by the board;

(3) copies of all written materials submitted to the board by the member whose license is in question;

(4) a written statement of the board's findings and determinations in the matter that is being referred.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1004 Time of Hearing

A matter referred to the committee for hearing shall be heard not less than 30 days and not more than 90 days after the date the notice of referral is received from the board by the committee.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1005 Notice of Hearing

(a) Time of Notice to Member—A member with respect to whom a matter has been referred for hearing shall receive notice of the hearing at least 20 days prior to the hearing.

(b) Service of Notice on Member—The notice of hearing shall be served on the member by registered mail.

(c) Content of Notice to Member—The notice of the hearing shall include

(1) notice of the date, time, and place of the hearing;

(2) notice to the member that he or she may submit for consideration written materials, including a written statement of explanation, at any time prior to or during the hearing;

(3) notice to the member that he or she may personally appear and be heard during the hearing;

(4) notice to the member that he or she may be represented by counsel at the hearing.

(d) Notice to the Board—Notice shall be transmitted to the board at least 20 days prior to the hearing of the date, time, and place of the hearing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1006 The Hearing**

(a) Nature of Inquiry: Suspension—When the matter being heard involves the question of whether a member's license shall be suspended for noncompliance, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the member was in compliance with the requirements of the rules at the time the board made its determination;

(2) if the member was not in compliance, whether there is good cause why his or her license should not be suspended.

(b) Nature of Inquiry: Reinstatement—When the matter being heard involves the question of whether the license of a suspended member shall be reinstated, the purpose of the hearing shall be to determine, as a matter of fact,

(1) whether the continuing legal education deficiency which gave rise to the member's suspension had been cured at the time the board made its determination that it had not been cured;

(2) if the deficiency had been cured at the time the board made its determination, whether the suspended member had paid the required reinstatement fee at the time the board made its determination.

(c) The Forum—A matter before the committee for a hearing shall be heard by a panel of three members of the committee, one of whom shall serve as the presiding member, designated as provided in Rule .1007 of this subchapter.

(d) Member's Right to be Heard—A member whose license is the subject of a hearing shall have the right to

(1) appear personally at the hearing;

(2) speak and be heard at the hearing on any aspect of the matter being heard;

(3) submit for consideration relevant written materials, including a written statement of explanation, at any time prior to or during the hearing;

(4) be represented by counsel at the hearing.

(e) Information from the Board

(1) The panel shall consider the written materials described in Rule .1003 of this subchapter transmitted by the board to the committee.

(2) A member of the board, or other person authorized by the board, may attend the hearing and may present oral or written information and argument on any aspect of the matter being heard.

(f) Effect of Board's Findings on Issues of Accreditation and Approval—When the board has determined that a member has failed to comply with the requirements of the rules or that a suspended member has failed to cure a deficiency, upon its finding that credits essential to compliance or reinstatement were acquired in a course or program that was not properly accredited or approved,

(1) the board's finding that the course or program was not properly accredited or approved shall be presumed by the panel to be correct; and

(2) the member may rebut the presumption of correctness by satisfying the panel that the course or program had in fact been properly accredited or approved; or

(3) the member may rebut the presumption of correctness by satisfying the panel that the board acted contrary to its rules in failing to accredit or approve the course or program.

(g) Deliberations of the Panel—The panel shall conduct its deliberations, make its determinations, and adopt its recommendations in private.

(h) Decision of the Panel—The panel shall consider a matter in accord with the process described in Rules .1008 and .1009 of this subchapter and shall put its determinations and recommendations in writing.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1007 The Panel**

(a) Assignment of Matter to Panel—A matter referred by the board for hearing and determination shall be assigned to a panel for hearing.

(b) Members of the Panel—A hearing panel shall consist of three members of the committee.

(c) Designation of Members—The members of a hearing panel shall be designated by the chairperson of the committee.

(d) Designation of Presiding Member—The chairperson of the committee shall designate one of the three members of a panel to serve as the presiding member.

(e) Duties of Presiding Member—The presiding member shall

(1) timely schedule the hearing;

(2) assure that proper and timely notice of hearing is given to the member and the board;

(3) preside at the hearing and rule on any question of procedure that may arise;

(4) preside at the deliberations of the panel;

(5) sign the written determinations and recommendations of the panel;

(6) report the panel's determinations and recommendations to the committee.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1008 Suspension Hearing: Process for Determining a Matter Involving the Question of Suspension**

When the matter before the panel is one involving the question of whether a member shall be suspended for failing to comply with the requirements of the rules, the panel shall proceed as follows:

(a) Examination for Basis for Noncompliance Determination—The panel first shall examine the written information transmitted by the board to the committee, and shall determine whether that information provides a basis for the board's determination that the member had failed to comply with the requirements of the rules at the time the board made its determination.

(b) When There Is No Basis for Noncompliance Determination—If the written information from the board provides no basis for a determination of noncompliance, the panel shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(c) When There Is Some Basis for Noncompliance Determination—If the written information from the board provides some basis for a determination of noncompliance, the panel then shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the member was in compliance with the requirements of the rules at the time the board made its determination.

(d) Assessing the Information on the Issue of Compliance

(1) Based on all the information before it, the panel shall determine whether it is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination.

(2) In assessing the information on compliance, when the board's determination of noncompliance is based upon its finding that credits essential to compliance were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) When the Panel Makes a Determination of Compliance—If the panel is not persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination it shall determine that the member is in compliance and shall report to the committee a recommendation that the member not be suspended.

(f) When the Panel Makes a Determination of Noncompliance—If the panel is persuaded that the member was not in compliance with the requirements of the rules at the time the board made its determination, the panel then shall consider all information sub-

mitted to the panel or to the board by the member and submitted by the board to the panel bearing on the issue of whether there is good cause why the member's license should not be suspended.

(g) When the Panel Determines That There Is Good Cause—If the panel is satisfied that there is good cause that the member's license should not be suspended, it shall determine that there is good cause and shall report to the committee a recommendation that the member's license not be suspended.

(h) When the Panel Determines That There Is Not Good Cause—If the panel is not satisfied that there is good cause why the member's license should not be suspended, it shall determine that there is not good cause and shall report to the committee a recommendation that the member's license be suspended.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1009 Reinstatement Hearing: Process for Determining a Matter Involving the Question of Reinstatement**

When the matter before the panel is one involving the question of whether a suspended member shall be reinstated following a suspension for noncompliance with the rules, the panel shall proceed as follows:

(a) Examination of the Basis for Determination That Deficiency Not Cured—The panel first shall examine the written information transmitted by the board to the committee and shall determine whether that information provides a basis for the board's determination that the deficiency for which the member's license was suspended had not been cured at the time the board made its determination.

(b) When There Is No Basis for Determination That Deficiency Not Cured—If the written information from the board provides no basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall determine that the deficiency had been cured and shall report to the committee a recommendation that the suspended member be reinstated.

(c) When There Is Some Basis for Determination That Deficiency Not Cured—If the written information from the board provides

some basis for a determination that the suspended member's deficiency had not been cured at the time the board made its determination, the panel shall consider all information submitted to the panel or to the board by the member bearing on the issue of whether the deficiency had been cured at the time the board made its determination.

(d) Assessing the Information on the Issue of Cure

(1) Based upon all the information before it, the panel shall determine whether it is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination.

(2) In assessing the information on cure, when the board's determination that the deficiency had not been cured is based upon its finding that credits essential to cure were acquired in a course or program that was not properly accredited or approved, the panel shall give that finding and any rebuttal information from the member the consideration described in Rule .1006(f) of this subchapter.

(e) When the Panel Determines That the Deficiency Had Not Been Cured—If the panel is persuaded that the suspended member's deficiency had not been cured at the time the board made its determination, it shall determine that the deficiency had not been cured and shall report to the committee a recommendation that the suspended member not be reinstated.

(f) When the Panel Determines That the Deficiency Had Been Cured—If the panel is persuaded that the suspended member's deficiency had been cured at the time the board made its determination, it shall determine that the deficiency had been cured and then shall consider all information submitted to the panel or to the board by the member and all information submitted by the board to the panel bearing on the issue of whether the reinstatement fee had been paid at the time the board made its determination.

(g) When the Panel Determines That Reinstatement Fee Had Been Paid—If the panel is not persuaded that the reinstatement fee had not been paid at the time the board made its determination, the panel shall determine that the fee had been paid and shall report to the committee a recommendation that the member be reinstated.

(h) When the Panel Determines That Reinstatement Fee Had Not Been Paid—If the panel has determined that the reinstatement

fee had not been paid at the time the board made its determination, the panel shall determine that the fee had not been paid and shall report to the committee a recommendation that the member not be reinstated.

(i) When the Member Submits Information Indicating Remedial Intervening Events—When a suspended member submits information indicating that, after the board's determination and prior to the hearing before the panel, the suspended member cured the deficiency (if failure to cure was a basis for the denial), the panel shall remand the matter to the board with a request that it reconsider the matter in light of the new information.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1010 Report by the Panel to the Committee**

(a) Report by the Panel—At the first meeting of the committee following a panel's hearing a matter, the panel shall report to the committee its determinations and recommendations.

(b) When Report Recommends Reinstatement or No Suspension—If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member not be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member be reinstated, the committee shall accept the report, and the panel's recommendation shall be the recommendation of the committee.

(c) When Report Recommends Suspension or No Reinstatement—If the panel reports to the committee, in a matter involving the question of suspension, a recommendation that the member be suspended, or, in a matter involving the question of reinstatement, a recommendation that the member not be reinstated, the committee shall consider the information reported by the panel and shall determine whether there is any basis for the panel's recommendation.

(d) When Information Contains No Basis for Panel's Recommendation—If the information reported by the panel contains no basis for the panel's recommendation of suspension or its recommendation of no reinstatement, the committee shall reject the panel's recommendation and shall recommend, in a suspension matter, that the member not be suspended or, in a reinstatement matter, that the member be reinstated.

(e) When Information Contains Some Basis for Panel's Recommendation—If the information reported by the panel contains some basis for the panel's recommendation of suspension, or its recommendation of no reinstatement, the committee shall accept the panel's recommendation and shall recommend, in a suspension matter, that the member be suspended or, in a reinstatement matter, that the member not be reinstated.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1011 Report by the Committee to the Council

At the first meeting of the council following the committee's receiving the report of a panel on a matter, the committee shall report to the council for final action the committee's recommendation in the matter.

History Note: Statutory Authority G.S. 84-23; Order of the North Carolina Supreme Court, dated October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

## Section .1100 Reserved

## Section .1200 Reserved

## Section .1300 Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts (IOLTA)

### .1301 Purpose

The IOLTA Board of Trustees (board) shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts. The plan is: Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct shall be deposited by the North Carolina State Bar through the board in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with the improvement of the administration

of justice, under the supervision and direction of the board established under this plan to administer the funds. The board will award grants under the six categories approved by the North Carolina Supreme Court being mindful of its tax exempt status and the IRS rulings that private interests of the legal profession are not to be funded with IOLTA funds.

The programs for which the funds may be utilized shall consist of

(1) providing civil legal services for indigents;

(2) establishment and maintenance of lawyer referral system in order to assure that persons in need of legal services can obtain such services from a qualified attorney;

(3) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys;

(4) development of a client security fund to protect the public from loss due to dishonest or fraudulent practices on the part of lawyers;

(5) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose;

(6) such other programs designed to improve the administration of justice as may from time to time be proposed by the board and approved by the Supreme Court of North Carolina.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1302 Jurisdiction: Authority**

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1303 Operational Responsibility**

The responsibility for operating the program of the board rests with the governing body of the board, subject to the statutes govern-

ing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1304 Size of Board

The board shall have nine members, at least six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1305 Lay Participation

The board may have no more than three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1306 Appointment of Members; When; Removal

The members of the board shall be appointed by the Council of the North Carolina State Bar. The July quarterly meeting is when the appointments are made. Vacancies occurring by reason of death, resignation or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1307 Term of Office

Each member who is appointed to the board shall serve for a term of three years beginning on September 1.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1308 Staggered Terms

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1309 Succession**

Each member of the board shall be entitled to serve for two full three-year terms. No member shall serve more than two consecutive three-year terms, in addition to service prior to the beginning of a full three-year term, without having been off the board for at least three years.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1310 Appointment of Chairperson**

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be for one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1311 Appointment of Vice-Chairperson**

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1312 Source of Funds**

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 10.3 of the Rules of Professional Conduct, voluntary contributions from lawyers, and interest, dividends or other proceeds earned on the board's funds from investments.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1313 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used to pay the administrative costs of the IOLTA program and to fund grants approved by the board under the six categories approved by the North Carolina Supreme Court as outlined above.

(a) Maintenance of Accounts: Audit—The funds of the IOLTA program shall be maintained in a separate account from funds of the North Carolina State Bar such that the funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis. The audit will be conducted after the books are closed at a time determined by the auditors, but not later than March 31 of the year following the year for which the audit is to be conducted.

(b) Investment Criteria—The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the Council of the North Carolina State Bar for handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursements—Disbursement of funds of the board in the nature of grants to qualified applicants in the public interest, less administrative costs, shall be made by the board in accordance with policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The board shall adopt an annual operational budget and disbursements shall be made in accordance with the budget as adopted. The board shall determine the signatories on the IOLTA accounts.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1314 Meetings

The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon

notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be a majority of the total membership of the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1315 Annual Report

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1316 Severability

If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of the plan are severable.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .1400 Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar

### .1401 Purpose; Definitions

(a) The Client Security Fund of the North Carolina State Bar was established by the Supreme Court of North Carolina pursuant to an order dated August 29, 1984. The fund is a standing committee of the North Carolina State Bar Council pursuant to an order of the Supreme Court dated October 10, 1984, as amended. Its purpose is to reimburse, in whole or in part in appropriate cases and subject to the provisions and limitations of the Supreme Court's orders and these rules, clients who have suffered financial loss as the result of dishonest conduct of lawyers engaged in the private practice of law in North Carolina, which conduct occurred on or after January 1, 1985.

(b) As used herein the following terms have the meaning indicated.

(1) "Applicant" shall mean a person who has suffered a reimbursable loss because of the dishonest conduct of an attorney and has filed an application for reimbursement.

(2) "Attorney" shall mean an attorney who, at the time of alleged dishonest conduct, was licensed to practice law by the North Carolina State Bar. The fact that the alleged dishonest conduct took place outside the state of North Carolina does not necessarily mean that the attorney was not engaged in the practice of law in North Carolina.

(3) "Board" shall mean the Board of Trustees of the Client Security Fund.

(4) "Council" shall mean the North Carolina State Bar Council.

(5) "Dishonest conduct" shall mean wrongful acts committed by an attorney against an applicant in the nature of embezzlement from the applicant or the wrongful taking or conversion of monies or other property of the applicant, which monies or other property were entrusted to the attorney by the applicant by reason of an attorney-client relationship between the attorney and the applicant or by reason of a fiduciary relationship between the attorney and the applicant customary to the practice of law.

(6) "Fund" shall mean the Client Security Fund of the North Carolina State Bar.

(7) "Reimbursable losses" shall mean only those losses of money or other property which meet all of the following tests:

(A) the dishonest conduct which occasioned the loss occurred on or after January 1, 1985;

(B) the loss was caused by the dishonest conduct of an attorney acting either as an attorney for the applicant or in a fiduciary capacity for the benefit of the applicant customary to the private practice of law in the matter in which the loss arose;

(C) the applicant has exhausted all viable means to collect applicant's losses and has complied with these rules.

(8) The following shall not be deemed "reimbursable losses":

(A) losses of spouses, parents, grandparents, children and siblings (including foster and half relationships), partners, associates or employees of the attorney(s) causing the losses;

(B) losses covered by any bond, security agreement or insurance contract, to the extent covered thereby;

(C) losses incurred by any business entity with which the attorney or any person described in Rule .1401(b)(8)(A) above is an officer, director, shareholder, partner, joint venturer, promoter or employee;

(D) losses, reimbursement for which has been otherwise received from or paid by or on behalf of the attorney who committed the dishonest conduct;

(E) losses arising in investment transactions in which there was neither a contemporaneous attorney-client relationship between the attorney and the applicant nor a contemporaneous fiduciary relationship between the attorney and the applicant customary to the practice of law. By way of illustration but not limitation, for purposes of this rule (Rule .1401 (b)(8)(E)), an attorney authorized or permitted by a person or entity other than the applicant as escrow or similar agent to hold funds deposited by the applicant for investment purposes shall not be deemed to have a fiduciary relationship with the applicant customary to the practice of law.

(9) "State Bar" shall mean the North Carolina State Bar.

(10) "Supreme Court" shall mean the North Carolina Supreme Court.

(11) "Supreme Court orders" shall mean the orders of the Supreme Court dated August 29, 1984, and October 10, 1984, as amended, authorizing the establishment of the Client Security Fund of the North Carolina State Bar and approving the rules of procedure of the Fund.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1402 Jurisdiction: Authority**

(a) Chapter 84 of the General Statutes vests in the State Bar authority to control the discipline, disbarment, and restoration of licenses of attorneys; to formulate and adopt rules of professional ethics and conduct; and to do all such things necessary in the furtherance of the purposes of the statutes governing the practice of the law as are not themselves prohibited by law. G.S. 84-22 authorizes the State Bar to establish such committees, standing or special, as from

time to time the council deems appropriate for the proper discharge of its duties; and to determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to such committees. The rules of the State Bar, as adopted and amended from time to time, are subject to approval by the Supreme Court under G.S. 84-21.

(b) The Supreme Court orders, entered in the exercise of the Supreme Court's inherent power to supervise and regulate attorney conduct, authorized the establishment of the Fund, as a standing committee of the council, to be administered by the State Bar under rules and regulations approved by the Supreme Court.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1403 Operational Responsibility**

The responsibility for operating the Fund and the program of the board rests with the board, subject to the Supreme Court orders, the statutes governing the practice of law, the authority of the council, and the rules of the board.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1404 Size of Board**

The board shall have five members, four of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1405 Lay Participation**

The board shall have one member who is not a licensed attorney.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1406 Appointment of Members; When; Removal

The members of the board shall be appointed by the council. Any member of the board may be removed at any time by the affirmative vote of a majority of the members of the council at a regularly called meeting. Vacancies occurring by reason of death, disability, resignation, or removal of a member shall be filled by appointment of the president of the State Bar with the approval of the council at its next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1407 Term of Office

Each member who is appointed to the board, other than a member appointed to fill a vacancy created by the death, disability, removal or resignation of a member, shall serve for a term of five years beginning as of the first day of the month following the date upon which the appointment is made by the council. A member appointed to fill a vacancy shall serve the remainder of the vacated term.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1408 Staggered Terms

It is intended that members of the board shall be elected to staggered terms such that one member is appointed in each year.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1409 Succession

Each member of the board shall be entitled to serve for one full five-year term. A member appointed to fill a vacated term may be appointed to serve one full five-year term immediately following the expiration of the vacated term but shall not be entitled as of right to such appointment. No person shall be reappointed to the board until the expiration of three years following the last day of the previous term of such person on the board.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1410 Appointment of Chairperson

The chairperson of the board shall be appointed from the members of the board annually by the council. The term of the chairperson shall be one year. The chairperson may be reappointed by the council thereafter during tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1411 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed from the members of the board annually by the council. The term of the vice-chairperson shall be one year. The vice chairperson may be reappointed by the council thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him by the chairperson or by the board.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1412 Source of Funds

Funds for the program carried out by the board shall come from assessments of members of the State Bar as ordered by the Supreme Court, from voluntary contributions, and as may otherwise be received by the Fund.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1413 Fiscal Responsibility

All funds of the board shall be considered funds of the State Bar and shall be maintained, invested, and disbursed as follows:

(a) Maintenance of Accounts; Audit—The State Bar shall maintain a separate account for funds of the board such that such

funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited annually in connection with the audits of the State Bar.

(b) Investment Criteria—The funds of the board shall be kept, invested, and reinvested in accordance with investment policies adopted by the council for dues, rents, and other revenues received by the State Bar in carrying out its official duties. In no case shall the funds be invested or reinvested in investments other than such as are permitted to fiduciaries under the General Statutes of North Carolina.

(c) Disbursement—Disbursement of funds of the board shall be made by or under the direction of the secretary of the State Bar.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1414 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the State Bar. The board by resolution may set other regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time. Written minutes of all meetings shall be prepared and maintained.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

### .1415 Annual Report

The board shall prepare at least annually a report of its activities and shall present the same to the council at the annual meeting of the State Bar.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1416 Appropriate Uses of the Client Security Fund**

(a) The board may use or employ the Fund for any of the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) The board with the authorization of the council shall, in the name of the North Carolina State Bar, enforce any claims which the board may have for restitution, subrogation, or otherwise, and may employ and compensate consultants, agents, legal counsel, and such other employees as it deems necessary and appropriate.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1417 Applications for Reimbursement**

(a) The board shall prepare a form of application for reimbursement which shall require the following minimum information, and such other information as the board may from time to time specify:

(1) the name and address of the applicant;

(2) the name and address of the attorney who is alleged to have engaged in dishonest conduct;

(3) the amount of the alleged loss for which application is made;

(4) the date on or period of time during which the alleged loss occurred;

(5) a general statement of facts relative to the application;

(6) a description of any relationship between the applicant and the attorney of the kinds described in Rules .1401 (b)(8)(A) and (C) of this subchapter;

(7) verification by the applicant;

(8) all supporting documents, including

(A) copies of any court proceedings against the attorney;

(B) copies of all documents showing any reimbursement or receipt of funds in payment of any portion of the loss.

(b) The application shall contain the following statement in boldface type:

"IN ESTABLISHING THE CLIENT SECURITY FUND PURSUANT TO ORDER OF THE SUPREME COURT OF NORTH CAROLINA, THE NORTH CAROLINA STATE BAR DID NOT CREATE OR ACKNOWLEDGE ANY LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL ATTORNEYS IN THE PRACTICE OF LAW. ALL REIMBURSEMENTS OF LOSSES FROM THE CLIENT SECURITY FUND SHALL BE A MATTER OF GRACE IN THE SOLE DISCRETION OF THE BOARD ADMINISTERING THE FUND AND NOT A MATTER OF RIGHT. NO APPLICANT OR MEMBER OF THE PUBLIC SHALL HAVE ANY RIGHT IN THE CLIENT SECURITY FUND AS A THIRD PARTY BENEFICIARY OR OTHERWISE."

(c) The application shall be filed in the office of the State Bar in Raleigh, North Carolina, attention Client Security Fund Board, and a copy shall be transmitted by such office to the chairperson of the board.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1418 Processing Applications**

(a) The board shall cause an investigation of all applications filed with the State Bar to determine whether the application is for a reimbursable loss and the extent, if any, to which the application should be paid from the Fund.

(b) The chairperson of the board shall assign each application to a member of the board for review and report. Wherever possible, the member to whom such application is referred shall practice in the county wherein the attorney practices or practiced.

(c) A copy of the application shall be served upon or sent by registered mail to the last known address of the attorney who it is alleged committed an act of dishonest conduct.

(d) After considering a report of investigation as to an application, any board member may request that testimony be presented concerning the application. In all cases, the alleged defalcating attorney or his or her representative will be given an opportunity to be heard by the board if the attorney so requests.

(e) The board shall operate the Fund so that, taking into account assessments ordered by the Supreme Court but not yet received and anticipated investment earnings, a principal balance of approximately $1,000,000 is maintained. Subject to the foregoing, the board shall, in its discretion, determine the amount of loss, if any, for which each applicant should be reimbursed from the Fund. In making such determination, the board shall consider, inter alia, the following:

(1) the negligence, if any, of the applicant which contributed to the loss;

(2) the comparative hardship which the applicant suffered because of the loss;

(3) the total amount of reimbursable losses of applicants on account of any one attorney or firm or association of attorneys;

(4) the total amount of reimbursable losses in previous years for which total reimbursement has not been made and the total assets of the Fund;

(5) the total amount of insurance or other source of funds available to compensate the applicant for any reimbursable loss.

(f) The board may, in its discretion, allow further reimbursement in any year of a reimbursable loss reimbursed in part by it in prior years.

(g) Provided, however, and the foregoing notwithstanding, in no case shall the Fund reimburse the otherwise reimbursable losses sustained

(1) by any one applicant as a result of the dishonest conduct of one attorney in an amount in excess of $60,000, or

(2) by all applicants as the result of the dishonest conduct of one attorney in amounts, in the aggregate, in excess of $100,000. The foregoing limitations shall apply in those cases in which the first claim alleging dishonest conduct of an attorney is filed after June 26, 1992.

(h) No reimbursement shall be made to any applicant unless reimbursement is approved by a majority vote of the entire board at a duly held meeting at which a quorum is present.

(i) No attorney shall be compensated by the board for prosecuting an application before it.

(j) An applicant may be advised of the status of the board's consideration of the application and shall be advised of the final determination of the board.

(k) (1) If the board receives, or believes that it may receive, claims from more than one applicant based upon alleged dishonest conduct of one attorney in amounts, in the aggregate, exceeding $100,000, the board may, in its discretion, publish written notice (the "notice") in a newspaper published, or of general circulation, in the county in which the attorney whose dishonest conduct is the subject of such claims maintained such attorney's last known office. Such notice shall state that any claim based on the alleged dishonest conduct of such attorney must be presented in writing to the board within one year following the first date of publication of the notice or such claims will be barred. The notice shall be substantially in the following form:

Before the Client Security Fund
of the North Carolina State Bar

In the Matter of
(NAME OF ATTORNEY)

Notice of Deadline
for Claims

NOTICE IS HEREBY GIVEN that the Board of Trustees (the "board") of the Client Security Fund (the "Fund") of the North Carolina State Bar will consider claims for reimbursement of losses sustained by clients of [NAME OF ATTORNEY], who formerly maintained an office for the practice of law at [OFFICE ADDRESS]. If you have or believe you may have sustained a loss as a result of dishonest conduct of [NAME OF ATTORNEY], you should promptly contact the Fund by calling or writing:

The Client Security Fund
P.O. Box 25908
Raleigh, NC 27611
Tel: 919/828-4620

Any claim must be filed in writing on forms available upon request from the Fund on or before [DATE WHICH IS ONE YEAR FOLLOWING DATE NOTICE IS PUBLISHED]. Any claims not filed on or before such date shall be barred and not be considered by the board. Reimbursement of losses is a matter of grace in the sole discretion of the board and not a matter of right.

This the ________ day of [MONTH], [YEAR].

By order of the Board of Trustees

/s/ [NAME], Secretary
The Client Security Fund of
The North Carolina State Bar

(2) If the notice is published as provided herein, the board shall not reimburse any applicants for claims based upon alleged dishonest conduct of the attorney named in the notice until after the expiration of the deadline for filing written claims stated in the notice.

(3) If the notice is published as provided herein, after expiration of the deadline for claims stated in the notice, the board shall consider all claims properly filed on or before the deadline based upon alleged dishonest conduct of the attorney named in the notice. If such claims as finally approved for reimbursement by the board, in the aggregate, exceed $100,000, the board shall cause to be disbursed to each applicant a pro rata portion of $100,000 determined by multiplying $100,000 by a fraction, the numerator of which is the amount of the claim of each applicant finally determined by the board to be a reimbursable loss in accordance with these rules and the denominator of which is the total amount of all claims finally determined by the board to be reimbursable losses resulting from the dishonest conduct of the attorney named in the notice, subject to the limitation that the board shall not reimburse any applicant in an amount in excess of $60,000.

(4) If the notice is published as provided herein, the board shall not consider any claim filed after the deadline based upon alleged dishonest conduct of the attorney named in the notice, but shall inform the applicant or any attorney representing the applicant that the claim is barred and the board is prohibited from considering such claim by reason of failure to file such claim within the time allowed.

(5) The board shall request that the State Bar include in any press releases announcing the institution of proceedings before, or the imposition of discipline by, the Disciplinary Hearing Commission based upon dishonest conduct of an attorney, a statement reading as follows:

> "Clients of a North Carolina lawyer whose money or property is shown to have been misappropriated or embezzled by that lawyer may, if timely application is filed, be able to obtain full or

partial reimbursement from the Client Security Fund of the North Carolina State Bar, which can be contacted by writing P.O. Box 25908, Raleigh, NC 27611 or calling 919/828-4620."

The provisions of Rule .1418(k)(1) through (4) above shall be effective notwithstanding the failure of such statement to be included in any press release.

(l) All applications, proceedings, investigations, and reports involving applicants for reimbursement shall be kept confidential until and unless the board authorizes reimbursement to the applicant, or the attorney alleged to have engaged in dishonest conduct requests that the matter be made public. All participants involved in an application, investigation, or proceeding (including the applicant) shall conduct themselves so as to maintain the confidentiality of the application, investigation or proceeding. This provision shall not be construed to deny relevant information to be provided by the board to disciplinary committees or to anyone else to whom the council authorizes release of information.

(m) The board may, in its discretion, for newly discovered evidence or other compelling reason, grant a request to reconsider any application which the board has denied in whole or in part; otherwise, such denial is final and no further consideration shall be given by the board to such application or another application upon the same alleged facts.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1419 Subrogation for Reimbursement**

(a) In the event reimbursement is made to an applicant, the State Bar shall be subrogated to the amount reimbursed and may bring an action against the attorney or the attorney's estate either in the name of the applicant or in the name of the State Bar. As a condition of reimbursement, the applicant may be required to execute a "subrogation agreement" to such effect. Filing of an application constitutes an agreement by the applicant that the North Carolina State Bar shall be subrogated to the rights of the applicant to the extent of any reimbursement. Upon commencement of an action by the State Bar pursuant to its subrogation rights, it shall advise the reimbursed applicant at his or her last known address. A reimbursed applicant may then join in such action to recover any loss in excess of the amount reimbursed by the Fund. Any amounts recovered from the

attorney by the board in excess of the amount to which the Fund is subrogated, less the board's actual costs of such recovery, shall be paid to or retained by the applicant as the case may be.

(b) Before receiving a payment from the Fund, the person who is to receive such payment or his or her legal representative shall execute and deliver to the board a written agreement stating that in the event the reimbursed applicant or his or her estate should ever receive any restitution from the attorney or his or her estate, the reimbursed applicant agrees that the Fund shall be repaid up to the amount of the reimbursement from the Fund plus expenses.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

**.1420 Authority Reserved by the Supreme Court**

The Fund may be modified or abolished by the Supreme Court. In the event of abolition, all assets of the Fund shall be disbursed by order of the Supreme Court.

History Note: Authority—Orders of the North Carolina Supreme Court, August 29, 1984, October 10, 1984
Readopted Effective December 8, 1994

## Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1501 Purpose and Definitions

(a) Purpose

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. The North Carolina State Bar, under Chapter 84 of the General Statutes of North Carolina, is charged with the responsibility of providing rules of professional conduct and with disciplining attorneys who do not comply with such rules. The Rules of Professional Conduct adopted by the North Carolina State Bar and approved by the Supreme Court of North Carolina require that lawyers adhere to important ethical standards, including that of rendering competent legal services in the representation of their clients. At a time when all aspects of life and society are changing rapidly or becoming subject to pressures brought about by change, laws and legal principles are also in transition (through additions to

the body of law, modifications and amendments) and are increasing in complexity. One cannot render competent legal services without continuous education and training.

The same changes and complexities, as well as the economic orientation of society, result in confusion about the ethical requirements concerning the practice of law and the relationships it creates. The data accumulated in the discipline program of the North Carolina State Bar argue persuasively for the establishment of a formal program for continuing and intensive training in professional responsibility and legal ethics.

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(b) Definitions

(1) "Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.

(2) "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

(3) "Approved activity" shall mean a specific, individual legal education activity presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is approved as a legal education activity under these rules by the Board of Continuing Legal Education.

(4) "Board" means the Board of Continuing Legal Education created by these rules.

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational activity accredited by the board. Generally, CLE will include educational activities designed principally to maintain or advance the professional competence of lawyers and/or to expand an appreciation and understanding of the professional responsibilities of lawyers.

(6) "Council" shall mean the North Carolina State Bar Council.

(7) "Credit hour" means an increment of time of 60 minutes which may be divided into segments of 30 minutes or 15 minutes, but no smaller.

(8) "Inactive member" shall mean a member of the North Carolina State Bar who is on inactive status.

(9) "In-house continuing legal education" shall mean courses or programs offered or conducted by law firms, either individually or in connection with other law firms, corporate legal departments, or similar entities primarily for the education of their members. The board may exempt from this definition those programs which it finds

(A) to be conducted by public or quasi-public organizations or associations for the education of their employees or members;

(B) to be concerned with areas of legal education not generally offered by sponsors of programs attended by lawyers engaged in the private practice of law.

(10) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.

(11) "Membership and Fees Committee" shall mean the Membership and Fees Committee of the North Carolina State Bar.

(12) A "newly admitted active member" is one who becomes an active member of the North Carolina State Bar for the first time, has been reinstated, or has changed from inactive to active status.

(13) "Practical skills courses" are those courses which are devoted primarily to instruction of basic practice procedures and techniques of law as distinct from substantive law. Examples of such courses would include preparation of legal documents and correspondence, and development of specific basic lawyering skills,

such as voir dire, jury argument, introducing evidence, and efficient management of a law office.

(14) "Professional responsibility" shall mean those courses or segments of courses devoted to a) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; and b) the professional obligations of the attorney to the client, the court, the public, and other lawyers. This definition shall be interpreted consistent with the provisions of Rule .1501(b)(5) above.

(15) "Rules" shall mean the provisions of the continuing legal education rules established by the Supreme Court of North Carolina (Section .1500 of this subchapter).

(16) "Sponsor" is any person or entity presenting or offering to present one or more continuing legal education programs, whether or not an accredited sponsor.

(17) "Year" shall mean calendar year.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1502 Jurisdiction: Authority**

The Council of the North Carolina State Bar hereby establishes the Board of Continuing Legal Education (board) as a standing committee of the council, which board shall have authority to establish regulations governing a continuing legal education program and a law practice assistance program for attorneys licensed to practice law in this state.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1503 Operational Responsibility**

The responsibility for operating the continuing legal education program and the law practice assistance program shall rest with the board, subject to the statutes governing the practice of law, the authority of the council, and the rules of governance of the board.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1504 Size of Board

The board shall have nine members, all of whom must be attorneys in good standing and authorized to practice in the state of North Carolina.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1505 Lay Participation

The board shall have no members who are not licensed attorneys.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1506 Appointment of Members; When; Removal

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term. Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1507 Term of Office

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1508 of this subchapter.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1508 Staggered Terms

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members shall be elected to terms of one year, three members shall be elected to terms of two years, and three members shall be elected to terms of three years. Thereafter, three members shall be elected each year.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1509 Succession

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off the board for at least three years.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1510 Appointment of Chairperson

The chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual report of the board, and generally shall represent the board in its dealings with the public.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1511 Appointment of Vice-Chairperson

The vice-chairperson of the board shall be appointed from time to time as necessary by the council. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1512 Source of Funds**

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) Accredited sponsors located in North Carolina (for courses offered within or outside North Carolina), or accredited sponsors not located in North Carolina (for courses given in North Carolina), or unaccredited sponsors located within or outside of North Carolina (for accredited courses within North Carolina) shall, as a condition of conducting an approved activity, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including an accredited sponsor, which conducts an approved activity which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved activity shall comply with Rule .1512(a)(2) below.

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education activities for which the sponsor does not submit a fee under Rule .1512(a)(1) above. Such fee shall accompany the member's annual affidavit. The fee shall be set by the board upon approval of the council.

(b) Funding for a law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1513 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit—The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditures therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria—The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents, and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement—Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar pursuant to authority of the council. The members of the board shall serve on a voluntary basis without compensation, but may be reimbursed for the reasonable expenses incurred in attending meetings of the board or its committees.

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of administration of the CLE program including an adequate reserve fund. Excess funds may be expended by the council on lawyer competency programs approved by the council.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1514 Meetings

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson, or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission or

telephone. A quorum of the board for conducting its official business shall be a majority of the members serving at a particular time.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1515 Annual Report**

The board shall prepare at least annually a report of its activities and shall present the same to the council one month prior to its annual meeting.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1516 Powers and Duties of the Board**

The board shall have the following powers and duties:

(1) to exercise general supervisory authority over the administration of these rules;

(2) to adopt and amend regulations consistent with these rules with the approval of the council;

(3) to establish an office or offices and to employ such persons as the board deems necessary for the proper administration of these rules, and to delegate to them appropriate authority, subject to the review of the council;

(4) to report annually on the activities and operations of the board to the council and make any recommendations for changes in the rules or methods of operation of the continuing legal education program;

(5) to submit an annual budget to the council for approval and to ensure that expenses of the board do not exceed the annual budget approved by the council;

(6) to administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1517 Scope and Exemptions**

(a) Except as provided herein these rules shall apply to every active member licensed by the North Carolina State Bar.

(b) The governor, the lieutenant governor, and all members of the council of state, all members of the federal and state judiciary, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly and members of the United States Armed Forces on full-time active duty are exempt. All active members, including members of the judiciary, who are exempt are encouraged to attend and participate in legal education programs.

(c) Any active member residing outside of North Carolina or any active member residing inside North Carolina who is a full-time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices in North Carolina nor represents North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules upon written application to the board. Such application shall be filed on or before the due date for the payment of annual dues, or sooner as the circumstances may require, and shall be in effect for the year for which the application was made.

(d) The board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption, or for a longer period upon a finding of a permanent disability.

(e) Nonresident attorneys from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1518 Continuing Legal Education Program**

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar

year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the area of professional responsibility; and

(2) at least once every three calendar years, each member shall be required to attend a specially designed three-hour block course of instruction devoted exclusively to the area of professional responsibility which will satisfy the requirement of Rule .1518(b)(1) above.

(c) During each of the first three years of admission, newly admitted active members shall be required to take a minimum of 9 of the 12 hours of continuing legal education in practical skills courses. The board may provide by regulation for exempting newly admitted members with prior experience as practicing lawyers from the requirements of this paragraph.

(d) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1519 Accreditation Standards**

The board shall approve continuing legal education activities which meet the following standards and provisions.

(1) They shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence and proficiency as a lawyer.

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility or ethical obligations of lawyers.

(3) Credit may be given for continuing legal education activities where live instruction is used or mechanically or electronically

recorded or reproduced material is used, including videotape or satellite transmitted programs.

(4) Continuing legal education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. It is recognized that written materials are not suitable or readily available for some types of subjects. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any accredited sponsor must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(7) In-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(8) Programs that cross academic lines, such as accounting-tax seminars, may be considered for approval by the board. However, the board must be satisfied that the content of the activity would enhance legal skills or the ability to practice law.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1520 Accreditation of Sponsors and Programs**

(a) An organization desiring accreditation as an accredited sponsor of courses, programs, or other continuing legal education activities may apply for accredited sponsor status to the board. The board shall approve a sponsor as an accredited sponsor if it is satisfied that the sponsor's programs have met the standards set forth in Rule .1519 of this subchapter and regulations established by the board.

(b) Once an organization has been accredited as an accredited sponsor, then the continuing legal education programs sponsored by that organization are presumptively approved for credit, provided that the standards set out in Rule .1519 of this subchapter and the provisions of Rule .1512 of this subchapter are met. The board may at

any time reevaluate and grant or revoke the presumptive approval status of an accredited sponsor.

(c) Any organization not accredited as an accredited sponsor which desires approval of a course or program shall apply to the board which shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(d) An active member desiring approval of a course or program which has not otherwise been approved shall apply to the board which shall adopt regulations to administer approval requests consistent with the requirements of Rule .1519 of this subchapter. Applicants denied approval of a program may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

(e) The board may provide by regulation for an announcement of accreditation for an approved continuing legal education program.

(f) The board may provide by regulation for the accredited sponsor, sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1521 Credit Hours**

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education activities approved by the board.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1522 Annual Report**

Commencing in 1989, each active member of the North Carolina State Bar shall make an annual written report to the North Carolina

State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter, unless the board's records indicate that such member has been previously exempted and the circumstances resulting in the exemption are unchanged. It shall be the responsibility of any previously exempted member whose circumstances have changed and who is therefore not presently qualified for an exemption to notify the board of such changed circumstances within 30 days after such become apparent and to satisfy fully the requirements of these rules for the year following such change in circumstances.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1523 Noncompliance**

(a) An attorney who is required to file a report of CLE credits and does not do so or who fails to meet the minimum requirements of these rules, including the payment of duly assessed penalties and attendee fees, may be suspended from the practice of law in the state of North Carolina.

(b) The board shall notify an attorney who appears to have failed to meet the requirements of these rules that the attorney will be suspended from the practice of law in this state, unless the attorney shows good cause why the suspension should not be made or the attorney shows that he or she has complied with the requirements within a 90-day period after receiving the notice. Notice shall be forwarded to the attorney's address as shown in the records of the North Carolina State Bar by certified mail. Ninety-three days after mailing such notice, if no affidavit is filed with the board by the attorney attempting to show good cause or attempting to show that the attorney has complied with the requirements of these rules, the attorney's license shall be suspended by order of the North Carolina State Bar.

(c) If the attorney responds to the notice, the board shall review all affidavits and other documents filed by the attorney to determine whether good cause has been shown or to determine whether the attorney has complied with the requirements of these rules within the 90-day period. If the board determines that good cause has been shown or that the attorney is in compliance with these rules, it shall enter an appropriate order. If the board determines that good cause has not been shown and that the attorney has not shown compliance

with these rules within the 90-day period, then the board shall refer the matter to the council for determination after hearing by the Membership and Fees Committee. If the council, after hearing by the Membership and Fees Committee, shall determine that the attorney has not complied with these rules and that good cause therefore has not been shown, it shall suspend the attorney's license to practice law in North Carolina until compliance is shown. The procedures to be followed by the council and the Membership and Fees Committee shall be the same as those followed when the council and the Membership and Fees Committee consider whether to suspend an attorney's license for the nonpayment of dues.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1524 Reinstatement**

Any member who has been suspended for noncompliance may be reinstated upon recommendation of the board upon a showing that the member's continuing legal education deficiency has been cured. The member shall file a petition with the board seeking reinstatement in which the member shall state with particularity the accredited legal education courses which the member has attended and the number of credit hours obtained since the last reporting period prior to the member's suspension. The petition shall be accompanied by a reinstatement fee, the amount of which shall be determined by the board upon approval of the council. Within 30 days of the receipt of the petition for reinstatement, the board shall determine whether the deficiency has been cured. If the board finds that the deficiency has been cured and the reinstatement fee paid, the board shall advise the secretary of the North Carolina State Bar who shall issue an order of reinstatement. If the board determines that the deficiency has not been cured or that the reinstatement fee has not been paid, the board shall refer the matter to the Membership and Fees Committee for hearing. Any member who complies with the requirements of the rules during the 90-day probationary period under Rule .1523(b) of this subchapter shall pay a late compliance fee, the amount of which shall be determined by the board upon approval of the council.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1525 Confidentiality

Unless otherwise directed by the Supreme Court of North Carolina, the files, records, and proceedings of the board, as they relate to or arise out of any failure of any active member to satisfy the requirements of these rules shall be deemed confidential and shall not be disclosed, except in furtherance of the duties of the board or upon the request of the active member affected or as they may be introduced in evidence or otherwise produced in proceedings under these rules.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1526 Effective Date

(a) The effective date of these rules shall be January 1, 1988.

(b) Active members licensed prior to July 1 of any calendar year shall meet the continuing legal education requirements of these rules for such year.

(c) Active members licensed after June 30 of any calendar year must meet the continuing legal education requirements of these rules for the next calendar year.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1527 Regulations

The following regulations (Section .1600 of the Rules of the North Carolina State Bar) for the continuing legal education program are hereby adopted and shall remain in effect until revised or amended by the board with the approval of the council. The board may adopt other regulations to implement the continuing legal education program with the approval of the council.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

## Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

### .1601 Organization

(a) Quorum—Five members shall constitute a quorum of the board.

(b) The Executive Committee—The executive committee of the board shall be comprised of the chairperson, a vice-chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of the full board. In such matters it shall have complete authority to act for the board.

(c) Other Committees—The chairperson may appoint from time to time any committees he or she deems advisable of not less than three members for the purpose of considering and deciding matters submitted to them.

(d) Definitions—As used herein, "board" means the Board of Continuing Legal Education, "CLE" means continuing legal education, and "rules" means the rules for the continuing legal education program adopted by the Supreme Court of North Carolina (Section .1500 of this subchapter). All other definitions shall be as set forth in the rules.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1602 General Course Approval**

(a) Law School Courses—Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

(b) Bar Review/Refresher Course—Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

(c) Approval—CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, on an individual program basis or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date

on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(d) Course Quality—The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(e) Records—Sponsors, including accredited sponsors, shall within 30 days after the course is concluded (1) furnish to the board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers; (2) remit to the board the appropriate sponsor fee; (3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(f) Announcement—Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of _____ hours, of which _____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(g) Notice—Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefor.

(h) In-House CLE and Self-Study—No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(b)(9) of this subchapter.

(i) Facilities—Sponsors ordinarily must provide a facility with adequate lighting and temperature control ventilation. For a nonclinical CLE activity, the facility should be set up in classroom or similar style to provide a writing surface for each preregistered attendee or sufficient space for taking notes, and shall provide sufficient space between the chairs in each row to permit easy access and exit to each seat. Crowding in the facility detracts from the learning process and will not be permitted.

(j) Course Materials—In addition to the requirements of Rule .1602(c) and (e) above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the board a copy of all materials presented and distributed at a CLE course or program.

(k) Nonlegal Educational Activities—Except in extraordinary circumstances, approval will not be given for general and personal educational activities. For example, the following types of courses will not receive approval:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses which deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse;

(3) courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management;

(4) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

A course or segment may be granted credit by the board when a bar organization's course trains volunteer attorneys in service to the profession if all segments of the course are devoted to CLE or professional responsibility, as such terms are defined in Rule .1501(b) of this subchapter, if such course or segment meets the standards of Section .1500 and Section .1600 of this subchapter, and if the sponsor represents that such course or segment meets these standards. No more than three hours of professional responsibility will be credited per training course.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1603 Accredited Sponsors**

In order to receive designation as an "accredited sponsor" of courses, programs or other continuing legal education activities under Rule .1520(a) of this subchapter, the application of the sponsor must meet the following requirements:

(1) The application for accredited sponsor status shall be submitted on a form furnished by the board.

(2) The application shall contain all information requested on the form.

(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.

(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.

(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.

(6) Notwithstanding the provisions of Rule .1603 (3), (4) and (5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1604 Accreditation of Videotape or Other Audiovisual Programs**

(a) The board may permit an active member to receive credit for attendance at, or participation in, videotape presentations or where audiovisual recorded or reproduced material is used.

(b) An attorney attending such a presentation is entitled to credit hours if

(1) the presentation from which the program is made would, if attended by an active member, be an accredited course;

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

(c) Unless the entire program has been produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the board. Board Form 2 may be utilized for this purpose.

(d) To receive approval for attendance at such programs, the following conditions must be met:

(1) The person or organization sponsoring the program must keep accurate records of attendance, and must forward a copy of the record of attendance of active members to the board within 30 days after presentation of the videotape program is completed.

(2) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials

made available to persons attending the course from which the program is made must be made available to those persons attending the program who desire to receive credit under these regulations.

(3) Attendance must be verified by a responsible party who is not attempting to earn credit hours by virtue of attendance at that presentation. Proof of attendance may be made by the verifying person on Board Form 5.

(4) A suitable classroom or rooms must be available for viewing the program and taking of notes.

(e) A minimum of five active members must physically attend the presentation of the program.

EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under this Rule .1604 are also met.

EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the board.

EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions of this Rule .1604 must also be met.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1605 Computation Of Credit**

(a) Computation Formula—CLE and professional responsibility hours shall be computed by the following formula:

$$\frac{\text{sum of the total minutes of actual instruction}}{60} = \text{Total Hours}$$

For example, actual instruction totaling 195 minutes would equal 3.25 hours toward CLE.

(b) Actual Instruction—Only actual education shall be included in computing the total hours of actual instruction. The following shall not be included:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) keynote speeches or speeches in connection with meals;

(5) questions and answer sessions at a ratio in excess of 15 minutes per CLE hour and programs less than 30 minutes in length.

(c) Teaching—As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education activity. Presentations accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat presentations qualify for one-half of the credits available for the initial presentation. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1606 Fees**

(a) Sponsor Fee—The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved activities presented in North Carolina and by accredited sponsors located in North Carolina for approved activities wherever presented, except that no sponsor fee is required where approved activities are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee is set at $1.25 per approved CLE hour per active member of the North Carolina State Bar in attendance. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $ 1.25
x Total Approved CLE hours (x 6)
x Number of NC Attendees (100)
= Total Sponsor Fee ($750)

(b) Attendee Fee—The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee is set at $1.25 per approved CLE hour for which the attorney claims credit. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit:

Fee: $ 1.25
x Total Approved CLE hours (x 3.0)
= Total Attendee Fee ($3.75)

(c) Fee Review—The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program.

(d) Uniform Application—The fee shall be applied uniformly without exceptions or other preferential treatment for a sponsor or attendee.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1607 Special Cases And Exemptions**

(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(b) Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be

granted by the board on a yearly basis upon written application of the attorney.

(c) Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

(d) Newly admitted active members who have previously been licensed to practice law in this state or in some other state and who have actually practiced law for a period of at least five years may apply to the board for an exemption from the practical skills requirement of Rule .1518(c) of this subchapter. This application must be filed prior to July 31 of the year for which the exemption is initially sought.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1608 General Compliance Procedures**

(a) Affidavit—Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.

(b) Late Filing Penalty—Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1524 of this subchapter.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

**.1609 Noncompliance Procedures**

(a) Reinstatement Fee—The uniform reinstatement fee is $250 and must accompany the reinstatement petition.

(b) Policy—Reinstatement will be granted only upon a showing that the member has attended sufficient approved CLE activity to make up his or her previous deficiency.

(c) Petition—The petition for reinstatement shall list the CLE activities according to a form provided by the board.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

### .1610 Authority For Appeals

(a) Appeals—Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board.

(b) Procedure—A decision made by the staff of the board pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

History Note: Authority—Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711.
Readopted Effective December 8, 1994

## Section .1700 The Plan of Legal Specialization

### .1701 Purpose

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, so that the public can more closely match its needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1702 Jurisdiction: Authority

The Council of the North Carolina State Bar (the council) with the approval of the Supreme Court of North Carolina hereby establishes the Board of Legal Specialization (board) as a standing committee of the council, which board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1703 Operational Responsibility

The responsibility for operating the specialization program rests with the board, subject to the statutes governing the practice of law, the authority of the council and the rules of governance of the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1704 Size of Board

The board shall have nine members, six of whom must be attorneys in good standing and authorized to practice law in the state of North Carolina. The lawyer members of the board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1705 Lay Participation

The board shall have three members who are not licensed attorneys.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1706 Appointment of Members; When; Removal

The members of the board shall be appointed by the council. The first members of the board shall be appointed as of the quarterly meeting of the council following the creation of the board. Thereafter, members shall be appointed annually as of the same quarterly meeting. Vacancies occurring by reason of death, resignation, or removal shall be filled by appointment of the council at the next quarterly meeting following the event giving rise to the vacancy, and the person so appointed shall serve for the balance of the vacated term.

Any member of the board may be removed at any time by an affirmative vote of a majority of the members of the council in session at a regularly called meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1707 Term of Office**

Each member who is appointed to the board shall serve for a term of three years beginning as of the first day of the month following the date on which the appointment is made by the council. See, however, Rule .1708 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1708 Staggered Terms**

It is intended that members of the board shall be elected to staggered terms such that three members are appointed in each year. Of the initial board, three members (two lawyers and one nonlawyer) shall be elected to terms of one year; three members (two lawyers and one nonlawyer) shall be elected to terms of two years; and three members (two lawyers and one nonlawyer) shall be elected to terms of three years. Thereafter, three members (two lawyers and one nonlawyer) shall be elected in each year.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1709 Succession**

Each member of the board shall be entitled to serve for one full three-year term and to succeed himself or herself for one additional three-year term. Thereafter, no person may be reappointed without having been off of the board for at least three years.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1710 Appointment of Chairperson**

The chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as chairperson shall be one year. The chairperson may be reappointed thereafter during his or her tenure on the board. The chairperson shall preside at all meetings of the board, shall prepare and present to the council the annual

report of the board, and generally shall represent the board in its dealings with the public.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1711 Appointment of Vice-Chairperson**

The vice-chairperson of the board shall be appointed from time to time as necessary by the council from among the lawyer members of the board. The term of such individual as vice-chairperson shall be one year. The vice-chairperson may be reappointed thereafter during his or her tenure on the board. The vice-chairperson shall preside at and represent the board in the absence of the chairperson and shall perform such other duties as may be assigned to him or her by the chairperson or by the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1712 Source of Funds**

Funding for the program carried out by the board shall come from such application fees, examination fees, course accreditation fees, annual fees or recertification fees as the board, with the approval of the council, may establish.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1713 Fiscal Responsibility**

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

(a) Maintenance of Accounts: Audit—The North Carolina State Bar shall maintain a separate account for funds of the board such that such funds and expenditure therefrom can be readily identified. The accounts of the board shall be audited on an annual basis in connection with the audits of the North Carolina State Bar.

(b) Investment Criteria—The funds of the board shall be handled, invested and reinvested in accordance with investment policies adopted by the council for the handling of dues, rents and other revenues received by the North Carolina State Bar in carrying out its official duties.

(c) Disbursement—Disbursement of funds of the board shall be made by or under the direction of the secretary-treasurer of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1714 Meetings**

The annual meeting of the board shall be held in October of each year in connection with the annual meeting of the North Carolina State Bar. The board by resolution may set regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1715 Annual Report**

The board shall prepare at least annually a report of its activities and shall present same to the council one month prior to its annual meeting.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1716 Powers and Duties of the Board**

Subject to the general jurisdiction of the council and the North Carolina Supreme Court, the board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty

(1) to administer the plan;

(2) subject to the approval of the council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;

(3) to appoint, supervise, act on the recommendations of and consult with specialty committees as hereinafter identified;

(4) to make and publish standards for the certification of specialists, upon the board's own initiative or upon consideration of recommendations made by the specialty committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

(5) to certify specialists or deny, suspend or revoke the certification of specialists upon the board's own initiative, upon recommendations made by the specialty committees or upon requests for review of recommendations made by the specialty committees;

(6) to establish and publish procedures, rules, regulations, and bylaws to implement this plan;

(7) to propose and request the council to make amendments to this plan whenever appropriate;

(8) to cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Rules of Professional Conduct to the appropriate disciplinary authority;

(9) to evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists;

(10) to cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization;

(11) notwithstanding any conflicting provision of the certification standards for any area of specialty, to direct any of the specialty committees not to administer a specialty examination if, in the judgment of the board, there are insufficient applicants or such would otherwise not be in the best interest of the specialization program.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1717 Retained Jurisdiction of the Council**

The council retains jurisdiction with respect to the following matters:

(1) upon recommendation of the board, establishing areas in which certificates of specialty may be granted;

(2) amending this plan;

(3) hearing appeals taken from actions of the board;

(4) establishing or approving fees to be charged in connection with the plan;

(5) regulating attorney advertisements of specialization under the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1718 Privileges Conferred and Limitations Imposed**

The board in the implementation of this plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers.

(1) No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist in a particular field of law.

(2) No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Rules of Professional Conduct, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his or her availability to practice in any field of law con-

sistent with Canon 2 of the Rules of Professional Conduct, even though he or she is not certified as a specialist in that field.

(3) All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member.

(4) Participation in the program shall be on a completely voluntary basis.

(5) A lawyer may be certified as a specialist in no more than two fields of law.

(6) When a client is referred by another lawyer to a lawyer who is a recognized specialist under this plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope of his or her representation and, consonant with any requirements of the Rules of Professional Conduct, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field.

(7) Any lawyer certified as a specialist under this plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1719 Specialty Committees

(a) The board shall establish a separate specialty committee for each specialty in which specialists are to be certified. Each specialty committee shall be composed of seven members appointed by the board, one of whom shall be designated annually by the chairperson of the board as chairperson of the specialty committee. Members of each specialty committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the board, are competent in the field of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment.

Appointment by the board to a vacancy shall be for the remaining term of the member leaving the specialty committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the specialty committee shall be held at regular intervals at such times, places and upon such notices as the specialty committee may from time to time prescribe or upon direction of the board.

(b) Each specialty committee shall advise and assist the board in carrying out the board's objectives and in the implementation and regulation of this plan in that specialty. Each specialty committee shall advise and make recommendations to the board as to standards for the specialty and the certification of individual specialists in that specialty. Each specialty committee shall be charged with actively administering the plan in its specialty and with respect to that specialty shall

(1) after public hearing on due notice, recommend to the board reasonable and nondiscriminatory standards applicable to that specialty;

(2) make recommendations to the board for certification, continued certification, denial, suspension, or revocation of certification of specialists and for procedures with respect thereto;

(3) administer procedures established by the board for applications for certification and continued certification as a specialist and for denial, suspension, or revocation of such certification;

(4) administer examinations and other testing procedures, if applicable, investigate references of applicants and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

(5) make recommendations to the board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty;

(6) perform such other duties and make such other recommendations as may be delegated to or requested of the specialty committee by the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum

standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed and currently in good standing to practice law in this state.

(2) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity, and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measurement of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the areas of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advance educational degree, teaching, judicial, government, or corporate legal experience.

(3) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education in the specialty accredited by the board for the specialty, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the board, upon advice from the appropriate specialty committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal educa-

tion courses have not been available during the three years immediately preceding establishment of the specialty.

(4) The applicant must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges, who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant or, at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her application consents to confidential inquiry by the board or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

(5) The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

(b) All matters concerning the qualification of an applicant for certification, including, but not limited to, applications, references, tests and test scores, files, reports, investigations, hearings, findings, recommendations, and adverse determinations shall be confidential so far as is consistent with the effective administration of this plan, fairness to the applicant and due process of law.

(c) The board may adopt uniform rules waiving the requirements of Rules .1720(a)(4) and (5) above for members of a specialty committee at the time the initial written examination for that specialty is given and permitting said members to file applications to become a board certified specialist in that specialty upon compliance with all other required minimum standards for certification of specialists.

(d) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the

requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1721 Minimum Standards for Continued Certification of Specialists

(a) The period of certification as a specialist shall be five years. During such period the board or appropriate specialty committee may require evidence from the specialist of his or her continued qualification for certification as a specialist, and the specialist must consent to inquiry by the board, or appropriate specialty committee of lawyers and judges, the appropriate disciplinary body, or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards.

(1) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Rule .1720(a)(2) of this subchapter) in the specialty during the entire period of certification as a specialist.

(2) The specialist must make a satisfactory showing, as determined by the board after advice from the appropriate specialty committee, of continuing legal education accredited by the board for the specialty during the period of certification as a specialist, the minimum being an average of 12 hours of credit for continuing legal education, or its equivalent, for each year during the entire period of certification as a specialist.

(3) The specialist must comply with the requirements set forth in Rules .1720(a)(1) and (4) of this subchapter.

(b) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the board may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer

review, as those requirements are set forth in the standards for continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1722 Establishment of Additional Standards

The board may establish, on its own initiative or upon the specialty committee's recommendation, additional or more stringent standards for certification than those provided in Rules .1720 and .1721 of this subchapter. Additional standards or requirements established under this rule need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more or less stringent than the requirements in any other area of specialty.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1723 Suspension or Revocation of Certification as a Specialist

(a) The board may revoke its certification of a lawyer as a specialist in the specialization program if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, that

(1) the certification of the lawyer as a specialist was made contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred, or suspended from practice by the Supreme Court of any other state or federal court or agency.

(b) The lawyer certified as a specialist has a duty to inform the board promptly of any fact or circumstance described in Rules .1723(a)(1) through (6) above.

(c) If the board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist and upon such other conditions as the board may prescribe. If the board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefore and compliance with such conditions and requirements as the board may prescribe.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1724 Right to Hearing and Appeal to Council**

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the board and, thereafter, the right to appeal the ruling made thereon by the board to the council under such rules and regulations as the board and council may prescribe. (See Section .1800 of this subchapter.)

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1725 Areas of Specialty**

There are hereby recognized the following specialties:

(1) bankruptcy law

(a) consumer bankruptcy law

(b) business bankruptcy law

(2) estate planning and probate law

(3) real property law

(a) real property—residential

(b) real property—business, commercial, and industrial

(4) family law

(5) criminal law

(a) criminal appellate practice

(b) state criminal law

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1726 Certification Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, Real Property Law, Family Law, and Criminal Law

Previous decisions approving the certification standards for the areas of specialty listed above are hereby reaffirmed.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .1800 Hearing and Appeal Rules of the Board of Legal Specialization

### .1801 Reconsideration of Applications, Failure of Written Examinations and Appeals

(a) Applications Incomplete and/or Applicants Not in Compliance with Standards for Certification

(1) Incomplete Applications—The executive director of the North Carolina State Bar Board of Legal Specialization (the board) will review every application to determine if the application is complete. The applicant will be notified of the incompleteness of his or her application. The applicant must submit the completed application within 21 days of the date of mailing of the notice. If the applicant fails to provide the required information for the application during the requisite time period, the executive director will refer the application to the specialty committee for review.

(2) Applicant Not in Compliance—The executive director shall refer to the specialty committee for review any application which appears complete on its face but which does not satisfactorily demonstrate compliance with the standards for certification in the specialty area for which certification is sought.

(3) Specialty Committee Action—The specialty committee shall review the incomplete applications and the applications not in compliance with the standards for certification. After reviewing the applications, the specialty committee shall recommend to the

board the acceptance or rejection of the applications. The specialty committee shall notify the board of its recommendations in writing and the reason for any negative recommendation must be specified. The specialty committee must complete the above process within 14 days of receiving the applications.

(4) Notification to Applicant of the Specialty Committee's Action—The executive director shall promptly notify the applicant in writing of the specialty committee's recommendation of rejection of the application. The notification must specify the reason for the recommendation of rejection of the application. In addition, the notification shall inform the applicant of his or her right to petition the board for review of the application or request a hearing before the board.

(5) Petition for Review by the Board—Within 21 days of the mailing of the notice from the executive director that an application has been recommended for rejection by the specialty committee, the applicant may petition the board for review. The petition may be informal (e.g., by letter), but should include the date on which notice of the recommendation of rejection was received and the reasons for which the applicant believes the specialty committee's recommendation of rejection should not be accepted.

(6) Review of Petition by the Board—A three-member panel of the board, to be appointed by the chairperson of the board, shall review and take action by a majority of the panel upon the petition and notify the applicant of the board's decision. The notification shall inform the applicant of his or her right to appeal the decision to the North Carolina State Bar Council (the council) if the board's action is unfavorable to the applicant.

(7) Request for Hearing—In lieu of a petition for review, an applicant may request a hearing before the board. The applicant shall notify the board through its executive director in writing of such request for a hearing within 21 days of the mailing of the notice regarding the specialty committee's recommendation of rejection of the application. The applicant shall set forth the grounds for the hearing before the board. In such a request, the applicant shall list the names of prospective witnesses and identify documentation and other evidence to be introduced at the hearing before the board. The applicant shall be notified of the board's decision, and if the board's decision is unfavorable to the applicant, the applicant will be notified of his or her right to appeal the board's decision to the council.

(8) Hearing Procedures

(A) Notice: Time and Place of Hearing—The chairperson of the board shall fix the time and place of the hearing as soon as practicable after the applicant's request for hearing is received. The applicant shall be notified of the hearing date. Such notice shall be given to the applicant at least 10 days prior to the time fixed for the hearing.

(B) Quorum—A panel of three members of the board, as appointed by the chairperson, shall be necessary to conduct the hearing with the majority of those in attendance necessary to decide upon the matter.

(C) Representation by Counsel and Witnesses—The applicant may be represented by counsel or represent himself or herself at such hearing. The applicant may offer witnesses and documents and may cross-examine any witness.

(D) Written Briefs—The applicant is urged to submit a written brief (in quadruplicate) 10 days prior to the hearing to the executive director for distribution to the panel in support of his or her position. However, written briefs are not required.

(E) Depositions—Should the applicant or executive director desire to take a deposition prior to the board hearing of any voluntary witness who cannot attend the board hearing, such intention to take, and request to take, the deposition of a witness may be applied for in writing to the chairperson of the board together with a written consent signed by the potential witness that he or she will give a deposition for one party and a statement to the effect that the witness cannot attend the hearing along with the reason for such unavailability. The party seeking to take the deposition of a witness shall state in detail as to what the witness is expected to testify. If the chairperson is satisfied that such deposition from a possible witness will be relevant to the issue in question before the board, then the chairperson will authorize said taking of the deposition. The chairperson will also designate the executive director or a member of the specialty committee to be present at the deposition. The deposition may be taken orally or by video. Any refusal of the taking of the deposition by the chairperson shall be reviewed by the board at the request of the applicant. The cost connected with taking the deposition shall be borne by the party requesting the deposition.

(F) Continuances—Motions for continuance of the hearing should be made to the chairperson of the board and such

motions will be granted or denied by the chairperson of the board.

(G) Burden of Proof: Preponderance of the Evidence—The panel of the board shall apply the preponderance of the evidence rule in determining whether or not to accept the application for certification. The burden of proof is upon the applicant.

(H) Conduct of Hearings: Rights of Parties

(i) Hearings shall be reported by a certified court reporter. The applicant shall pay the costs associated with obtaining the court reporter's services for the hearing. The applicant shall pay the costs of the transcript and shall arrange for the preparation of the transcript with the court reporter. The applicant shall be taxed with all other costs of the hearing, but such costs shall not include any compensation to the members of the board before whom the hearing is conducted. The board in its discretion may refund to the applicant all or some portion of the necessary costs incurred as a result of the hearing.

(ii) The applicant may retain counsel at all stages of the investigation and at all meetings. The applicant and his or her counsel shall have the right to attend all hearings.

(iii) Oral evidence at hearings shall be taken only on oath or affirmation. The applicant shall have the right to testify unless he or she specifically waives such right or fails to appear at the hearing. If the applicant does not testify on his or her behalf, the applicant may be called and examined by the panel of the board, the executive director, and any member of the specialty committee. The applicant's failure to appear at the hearing ordered by the board, after receipt of written notice, shall constitute a waiver of the applicant's right to a hearing before the board.

(iv) At any hearing, the panel of the board, the executive director, any member of the appropriate specialty committee, and the applicant shall have these rights: (a) to call and examine witnesses; (b) to offer exhibits; (c) to cross-examine witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; and (d) to impeach any witness

regardless of who first called such witness to testify and to rebut any evidence.

(v) Hearings need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.

(vi) Any hearing may be recessed or adjourned from time to time at the discretion of the panel.

(9) Failure of Applicant to Petition the Board for Review or Request a Hearing Before the Board Within the Time Allowed by These Rules—If the applicant does not petition the board for review or request a hearing before the board regarding the specialty committee's recommendation of rejection of the application within the time allowed by these rules, the board shall act on the matter at its next board meeting.

(b) Failure of Written Examination

(1) Review of Examination—Within 30 days of the mailing of the notice from the board's executive director that the applicant has failed the written examination, the applicant may review his or her examination at the office of the board at a time designated by the executive director. The applicant shall not remove the examination from the board's office, but may upon request be furnished a copy of all questions and answers upon which he or she did not receive full credit on the examination. The costs of the reproduction of the examination shall be borne by the applicant.

(2) Petition for Grade Review—If, after reviewing the examination, the applicant feels an error or errors were made in the grading, he or she may file with the executive director a petition for grade review. The petition must be filed within 45 days of the mailing of the notice of failure and should set out in detail the area or areas which, in the opinion of the applicant, have been incorrectly graded. Supporting information may be filed to substantiate the applicant's claim. At the time of filing the petition, the applicant must either (A) request a hearing before a three-member panel of the board; or (B) waive his or her right to a hearing before the board and request that the board render a decision based upon its review of the applicant's examination,

supporting documents, and the recommendations of the review committee of the specialty committee.

(3) Review Procedure—The applicant's examination and petition shall be submitted to a panel consisting of a minimum of at least three members of the specialty committee (the review committee of the specialty committee). All information will be submitted in blind form, the staff being responsible for deleting any identifying information on the examination or the petition. The review committee of the specialty committee shall review the entire examination of the applicant. The review committee of the specialty committee shall recommend to the board that the grade of the examination remain the same or be changed.

(4) Decision of the Board—A panel of the board shall consider the applicant's petition for grade review either by hearing or by a review only of the applicant's submitted materials.

(5) Hearing Procedures—The rules set forth in Rule .1801(a)(8) above shall be followed when an applicant petitions for a hearing before the board for a grade review of his or her examination.

(6) Burden of Proof: Preponderance of the Evidence—The panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's grade on the examination should remain the same or be changed. The burden of proof is upon the applicant.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1802 Denial of Continued Certification as a Specialist**

(a) Denial of Continued Certification—The board, upon its initiative or upon recommendation of the appropriate specialty committee, may deny continued certification of a specialist, if the applicant does not meet the requirements as found in Rule .1721(a) of this subchapter.

(b) Notification of Board Action—The executive director shall notify the applicant of the board's decision to grant or deny continued certification as a specialist.

(c) Request for Hearing—Within 21 days of the mailing of notice from the executive director of the board that the applicant has been denied continued certification, the applicant may request a hearing before the board.

(d) Hearing Procedure—The rules set forth in Rule .1801(a)(8) of this subchapter shall be followed when an applicant requests a hearing regarding the denial of continued certification.

(e) Burden of Proof: Preponderance of the Evidence—A three-member panel of the board shall apply the preponderance of the evidence rule in determining whether the applicant's certification should be continued. The burden of proof is upon the applicant.

(f) Notification of Board's Decision—The board shall notify the applicant of its decision to grant or deny continued certification as a specialist.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1803 Suspension or Revocation of a Specialist's Certification**

(a) The board may suspend or revoke its certification of a lawyer as a specialist upon the board's initiative or upon recommendation of the appropriate specialty committee and after hearing before the board on appropriate notice, upon a finding that:

(1) the lawyer was certified as a specialist contrary to the rules and regulations of the board;

(2) the lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the board or appropriate specialty committee;

(3) the lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the board;

(4) the lawyer certified as a specialist has failed to pay the fees required;

(5) the lawyer certified as a specialist no longer meets the standards established by the board for the certification of specialists; or

(6) the lawyer certified as a specialist has been disciplined, disbarred or suspended from practice in North Carolina or by the supreme court of any other state or federal court or agency.

(b) The executive director shall notify the specialist in writing of the board's consideration of the suspension or revocation of the specialist's certification. The specialist will also be notified of his or her right to a hearing on the issue. The specialist must request in writing

a hearing within 21 days of the mailing of the notice of suspension or revocation of certification.

(c) At its next regular or specially called meeting, the board shall conduct a hearing according to the hearing procedures set forth in Rule .1801(a)(8) of this subchapter. The board shall apply the preponderance of the evidence rule in determining whether the specialist's certification should be suspended or revoked. The burden of proof is upon the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1804 Appeal to the Council**

(a) Appealable Decisions—An appeal may be taken to the council from a decision of the board which denies an applicant certification (i.e., when an applicant's application has been rejected because it is incomplete and/or not in compliance with the standards for certification or when an applicant fails the written specialty examination), denies an applicant continued certification as a specialist, or suspends or revokes a specialist's certification. (Persons who appeal the board's decision are referred to herein as appellants.)

(b) Filing the Appeal—An appeal from a decision of the board as described in Rule .1804(a) above may be taken by filing with the executive director of the North Carolina State Bar (the State Bar) a written notice of appeal not later than 21 days after the mailing of the board's decision to the applicant who is denied certification or continued certification or to a lawyer whose certification is suspended or revoked.

(c) Time and Place of Hearing—The appeal will be scheduled for hearing at a time set by the council. The executive director of the State Bar shall notify the appellant and the board of the time and place of the hearing before the council.

(d) Record on Appeal to the Council

(1) The record on appeal to the council shall consist of all the evidence offered at the hearing before the board. The executive director of the board shall assemble the record and certify it to the executive director of the State Bar and notify the appellant of such action.

(2) The appellant shall make prompt arrangement with the court reporter to obtain and have filed with the executive director of the State Bar a complete transcript of the hearing. Failure of the

appellant to make such arrangements and pay the costs shall be grounds for dismissal of the appeal.

(e) Parties Appearing Before the Council—The appellant may request to appear, with or without counsel, before the council and make oral argument. The board may appear on its own behalf or by counsel.

(f) Appeal Procedure—The council shall consider the appeal en banc. The council shall consider only the record on appeal, briefs, and oral arguments. The decision of the council shall be by a majority of those members voting. All council members present at the meeting may participate in the discussion and deliberation of the appeal. Members of the board who also serve on the council are recused from voting on the appeal.

(g) Notice of the Council's decision—The appellant shall receive written notice of the council's decision.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1805 Judicial Review**

(a) Appeals—The appellant or the board may appeal from an adverse ruling by the council.

(b) Wake County Superior Court—All appeals from the council shall lie to the Wake County Superior Court. (See N.C. State Bar v. Du Mont, 304 N.C. 627, 286 S.E.2d 89 (1982).)

(c) Judicial Review Procedures—Article 4 of G.S. 150B shall be complied with by all parties relative to the procedures for judicial review of the council's decision.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1806 Additional Rules Pertaining to Hearings and Appeals**

(a) Notices—Every notice required by these rules shall be mailed to the applicant.

(b) Expenses Related to Hearings and Appeals—In its discretion, the board may direct that the necessary expenses incurred in any investigation, processing, and hearing of any matter to the board or appeal to the council be paid by the board. However, all expenses related to travel to any hearing or appeal for the applicant, his or her

attorney, and witnesses called by the applicant shall be borne by the applicant and shall not be paid by the board.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .1900 Rules Concerning the Accreditation of Continuing Legal Education for the Purposes of the Board of Legal Specialization

### .1901 General Provisions

(a) An applicant for certification in a specialty field must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the last three years prior to application in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for three years and dividing by three.

(b) An applicant for continued certification must make a satisfactory showing of the requisite number of hours of continuing legal education (CLE) in the specialty field for each of the five years of certification in accord with the standards adopted by the board in the field. In no event will the number of hours be less than an average of twelve hours per year. The average number of hours is computed by adding all hours of continuing legal education credits in the field for the five years and dividing by five.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1902 Definitions

(1) Applicant—The person applying for certification or continued certification of specialization.

(2) Board—The North Carolina State Bar Board of Legal Specialization.

(3) Committee—The specialty committee appointed by the board in the applicant's specialty field.

(4) Sponsor—An organization offering continuing legal education courses for attendance by attorneys.

(5) Accredited Sponsor—A sponsor which has demonstrated to the satisfaction of the board that the continuing legal education pro-

grams offered by it meet the accreditation standards on a continuing basis warranting a presumption of accreditation.

(6) Accreditation—A determination by the board that the continuing legal education activities further the professional competence of the applicant and a certain number of hours of continuing legal education credit should be awarded for participation in the continuing legal education activity.

(7) Continuing Legal Education (CLE)—Attendance at lecture-type instruction meeting the standards in Rule .1903 of this subchapter or participation in alternative activities described in Rule .1905 of this subchapter.

(8) Specialty Field—An area of the law as defined by the board in which the board certifies specialists.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .1903 Accreditation Standards for Lecture-Type CLE Activities

(a) The CLE activity shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence in the applicant's specialty field.

(b) The CLE activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, or ethical obligations of lawyers in the applicant's specialty field.

(c) The CLE activity may be presented by either live instruction or mechanical or electronically recorded or reproduced material. If electronic transmission is used, an instructor should be present for comment or to answer questions. The board may reduce the hours of credit for electronic transmission when no instructor is present.

(d) Continuing legal education materials are to be prepared and activities conducted by an individual or group qualified by practical or academic experience in a setting suitable to the educational activity of the program.

(e) Except when not suitable or readily available because of the topic or the nature of the lecture, thorough, high quality, and carefully prepared written materials shall be provided to all attendees prior to or at the time the instruction is presented. Absence of materials should be the exception and not the rule.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1904 Computation of Hours of Instruction**

(a) Hours of CLE will be computed by adding the number of minutes of actual instruction, dividing by 60 and rounding the results to the nearest one-tenth of an hour.

(b) Only actual instruction will be included in computing the total hours of actual instruction. The following will be excluded:

(1) introductory remarks;

(2) breaks;

(3) business meetings;

(4) keynote speeches or speeches in connection with meals;

(5) question and answer sessions in excess of fifteen minutes per hour of instruction;

(6) programs of less than 60 minutes in length.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1905 Alternatives to Lecture-Type CLE Course Instruction**

(a) Teaching—Preparation and presentation of written materials at an accredited CLE course will qualify for CLE credit at the rate of three hours of credit for each hour of presentation as computed under Rule .1904 of this subchapter. In the case of joint preparation and/or presentation, each preparer and presenter will receive a proportionate share of the total credit available. Repeat presentations of substantially the same materials will not qualify for additional credit. Instruction at an academic institution will qualify for three hours of CLE credit per semester hour taught in the specialty field.

(b) Publication—Publication of a scholarly article in the applicant's specialty field will qualify for CLE credit in the discretion of the specialty committee, subject to board approval, based on a review of the article, its content, and its quality. No more than ten hours of credit will be given for a single article.

(c) Self-study—An individual may review video or audio tapes or manuscripts of lectures from qualified CLE courses, which lectures would meet the accreditation standards in Rule .1903 of this subchapter and receive credit according to the computation of hours in

Rule .1904 of this subchapter provided that no more than two hours per year of self-study shall qualify to meet the CLE requirements for certification or recertification.

(d) Advanced degrees—Attendance at courses of instruction at a law school which can be credited toward the earning of an advanced degree in the specialty field of the applicant will qualify for one hour of CLE credit per semester hour taken if attained in the required period prior to application for certification or recertification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1906 Accreditation of Courses**

(a) All courses offered by an accredited sponsor which relate to the specialty field as defined by the board shall be accredited and credit for attendance shall be given for the hours of instruction related to the specialty field of the applicant as determined by the board.

(b) The applicant shall make a showing that any course for which the applicant desires CLE credit offered by a sponsor not on the accredited sponsor list meets the accreditation standards of Rule .1903 of this subchapter. The board will then determine the number of hours of credit based upon the standards of Rule .1904 of this subchapter.

(c) An accredited sponsor may not represent or advertise that a CLE course is approved or that the attendees will be given CLE credit by the board unless such sponsor provides a brochure or other appropriate information describing the topics, hours of instruction, and instructors for its CLE offerings in a specialty field at least thirty days in advance of the date of the course and pay a fee of $100 per course for the costs of accreditation.

(d) An unaccredited sponsor desiring advance accreditation of a course and the right to designate its accreditation for the appropriate number of CLE credits in its solicitations shall submit a brochure or other appropriate information describing the topics, hours of instruction, location, and instructors for its CLE offerings at least sixty days prior to the date of the course. A fee of $200 shall accompany all requests for accreditation of courses from a sponsor not on the accredited sponsor list.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1907 Accreditation of Sponsor**

(a) The following is the list of accredited sponsors:

(1) North Carolina Bar Foundation

(2) North Carolina Academy of Trial Lawyers

(3) Wake Forest University Continuing Legal Education

(4) University of North Carolina at Chapel Hill Continuing Legal Education

(5) Duke University School of Law Continuing Legal Education

(6) Norman Adrian Wiggins School of Law Continuing Legal Education

(7) Middle District Bankruptcy Seminar

(8) UCB Estate Planning and Taxation Seminar

(9) any member of the Association of Continuing Legal Education Administrators

(10) University of Miami School of Law

(11) any of the following groups: American Bar Association, American College of Probate Counsel, American College of Trial Counsel, American Patent Law Association, Association of American Law Schools, Association of Life Insurance Counsel, Conference of Chief Justices, Council on Legal Education for Professional Responsibility, Inc., Federal Bar Association, Federal Communications Bar Association, Judge Advocates Association, Maritime Law Association of the United States, National Association of Attorneys General, National Association of Bar Executives, National Association of Bar Presidents, National Association of Bar Counsel, National Association of Women Lawyers, National Bar Association, National Conference of Bar Examiners, National Conference of Commissioners on Uniform State Laws, National Conference of Judicial Councils, National District Attorneys Association, and National Legal Aid and Defender Association.

(b) Any sponsor not listed in Rule .1907(a) above desiring to attain accredited sponsor status must submit to the board a description of the courses offered for the two years prior to application to the board for accredited sponsor status. The board may request copies of any course materials used in any of the offered courses. If, in the judgment of the board, the sponsor has met the accreditation

standards of Rule .1903 of this subchapter for each of the courses offered, the board will designate the sponsor as an accredited sponsor.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.1908 Showing by Applicants**

Every applicant will list each type of CLE activity under each of the following categories:

(1) attendance at CLE instruction offered by an accredited sponsor. The course name, sponsor, and number of hours of CLE shall be listed by the applicant;

(2) attendance at CLE instruction offered by a sponsor not on the accredited sponsor list or not given advanced approval by the board under Rule .1906 of this subchapter. A fee of $5.00 per course will be charged for accrediting each course listed by the applicant offered by a sponsor not on the accredited sponsor list or not given advanced approval under Rule .1906(d) of this subchapter. The course name, sponsor, and number of hours of CLE shall be listed by the applicant;

(3) participation as an instructor at a CLE course. The course name, sponsor, and number of hours of instruction or preparation shall be stated by the applicant;

(4) publication of a scholarly article. A copy of the publication shall accompany the application;

(5) self-study. A description of the materials used, the dates of use, the number of hours claimed, and the source from which they were obtained shall accompany the application.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Section .2000 Rules of the Board of Legal Specialization for Approval of Independent Certifying Organizations**

**.2001 Policy Statement**

These guidelines for reviewing independent organizations which certify lawyers as specialists are designed to thoroughly evaluate the purpose and function of such certifying organizations and the procedures they use in their certification processes. These guidelines are

not meant to be exclusive, but to provide a framework in which certifying organizations can be evaluated. The aim of this evaluation is to provide consumers of legal services a means of access to lawyers who are qualified in particular fields of law.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2002 General Procedure

As contemplated in Rule 2.5 of the North Carolina Rules of Professional Conduct, the North Carolina State Bar, through its Board of Legal Specialization (the board), shall, upon the filing of a completed application and the payment of any required fee, review the standards and procedures of any organization which certifies lawyers as specialists and desires the approval of the North Carolina State Bar. The board shall prepare an application form to be used by certifying organizations and shall administer the application process.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2003 Factors to be Considered in Reviewing Certifying Organizations

(a) Purpose of the Organization—The stated purposes for the original formation of the organization and any subsequent changes in those purposes shall be examined to determine whether the organization is dedicated to the maintenance of professional competence.

(b) Background of the Organization—The length of time the organization has been in existence, whether the organization is a successor of another, the requirements for membership in the organization, the number of members which the organization has, the business structure under which the organization operates, and the professional qualifications of the individuals who direct the policies and operations of the organization shall be examined to determine whether the organization is a bona fide certifying organization.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2004 Standards for Approval of Certifying Organizations

The following standards are to be considered by the board in evaluating an application for approval of a certifying organization.

(1) Uniform Applicability of Certification Standards—In general, the standards for certification in any specialty field must be

understandable and easily applied to individual applicants. Certification by the organization must be available to any attorney who meets the standards, and the organization must not certify an attorney who has not demonstrably met each standard. The organization must agree to promptly inform the board of any material changes in its standards, definitions of specialty fields or certifying procedures and must further agree to respond promptly to any reasonable requests for information from the board.

(2) Definitions of Specialty Fields—Every field of law in which certification is offered must be susceptible of meaningful definition and be an area in which North Carolina lawyers regularly practice.

(3) Decision Making by Recognized Experts—The persons in a certifying organization making decisions regarding applicants shall include lawyers who, in the judgment of the board, are experts in the subject areas of practice and who each have extensive practice or involvement in those areas of practice.

(4) Certification Standards—A certifying organization's standards for certification of specialists must include, as a minimum, the standards required for certification set out in the North Carolina Plan of Legal Specialization (Section .1700 of this subchapter) and in the rules, regulations and standards adopted by the board from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for a determination that an applicant possesses special competence in a particular field of law, as demonstrated by the following means:

(a) Substantial Involvement—Substantial involvement in the area of specialty during the five-year period immediately preceding application to the certifying agency. Substantial involvement is generally measured by the amount of time spent practicing in the area of specialty. In no event may the time spent in practicing the specialty be less than 25 percent of the total practice of a lawyer engaged in a normal full-time practice;

(b) Peer Review—Peer recommendations from attorneys or judges who are familiar with the competence of the applicant in the area of specialty, none of whom are related to, engaged in legal practice with, or involved in continuing commercial relationships with the lawyer;

(c) Written Examination—Objective evaluation of the applicant's knowledge of the substantive and procedural law in the area of specialty as determined by written examination;

(d) Continuing Legal Education—At least 36 hours of approved continuing legal education credit in the area of specialty during the three years immediately preceding application to the certifying organization.

(5) Applications and Procedures—Application forms used by the certifying organization must be submitted to the board for review to determine that the requirements specified above are being met by applicants. Additionally, the certifying organization must submit a description of the process it uses to review applications.

(6) Requirements for Recertification—The standards used by a certifying organization must provide for certification for a limited period of time, which shall not exceed five years, after which time persons who have been certified must apply for recertification. Requirements for recertification must include continued substantial involvement in the area of specialty, continuing legal education, and appropriate peer review.

(7) Revocation of Certification—The standards used by a certifying organization shall include a procedure for revocation of certification. A certification shall be revoked upon a finding that the certificate holder has been disbarred or suspended from the practice of law. The standards shall require a certificate holder to report his or her disbarment or suspension from the practice of law to the certifying organization.

(8) Waiver—The standards used by a certifying organization may provide for waiver of the peer review and written examination requirements set forth in Rules .2004(4)(b) and (c) above for an applicant who was responsible for formulating and grading the organization's initial written examination in his or her area of specialty.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2005 Application Procedure**

(a) The organization may file an application seeking approval of the organization by the board. Applications shall be on forms available from and approved by the board. The application fee shall be $1,000.

(b) The organization which has been approved shall provide its standards, definitions and/or certifying procedures to the board in January of each year and must pay an annual administrative fee of $100 to maintain its approved status.

(c) When the board determines that an approved certifying organization has ceased to exist, has ceased to operate its certification program in the manner described in its application, or has failed to comply with the requirements of Rule .2005(b) above, its approved status shall be revoked. After such a revocation, no North Carolina lawyer may publicize a certification from the organization in question.

(d) The appeal procedures of the board shall apply to any application by an organization for approval as a certifying organization and any decision to revoke a certifying organization's approved status.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2006 Effect of Approval of a Certifying Organization by the Board of Legal Specialization

When an organization is approved as a certifying organization by the board, any North Carolina lawyer certified as a specialist by that organization may publicize that certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .2100 Certification Standards for the Real Property Law Specialty

### .2101 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates real property law, including the subspecialties of real property-residential transactions and real property-business, commercial, and industrial transactions as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2102 Definition of Specialty**

The specialty of real property law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases, and determination of property rights. Subspecialties in the field are identified and defined as follows:

(a) Real Property Law-Residential Transactions—The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition, of residential real property by individuals;

(b) Real Property Law-Business, Commercial, and Industrial Transactions—The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2103 Recognition as a Specialist in Real Property Law**

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-residential transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for the real property law-business, commercial, and industrial transactions, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Business, Commercial, and Industrial Transactions." If a lawyer qualifies as a specialist in real property law by meeting the standards set for both the real property law-residential transactions subspecialty and the real property law-business, commercial, and industrial transactions subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law-Residential, Business, Commercial and Industrial Transactions."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2104 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in real property law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2105 Standards for Certification as a Specialist in Real Property Law

Each applicant for certification as a specialist in real property law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in real property law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of real property law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of real property law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent means service as a law professor concentrating in the teaching of real property law. Teaching may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education—An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in real property law during the three years preceding application with not less than 6 credits in any one year.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability in real property law.

(1) Terms—The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge in the following topics in real property law or in the subspecialty or subspecialties that the applicant has elected:

(A) title examinations, property transfers, financing, leases, and determination of property rights;

(B) the acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals;

(C) the acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2106 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2106(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2105(b) of this subchapter.

(b) Continuing Legal Education—The specialist must have earned no less than 60 hours of accredited continuing legal education credits in real property law as accredited by the board with not less than 6 credits earned in any one year.

(c) Peer Review—The specialist must comply with the requirements of Rule .2105(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2105 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2105 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2107 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in real property law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .2200 Certification Standards for the Bankruptcy Law Specialty

### .2201 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates bankruptcy law, including the subspecialties of consumer bankruptcy law and business bankruptcy law, as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2202 Definition of Specialty

The specialty of bankruptcy law is the practice of law dealing with all laws and procedures involving the rights, obligations, and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions. Subspecialties in the field are identified and defined as follows:

(a) Consumer Bankruptcy Law—The practice of law dealing with consumer bankruptcy and the representation of interested parties in contested matters or adversary proceedings in individual filings of Chapter 7, Chapter 12, or Chapter 13;

(b) Business Bankruptcy Law—The practice of law dealing with business bankruptcy and the representation of interested parties in contested matters or adversary proceedings in bankruptcy cases filed on behalf of debtors who are or have been engaged in business prior to an entity filing Chapter 7, Chapter 9, Chapter 11, or Chapter 12.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2203 Recognition as a Specialist in Bankruptcy Law

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for the consumer bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Consumer Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy

law by meeting the standards set for the business bankruptcy law subspecialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business Bankruptcy Law." If a lawyer qualifies as a specialist in bankruptcy law by meeting the standards set for both the consumer bankruptcy law and the business bankruptcy law subspecialties, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Business and Consumer Bankruptcy Law."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2204 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in bankruptcy law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2205 Standards for Certification as a Specialist in Bankruptcy Law

Each applicant for certification as a specialist in bankruptcy law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in bankruptcy law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of bankruptcy law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of bankruptcy law, but not less than 400 hours in any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession

(A) service as a judge of any bankruptcy court, service as a clerk of any bankruptcy court, or service as a standing trustee;

(B) corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith;

(C) service as a deputy or assistant clerk of any bankruptcy court, as a research assistant to a bankruptcy judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education—An applicant must have earned no less than 36 hours of accredited continuing legal education (CLE) credits in bankruptcy law, during the three years preceding application with not less than 6 credits in any one year.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be a judge of any bankruptcy court.

(2) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(3) The references shall be given on standardized forms provided by the board with the application for certification in the

specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability in bankruptcy law.

(1) Terms—The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge and application of the law in the following topics in the subspecialty or subspecialties that the applicant has elected:

(A) all provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;

(B) the Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;

(C) bankruptcy crimes and immunity;

(D) state laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the creation, perfection, enforcement, and priorities of secured claims, claim and delivery; and attachment and garnishment;

(E) judicial interpretations of any of the above.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2206 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2206(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application, he or she

has had substantial involvement in the specialty as defined in Rule .2205(b) of this subchapter.

(b) Continuing Legal Education—Since last certified, a specialist must have earned no less than 60 hours of accredited continued legal education credits in bankruptcy law with not less than 6 credits earned in any one year.

(c) Peer Review—The specialist must comply with the requirements of Rule .2205(d) of this subchapter.

(d) Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2205 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2205 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2207 Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in bankruptcy law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .2300 Certification Standards for the Estate Planning and Probate Law Specialty

**.2301 Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates estate planning and probate law as a field of law for which certification of specialists under the Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effctive December 8, 1994

**.2302 Definition of Specialty**

The specialty of estate planning and probate law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2303 Recognition as a Specialist in Estate Planning and Probate Law**

If a lawyer qualifies as a specialist in estate planning and probate law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2304 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in estate planning and probate law shall be governed by the provisions of the Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2305 Standards for Certification as a Specialist in Estate Planning and Probate Law**

Each applicant for certification as a specialist in estate planning and probate law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in estate planning and probate law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of

application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—The applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of estate planning and probate law.

(1) Substantial involvement shall be measured as follows:

(A) Time Spent—During the five years preceding the application, the applicant has devoted an average of at least 500 hours a year to the practice of estate planning and probate law, but not less than 400 hours in any one year;

(B) Experience Gained—During the five years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) prepared or supervised the preparation of (1) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minor's trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments; and (2) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative before the clerk of superior court, guardianship, will contest, and declaratory judgment actions;

(iv) prepared, reviewed or supervised the preparation of federal estate tax returns, North Carolina inheritance tax returns, and federal and state fiduciary

income tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board from an approved law school) may be substituted for one year of experience to meet the five-year requirement;

(B) service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may be substituted for one year of experience to meet the five-year requirement;

(C) service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the specialty committee and the board). Such service may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education—An applicant must have earned no less than 72 hours of accredited continuing legal education (CLE) credits in estate planning and probate law during the three years preceding application. Of the 72 hours of CLE, at least 45 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee

of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability in estate planning and probate law.

(1) Terms—The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge and application of the law in the following topics:

(A) federal and North Carolina gift taxes;

(B) federal estate tax;

(C) North Carolina inheritance tax;

(D) federal and North Carolina fiduciary income taxes;

(E) federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;

(F) North Carolina law of wills and trusts;

(G) North Carolina probate law, including fiduciary accounting;

(H) federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts;

(I) North Carolina law of business organizations, family law, and property law as they may be applicable to estate planning transactions;

(J) federal and North Carolina tax law applicable to partnerships and corporations (including S corpora-

tions) which may be encountered in estate planning and administration.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2306 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter.

(b) Continuing Legal Education—Since last certified, a specialist must have earned no less than 120 hours of accredited continuing legal education credits in estate planning and probate law. Of the 120 hours of CLE, at least 75 hours shall be in estate planning and probate law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

(c) Peer Review—The specialist must comply with the requirements of Rule .2305(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2305 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2307 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in estate planning and probate law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .2400 Certification Standards for the Family Law Specialty

### .2401 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates family law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2402 Definition of Specialty

The specialty of family law is the practice of law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2403 Recognition as a Specialist in Family Law

If a lawyer qualifies as a specialist in family law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Family Law."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2404 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in family law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2405 Standards for Certification as a Specialist in Family Law**

Each applicant for certification as a specialist in family law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification as a specialist in family law:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of family law.

(1) Substantial involvement shall mean during the five years preceding the application, the applicant has devoted an average of at least 600 hours a year to the practice of family law, and not less than 400 hours during any one year.

(2) Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

(3) Practice equivalent shall mean

(A) service as a law professor concentrating in the teaching of family law. Such service may be substituted for one year of experience to meet the five-year requirement.

(B) service as a district court judge in North Carolina, hearing a substantial number of family law cases. Such service may be substituted for one year of experience to meet the five-year requirement.

(c) Continuing Legal Education—An applicant must have earned no less than 45 hours of accredited continuing legal education (CLE) credits in family law, 9 of which may be in related fields, during the three years preceding application, with not less than 9 credits in any one year. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(d) Peer Review—An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the

competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability in family law.

(1) Terms—The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter—The examination shall cover the applicant's knowledge and application of the law relating to marriage, divorce, alimony, child custody and support, equitable distribution, enforcement of support, domestic violence, bastardy, and adoption including, but not limited to, the following:

(A) contempt (Chapter 5A of the North Carolina General Statutes);

(B) adoptions (Chapter 48);

(C) bastardy (Chapter 49);

(D) divorce and alimony (Chapter 50);

(E) Uniform Child Custody Jurisdiction Act (Chapter 50A);

(F) domestic violence (Chapter 50B);

(G) marriage (Chapter 51);

(H) powers and liabilities of married persons (Chapter 52);

(I) Uniform Reciprocal Enforcement of Support Act (Chapter 52A);

(J) Uniform Premarital Agreement Act (Chapter (52B);

(K) termination of parental rights, as relating to adoption and termination for failure to provide support (Article 24B of Chapter 7A);

(L) garnishment and enforcement of child support obligations (Chapter 110-136 et.seq.).

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2406 Standards for Continued Certification as a Specialist**

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2406(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2405(b) of this subchapter.

(b) Continuing Legal Education—Since last certified, a specialist must have earned no less than 60 hours of accredited continuing legal education credits in family law or related fields. Not less than nine credits may be earned in any one year, and no more than twelve credits may be in related fields. Related fields shall include taxation, trial advocacy, evidence, negotiation, and juvenile law.

(c) Peer Review—The specialist must comply with the requirements of Rule .2405(d) of this subchapter.

(d) Time for Application—Application for continued certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require

compliance with all requirements of Rule .2405 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2405 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2407 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in family law are subject to any general requirement, standards, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Section .2500 Certification Standards for the Criminal Law Specialty

### .2501 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates criminal law, including the subspecialties of criminal appellate practice and state criminal law, as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2502 Definition of Specialty

The specialty of criminal law is the practice of law dealing with the defense or prosecution of those charged with misdemeanor and felony crimes in state and federal trial and appellate courts. Subspecialties in the field are identified and defined as follows:

(a) Criminal Appellate Practice—The practice of criminal law at the appellate court level;

(b) State Criminal Law—The practice of criminal law in state trial and appellate courts.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2503 Recognition as a Specialist in Criminal Law**

A lawyer may qualify as a specialist by meeting the standards set for criminal law or the subspecialties of criminal appellate practice or state criminal law. If a lawyer qualifies as a specialist by meeting the standards set for the criminal law specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Appellate Practice." If a lawyer qualifies as a specialist by meeting the standards set for the subspecialty of state criminal law, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in State Criminal Law." If a lawyer qualifies as a specialist by meeting the standards set for both criminal law and the subspecialty of criminal appellate practice, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Criminal Law and Criminal Appellate Practice."

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2504 Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in criminal law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.2505 Standards for Certification as a Specialist**

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition each applicant shall meet the following standards for certification:

(a) Licensure and Practice—An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. During the period of certification an applicant

shall continue to be licensed and in good standing to practice law in North Carolina.

(b) Substantial Involvement—An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of criminal law.

(1) For the specialty of criminal law and the subspecialty of state criminal law, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. Substantial involvement shall mean

(A) during the applicant's entire legal career, the applicant must have been participating counsel of record in criminal proceedings as follows:

(i) five felony jury trials in cases submitted to jury for decision;

(ii) ten additional jury trials, regardless of offenses, submitted to jury for decision;

(iii) fifty additional criminal matters to disposition in the state district or superior courts, or in the U.S. district court (disposition being defined as the conclusion of a criminal matter);

(iv) any one of the following:

(a) two oral appearances before an appellate court of the State of North Carolina or the United States; or

(b) three written appearances before any appellate court in which the applicant certifies that he or she had primary responsibility for the preparation of the record on appeal and brief; or

(c) 25 additional criminal trials in any jurisdiction which were submitted to the judge or jury for decision.

(B) during the five years immediately preceding application to the board, the applicant must have

(i) appeared as participating counsel for at least 25 days in the jury trial of one or more criminal cases, whether to verdict or not;

(ii) made 75 court appearances in any substantive non-jury trials or proceedings (excluding calendar calls,

continuance motions, or other purely administrative matters) in a criminal court of any jurisdiction;

(iii) devoted an average of 500 hours per year in the area of criminal law but not less than 400 hours in any one year.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completing the requirements in Rule .2505(b)(1)(A) and (B) above, and the applicant shows substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the five required years of Rule .2505(b)(1)(B)(iii) above and must meet all of the requirements of Rule .2505(b)(1)(A)(iv) above and three-fifths of the remaining requirements of Rule .2505(b)(1)(B) above.

(2) For the subspecialty of criminal appellate practice, the applicant must have been engaged in the active practice of law for at least five years prior to certification with a substantial involvement in the area of criminal law. For the subspecialty of criminal appellate practice, substantial involvement shall mean

(A) the applicant must have been engaged in the active practice of law for at least five years prior to certification, (unless excepted under Rule .2505(b)(2)(B)(ii) below). During the applicant's entire legal career, the applicant must have completed the requirements set forth in Rule .2505(b)(1)(A) above;

(B) during the applicant's entire legal career, the applicant must have also

(i) represented a party in at least 15 criminal appeals, 5 of which must have been within the two years preceding the application;

(ii) had substantial involvement in criminal appellate work, including brief writing, motion practice, oral arguments, and extraordinary writs. Sitting as an appellate court judge for at least one year of the three years preceding application will fulfill three years of the practice requirements.

(C) upon recommendation by the specialty committee and approval by the board, where the profession or the geographical location of an applicant prohibits his or her completion of all or a portion of the requirements of Rule .2505(b)(2)(A) above and the applicant can show substantial involvement in other areas of law requiring similar skills, or has engaged in research, writing, or teaching special studies of criminal law and procedure, to include criminal appellate law, said applicant may substitute such experience for one year of the required five years and may qualify by meeting all of the requirements of Rules .2505(b)(1)(A)(i) and (ii) above, and upon the showing of the representation of at least five criminal appellate actions within the last two years.

(c) Continuing Legal Education

(1) In the specialty of criminal law, the state criminal law subspecialty, and the criminal appellate practice subspecialty, an applicant must have earned no less than 40 hours of accredited continuing legal education credits in criminal law during the three years preceding the application, which 40 hours must include the following:

(A) at least 34 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(2) In order to be certified as a specialist in both criminal law and the subspecialty of criminal appellate law, an applicant must have earned no less than 46 hours of accredited continuing legal education credits in criminal law during the three years preceding application, which 46 hours must include the following:

(A) at least 40 hours in skills pertaining to criminal law, such as evidence, substantive criminal law, criminal procedure, criminal trial advocacy, criminal trial tactics, and appellate advocacy;

(B) at least 6 hours in the area of ethics and criminal law.

(d) Peer Review

(1) Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, and the subspe-

cialty of criminal appellate practice must make a satisfactory showing of qualification through peer review.

(2) All references must be licensed and in good standing to practice in North Carolina and must be familiar with the competence and qualifications of the applicant in the specialty field. The applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualifications.

(3) Written peer reference forms will be sent by the board or the specialty committee to the references. Completed peer reference forms must be received from at least five of the references. The board or the specialty committee may contact in person or by telephone any reference listed by an applicant.

(A) Each applicant for certification as a specialist in the specialty of criminal law and in the subspecialty of state criminal law must provide for reference and independent inquiry the names and addresses of the following:

(i) four attorneys of generally recognized stature who practice in the field of criminal law;

(ii) two judges of different jurisdictions before whom the applicant has litigated a case to disposition within the previous two years;

(iii) opposing counsel, co-counsel, and judges in the last five jury trials conducted by the applicant;

(iv) opposing counsel, co-counsel, and judges in the last five nonjury trials or procedures conducted by the applicant;

(v) if the applicant has participated in appellate matters, opposing counsel, co-counsel, and judges in the last two appellate matters conducted by the applicant as well as copies of all briefs filed by the applicant in these two appellate matters;

(vi) if an applicant has not prepared any appellate briefs, then the applicant shall submit to the specialty committee two separate trial court memoranda submitted to a trial court within the last three years which were prepared and filed by the applicant.

(B) An applicant for the subspecialty of criminal appellate practice shall provide the names and addresses of the following:

(i) four attorneys of generally recognized stature to attest to the applicant's substantial involvement and competence in criminal appellate practice. Such lawyers shall be substantially involved in criminal appellate practice and familiar with the applicant's practice;

(ii) two judges before whom the applicant has appeared in criminal appellate matters within the last two years to attest to the applicant's substantial involvement and competence in criminal appellate practices;

(iii) opposing counsel, judges, and any co-counsel in the last two appellate matters the applicant has handled. The applicant shall also provide all briefs filed in these matters.

(C) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(e) Examination—The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms—The examination(s) shall be in written form and shall be given at such times as the board deems appropriate. The examination(s) shall be administered and graded uniformly by the specialty committee.

(2) Subject Matter

(A) The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

(i) the North Carolina and Federal Rules of Evidence;

(ii) state and federal criminal procedure and state and federal laws affecting criminal procedure;

(iii) constitutional law;

(iv) appellate procedure and tactics;

(v) trial procedure and trial tactics;

(vi) criminal substantive law;

(vii) the North Carolina Rules of Appellate Procedure.

(B) An applicant for certification in the specialty of criminal law shall take part I (covering state law) and part II (covering federal law) of the criminal law examination. An applicant for certification in the subspecialty of state criminal law shall take part I of the criminal law examination.

(3) Requirement of Criminal Law Examination for Criminal Appellate Practice—An applicant for certification in the subspecialty of criminal appellate practice must successfully pass the examination in criminal law. If an applicant for certification in criminal appellate practice is already certified as a specialist in the subspecialty of state criminal law, then the applicant must take part II (covering federal law) of the examination in criminal law as well as the criminal appellate practice examination.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2506 Standards for Continued Certification as a Specialist

The period of certification is five years. A certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2506(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement—The specialist must demonstrate that for the five years preceding reapplication he or she has had substantial involvement in the specialty or subspecialty as defined in Rule .2505(b)(1)(B) and (C) of this subchapter for the specialty of criminal law and the subspecialty of state criminal law, and Rule .2505(b)(2) of this subchapter for the subspecialty of criminal appellate practice.

(b) Continuing Legal Education—The specialist must have earned no less than 65 hours of accredited continuing legal education credits in criminal law with not less than 6 credits earned in any one year.

(c) Peer Review—The specialist must comply with the requirements of Rule .2505(d) of this subchapter.

(d) Time for Application—Application for continuing certification shall be made not more than 180 days nor less than 90 days prior to the expiration of the prior period of certification.

(e) Lapse of Certification—Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Rule .2505 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification—If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Rule .2505 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .2507 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in criminal law, the subspecialty of state criminal law and the subspecialty of criminal appellate practice are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## SUBCHAPTER E

## REGULATIONS FOR ORGANIZATIONS PRACTICING LAW

### Section .0100 Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law

### .0101 Authority, Scope, and Definitions

(a) Authority—Chapter 55B of the General Statutes of North Carolina, being "the Professional Corporation Act," particularly Section 55B-12, and Chapter 57C, being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c), authorizes the Council of the North Carolina State Bar (the council) to adopt regulations for professional corporations and professional limited liability com-

panies practicing law. These regulations are adopted by the council pursuant to that authority.

(b) Statutory Law—These regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and professional limited liability companies (Chapter 57C) and shall be interpreted in harmony with those statutes and with other statutes and laws governing corporations and limited liability companies generally.

(c) Definitions—All terms used in these regulations shall have the meanings set forth below or shall be as defined in the Professional Corporation Act or the North Carolina Limited Liability Company Act as appropriate.

(1) "Council" shall mean the Council of the North Carolina State Bar.

(2) "Licensee" shall mean any natural person who is duly licensed to practice law in North Carolina.

(3) "Professional limited liability company or companies" shall mean any professional limited liability company or companies organized for the purpose of practicing law in North Carolina.

(4) "Professional corporations" shall mean any professional corporation or corporations organized for the purpose of practicing law in North Carolina.

(5) "Secretary" shall mean the secretary of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0102 Name of Professional Corporation or Professional Limited Liability Company**

(a) Name of Professional Corporation—The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word, or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(a)(1), (2) and (5) below. The following additional requirements shall apply to the name of a professional corporation:

(1) Corporate Designation—The name of a professional corporation shall end with the following words:

(A) "Professional Association" or the abbreviation "P.A."; or

(B) "Professional Corporation" or the abbreviation "P.C."

(2) Deceased or Retired Shareholder—The surname of any shareholder of a professional corporation may be retained in the corporate name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her shares of stock in the professional corporation;

(3) Disqualified Shareholder—If a shareholder in a professional corporation whose surname appears in the corporate name becomes a "disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his or her shares of stock in the corporation;

(4) Shareholder Becomes Judge or Official—If a shareholder in a professional corporation whose surname appears in the corporate name becomes a judge or other adjudicatory officer or holds any other office which disqualifies such shareholder to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his or her shares of stock in the corporation;

(5) Trade Name Allowed—A professional corporation shall not use any name other than its corporate name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Rules of Professional Conduct.

(b) Name of Professional Limited Liability Company—The name of every professional limited liability company shall contain the surname of one or more of its members or one or more persons who were associated with its immediate corporate, individual, partnership, or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required or permitted by Rules .0102(b)(1), (2) and (5) below. The following requirements shall apply to the name of a professional limited liability company:

(1) Professional Limited Liability Company Designation—The name of a professional limited liability company shall end with the words "Professional Limited Liability Company" or the abbreviation "P.L.L.C.";

(2) Deceased or Retired Member—The surname of any member of a professional limited liability company may be retained in the limited liability company name after such person's death, retirement, or inactivity due to age or disability, even though such person may have disposed of his or her interest in the professional limited liability company;

(3) Disqualified Member—If a member of a professional limited liability company whose surname appears in the name of such professional limited liability company becomes a "disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member, and such member shall promptly dispose of his or her interest in the professional limited liability company;

(4) Member Becomes Judge or Official—If a member of a professional limited liability company whose surname appears in the professional limited liability company name becomes a judge or other adjudicatory official or holds any other office which disqualifies such person to practice law, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member and such person shall promptly dispose of his or her interest in the professional limited liability company;

(5) Trade Name Allowed—A professional limited liability company shall not use any name other than its limited liability company name, except to the extent a trade name or other name is required or permitted by statute, rule of court, or the Rules of Professional Conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0103 Registration with the North Carolina State Bar

(a) Registration of Professional Corporation—At least one of the incorporators of a professional corporation shall be an attorney at law duly licensed to practice in North Carolina. The incorporators shall comply with the following requirements for registration of a professional corporation with the North Carolina State Bar:

(1) Filing with State Bar—Prior to filing the articles of incorporation with the secretary of state, the incorporators of a professional corporation shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of incorporation;

(B) an additional executed copy of the articles of incorporation;

(C) a conformed copy of the articles of incorporation;

(D) a registration fee of fifty dollars;

(E) an application for certificate of registration for a professional corporation (Form DC-1; see Section .0106(a) of this subchapter) verified by all incorporators, setting forth

(i) the names and addresses of each person who will be an original shareholder or an employee who will practice law for the corporation; (ii) the name and address of at least one person who is an incorporator; (iii) the name and address of at least one person who will be an original director; and (iv) the name and address of at least one person who will be an original officer, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the corporation will be conducted in compliance with the Professional Corporation Act and these regulations; and

(F) a certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of incorporation, to be executed by the secretary in accordance with Rule .0103(a)(2) below.

(2) Certificates Issued by Secretary and Council—The secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and these regulations. If the secretary determines that all persons who will be original shareholders are duly licensed to practice law in North Carolina and that the articles of incorporation conform with the laws relating to professional corporations and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional corporation by the Council of the North Carolina State Bar (Form PC-2; see Rule .0106(b) of this subchapter) attached to the original, the executed copy, and the conformed copy of the articles of

incorporation and return the original and the conformed copies of the articles of incorporation, together with the attached certificates, to the incorporators for filing with the secretary of state;

(B) retain the executed copy of the articles of incorporation together with the application (Form PC-1) and the certification of council (Form PC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional corporation (Form PC-3; see Rule .0106(c) of this subchapter) to the professional corporation to become effective upon the effective date of the articles of incorporation after said articles are filed with the secretary of state.

(b) Registration of a Professional Limited Liability Company—At least one of the persons executing the articles of organization of a professional limited liability company shall be an attorney at law duly licensed to practice law in North Carolina. The persons executing the articles of organization shall comply with the following requirements for registration with the North Carolina State Bar:

(1) Filing with State Bar—Prior to filing the articles of organization with the secretary of state, the persons executing the articles of organization of a professional limited liability company shall file the following with the secretary of the North Carolina State Bar:

(A) the original articles of organization;

(B) an additional executed copy of the articles of organization;

(C) a conformed copy of the articles of organization;

(D) a registration fee of $50;

(E) an application for certificate of registration for a professional limited liability company (Form PLLC-1; see Rule .0106(f) of this subchapter) verified by all of the persons executing the articles of organization, setting forth

(i) the names and addresses of each original member or employee who will practice law for the professional limited liability company; (ii) the name and address of at least one person executing the articles of organization; and (iii) the name and address of at least one person who will be an original manager, and stating that all such per-

sons are duly licensed to practice law in North Carolina, and representing that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and these regulations;

(F) a certification for professional limited liability company by the Council of the North Carolina State Bar, (Form PLLC-2; see Rule .0106(g) of this subchapter), a copy of which shall be attached to the original, the executed copy, and the conformed copy of the articles of organization, to be executed by the secretary in accordance with Rule .0103(b)(2) below.

(2) Certificates Issued by the Secretary—The secretary shall review the articles of organization for compliance with the laws relating to professional limited liability companies and these regulations. If the secretary determines that all of the persons who will be original members are duly licensed to practice law in North Carolina and the articles of organization conform with the laws relating to professional limited liability companies and these regulations, the secretary shall take the following actions:

(A) execute the certification for professional limited liability company by the Council of the North Carolina State Bar (Form PLLC-2) attached to the original, the executed copy and the conformed copy of the articles of organization and return the original and the conformed copy of the articles of organization, together with the attached certificates, to the persons executing the articles of organization for filing with the secretary of state;

(B) retain the executed copy of the articles of organization together with the application (Form PLLC-1) and the certification (Form PLLC-2) in the office of the North Carolina State Bar as a permanent record;

(C) issue a certificate of registration for a professional limited liability company (Form PLLC-3; see Rule .0106(h) of this subchapter) to the professional limited liability company to become effective upon the effective date of the articles of organization after said articles are filed with the secretary of state.

(c) Refund of Registration Fee—If the secretary is unable to make the findings required by Rules .0103(a)(2) or .0103(b)(2) above, the secretary shall refund the $50 registration fee.

(d) Expiration of Certificate of Registration—The initial certificate of registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

(e) Renewal of Certificate of Registration—The certificate of registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year upon the following conditions:

(1) Renewal of Certificate of Registration for Professional Corporation—A professional corporation shall submit an application for renewal of certificate of registration for a professional corporation (Form PC-4; see Rule .0106(d) of this subchapter) to the secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the state of North Carolina and representing that the corporation has complied with these regulations and the provisions of the Professional Corporation Act. Upon a finding by the secretary that the representations in the application are correct, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(2) Renewal of Certificate of Registration for a Professional Limited Liability Company—A professional limited liability company shall submit an application for renewal of certificate of registration for a professional limited liability company (Form PLLC-4; see Rule .0106(i) of this subchapter) to the secretary listing the names and addresses of all of the members and employees of the professional limited liability company who practice law, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the state of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Upon a finding by the secretary that the representations in the application are correct, the secretary shall renew the certificate of registration by making a notation in the records of the North Carolina State Bar;

(3) Renewal Fee—An application for renewal of a certificate of registration for either a professional corporation or a profession-

al limited liability company shall be accompanied by a renewal fee of $25;

(4) Refund of Renewal Fee—If the secretary is unable to make the findings required by Rules .0103(e)(1) or .0103(e)(2) above, the secretary shall refund the $25 registration fee;

(5) Failure to Apply for Renewal of Certificate of Registration—In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days following the expiration date of its certificate of registration, the secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate application for renewal of certificate of registration, together with the renewal fee, to the North Carolina State Bar within 30 days or to show cause for failure to do so. Failure to submit the application and the renewal fee within said thirty days, or to show cause within said time period, shall result in the suspension of the certificate of registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the secretary of state of the suspension of said certificate of registration;

(6) Reinstatement of Suspended Certificate of Registration—Upon (a) the submission to the North Carolina State Bar of the appropriate application for renewal of certificate of registration, together with all past due renewal fees; and (b) a finding by the secretary that the representations in the application are correct, a suspended certificate of registration of a professional corporation or professional limited liability company shall be reinstated by the secretary by making a notation in the records of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0104 Management and Financial Matters**

(a) Management—At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be attorneys at law duly licensed to practice in North Carolina.

(b) Authority Over Professional Matters—No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services.

(c) No Income to Disqualified Person—The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is a "disqualified person," as such term is defined in G.S. 55B-2(1), or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rules .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) Stock of a Professional Corporation—A professional corporation may acquire and hold its own stock.

(e) Acquisition of Shares of Deceased or Disqualified Shareholder—Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) Stock Certificate Legend—There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) Transfer of Stock of Professional Corporation—When stock of a professional corporation is transferred, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC-5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars for each transferee listed on the stock transfer certificate.

(h) Stock Register of Professional Corporation—The stock register of a professional corporation shall be kept at the principal office

of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0105 General and Administrative Provisions**

(a) Administration of Regulations--These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) Appeal to Council—If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) Articles of Amendment, Merger, and Dissolution—A copy of the following documents, duly certified by the secretary of state, shall be filed with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) Filing Fee—Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee of two dollars.

(e) Accounting for Filing Fees—All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) Records of State Bar—The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) Additional Information—A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0106 Forms**

**(a) Form PC-1:**

Application for Certificate of Registration for a
Professional Corporation

The undersigned, being all of the incorporators of ______________________, a professional corporation to be incorporated under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person who is an incorporator, at least one person who will be an original officer, and at least one person who will be an original director, and all persons who, to the best knowledge and belief of the undersigned, will be original shareholders and employees who will practice law for said professional corporation are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

| Name and Position (incorporator, officer, director, shareholder, employee) | Address |
|---|---|
| ______________________ | ______________________ |
| ______________________ | ______________________ |
| ______________________ | ______________________ |

2. To the best of our knowledge and belief, all of the persons listed above are duly licensed to practice law in the state of North Carolina.

3. The undersigned represent that the professional corporation will be conducted in compliance with the Professional Corporations Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

4. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional corporation's articles of incorporation after said articles are filed with the secretary of state.

5. Attached hereto is the registration fee of $50.

This the _____ day of ________________, 19__.

______________________
Incorporator

______________________
Incorporator

______________________
Incorporator
[Signatures of all incorporators.]

NORTH CAROLINA

______________ COUNTY

I hereby certify that ______________, ______________, ______________, ______________, and ______________, being all of the incorporators of ______________________, a professional corporation, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this _____ day of _______________, 19___.

_______________________________
Notary Public

My commission expires:

_______________________________

**(b) Form PC-2:**

Certification for Professional Corporation by Council of the North Carolina State Bar

The incorporators of ____________________, a professional corporation, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original owners of said professional corporation's shares.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that each person who will be an original owner of the shares of stock of said professional corporation is duly licensed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this _____ day of _______________, 19___.

_______________________________
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and must be attached to the original articles of incorporation when filed with the secretary of state. See Rule .0103(a)(2) of this subchapter.]

**(c) Form PC-3:**

Certificate of Registration for a Professional Corporation

It appears that ________________________, a professional corporation, has met all of the requirements of G.S. 55B-4, G.S. 55B-6 and the Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law of the North Carolina State Bar.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Cor-

poration pursuant to the provisions of G.S. 55B-10 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of incorporation of said professional corporation, after said articles are filed with the secretary of state, and expires on June 30, 19___.

This the _____ day of ________________, 19___.

_________________________________
Secretary of the North Carolina State Bar

**(d) Form PC-4:**

Application for Renewal of Certificate of Registration
for Professional Corporation

Application is hereby made for renewal of the Certificate of Registration for Professional Corporation of _______________________, a professional corporation.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the officers and one of the directors, and all of the shareholders and employees of said professional corporation who practice law for said professional corporation are duly licensed to practice law in the state of North Carolina. The names and addresses of such persons are:

| Name and Position (officer, director shareholder, employee) | Address |
|---|---|
| ____________________________ | ____________________________ |
| ____________________________ | ____________________________ |
| ____________________________ | ____________________________ |

2. At all times since the issuance of its Certificate of Registration for Professional Corporation, said professional corporation has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the Professional Corporations Act.

3. Attached hereto is the renewal fee of $25.

This the ____ day of ______________, 19__.

______________________________
(Professional Corporation)

By ______________________________
President (or Chief Executive)

NORTH CAROLINA

____________ COUNTY

I hereby certify that ____________________, being the ____________________ of ____________________, a professional corporation, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this ____ day of ______________, 19__.

______________________________
Notary Public

My commission expires:

______________________________

**(e) Form PC-5:**

North Carolina State Bar Stock Transfer Certificate

I hereby certify that __________________________ is duly
(transferee)
licensed to practice law in the State of North Carolina and as of this date may be a transferee of shares of stock in a professional corporation formed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of ______________, 19__.

______________________________
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-6 and must be attached to the transferee's stock certificate. See Rule .0104(g) of this subchapter.]

**(f) Form PLLC-1:**

Application for Certificate of Registration for a
Professional Limited Liability Company

The undersigned, being all of the persons executing the articles of organization of ____________________, a professional limited liability company to be organized under the laws of the state of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person executing the articles of organization, at least one person who will be an original manager, and all persons who, to the best knowledge and belief of the undersigned, will be original members and employees who will practice law for said professional limited liability company are duly licensed to practice law in the state of North Carolina. The names and addresses of all such persons are:

| Name and Position (signer of articles manager, member, employee) | Address |
|---|---|
| ____________________ | ____________________ |
| ____________________ | ____________________ |
| ____________________ | ____________________ |

2. To the best of our knowledge and belief, all of the persons listed above are duly licensed to practice law in the state of North Carolina.

3. The undersigned represent that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and with the North Carolina state Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

4. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional limited liability company's articles of organization after said articles are filed with the secretary of state.

5. Attached hereto is the registration fee of $50.

This the _____ day of ________________, 19___.

______________________________

______________________________

[Signatures of all persons executing articles of organization.]

NORTH CAROLINA

_____________ COUNTY

I hereby certify that ______________, ______________, ______________, ______________, and ______________, being all of the persons executing the articles of organization of ________________________, a professional limited liability company, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this _____ day of ________________, 19___.

______________________________

Notary Public

My commission expires:

______________________________

**(g) Form PLLC-2:**

Certification for Professional Limited Liability Company by Council of the North Carolina State Bar

All of the persons executing the articles of organization of ______________________, a professional limited liability company, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original members of said professional limited liability company.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the state of North Carolina, I hereby certify that each person who will be an original member of said professional limited liability company is duly licensed to practice law in the state of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day of ______________, 19__.

______________________________
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and G.S. 57C-2-01 and must be attached to the original articles of organization when filed with the secretary of state. See Rule .103(b)(2) of this subchapter.]

**(h) Form PLLC-3:**

Certificate of Registration for a Professional
Limited Liability Company

It appears that __________________, a professional limited liability company, has met all of the requirements of G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Limited Liability Company pursuant to the provisions of G.S. 55B-10, G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of organization of said professional limited liability company, after said articles are filed with the secretary of state, and expires on June 30, 19__.

This the ____ day of ______________, 19__.

______________________________
Secretary of the North Carolina State Bar

**(i) Form PLLC-4:**

Application for Renewal of Certificate of Registration
for Professional Limited Liability Company

Application is hereby made for renewal of the Certificate of Registration for Professional Limited Liability Company of __________________, a professional limited liability company.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the managers, and all of the members and employees of said professional limited liability company who practice law for said professional limited liability company are duly licensed to practice law in the State of North Carolina. The names and addresses of all such persons are:

| Name and Position (manager, member, employee) | Address |
| --- | --- |
| ______________________________ | ______________________________ |
| ______________________________ | ______________________________ |
| ______________________________ | ______________________________ |

2. At all times since the issuance of its Certificate of Registration for Professional Limited Liability Company, said professional limited liability company has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the provisions of the North Carolina Limited Liability Company Act.

3. Attached hereto is the renewal fee of $25.

This the _____ day of ________________, 19___.

______________________________
(Professional Limited Liability Company)

By ______________________________
Manager

NORTH CAROLINA

______________ COUNTY

I hereby certify that __________________________, being a manager of __________________________, a professional limited liability company, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this _____ day of ________________, 19___.

______________________________
Notary Public

My commission expires:

___________________________________

## Section .0200 Registration of Interstate Law Firms

### .0201 Registration Requirement

No law firm or professional organization which maintains an office in North Carolina and has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina or has as its partner, shareholder, or member a law firm or professional organization which has among its constituent partners, shareholders, members, or employees attorneys who are not licensed to practice law in North Carolina may do business in North Carolina without first having obtained a certificate of registration.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### .0202 Conditions of Registration

The secretary of the North Carolina State Bar shall issue such a certificate upon satisfaction of the following conditions precedent:

(1) There shall be filed with the secretary of the North Carolina State Bar a registration statement disclosing:

(a) all names used to identify the filing law firm or professional organization;

(b) addresses of all offices maintained by the filing law firm or professional organization;

(c) the name and address of any law firm or professional organization with which the filing law firm or professional organization is in partnership and the name and address of such partnership;

(d) the name and address of each attorney who is a partner, shareholder, member or employee of the filing law firm or professional organization or who is a partner, shareholder, member or employee of a law firm or professional organization with which the filing law firm or professional organization is in partnership;

(e) the relationship of each attorney identified in Rule .0202(1)(d) above to the filing law firm or professional organization;

(f) the states to which each attorney identified in Rule .0202(1)(d) above is admitted to practice law.

(2) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization by a member who is licensed in North Carolina certifying that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina is a member in good standing of each state bar to which the attorney has been admitted.

(3) There shall be filed with the registration statement a notarized statement of the filing law firm or professional organization affirming that each attorney identified in Rule .0202(1)(d) above who is not licensed to practice law in North Carolina will govern his or her personal and professional conduct with respect to legal matters arising from North Carolina in accordance with the Rules of Professional Conduct of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0203 Registration Fee**

There shall be submitted with each registration statement and supporting documentation a registration fee of $500.00 as administrative cost.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0204 Certificate of Registration**

A certificate of registration shall remain effective until January 1 following the date of filing and may be renewed annually by the secretary of the North Carolina State Bar upon the filing of an updated registration statement which satisfies the requirements set forth above and the submission of the registration fee.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0205 Effect of Registration**

This rule shall not be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

History Note: Statutory Authority G.S. 84-16; G.S. 84-23
Readopted Effective December 8, 1994

## Section .0300 Rules Concerning Prepaid Legal Services Plans

### .0301 Registration Requirement

No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

### .0302 Registration Site

A prepaid legal services plan must be registered in the office of the North Carolina State Bar prior to its implementation or operation in North Carolina on forms supplied by the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

### .0303 Requirement to File Amendments

Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar no later than 30 days after the adoption of such amendments.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

### .0304 Advertising of State Bar Approval Prohibited

Prepaid legal services plans approved by the North Carolina State Bar shall register with the North Carolina State Bar on or before January 31, 1992. Effective January 31, 1992, the approval of these existing plans is revoked and the plans shall not advertise, communicate, or represent in any way that the North Carolina State Bar approved the plan.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

### .0305 Annual Registration

Subsequent to initial registration, all prepaid legal services plans shall be registered annually on or before January 31 on forms supplied by the State Bar.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

**.0306 Registration Fee**

The initial and annual registration fees for each prepaid legal services plan shall be $100.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

**.0307 Index of Registered Plans**

The North Carolina State Bar shall maintain an index of the prepaid legal services plans registered pursuant to these rules. All documents filed in compliance with this rule are considered public documents and shall be available for public inspection during normal business hours.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

**.0308 State Bar May Not Approve or Disapprove Plans**

The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under this rule shall not be construed to indicate approval or disapproval of the plan.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

**.0309 State Bar Jurisdiction**

The North Carolina State Bar retains jurisdiction of North Carolina licensed attorneys who participate in prepaid legal services plans and North Carolina licensed attorneys are subject to the rules and regulations governing the practice of law.

History Note: Statutory Authority G.S. 84-23; G.S. 84-23.1
Adopted Effective December 8, 1994

## Section .0400 Rules for Arbitration of Internal Law Firm Disputes

**.0401 Purpose**

Subject to these rules, the North Carolina State Bar will administer a voluntary binding arbitration program for resolution of disputed issues between lawyers arising out of the dissolution of law firms or disputes within law firms. The purpose of this arbitration procedure is to provide a mechanism for resolving economic disputes between lawyers arising out of the operation or dissolution of law firms.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0402 Submission to Arbitration**

The program is voluntary. The procedure shall be instituted by a written submission to arbitration agreement, executed by all the parties to the dispute, in a form and manner as provided by the executive director of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0403 Jurisdiction**

The procedure may be used for the resolution of any dispute if all of the following conditions are met:

(a) the disputed issues submitted to arbitration hereunder shall be solely between or among lawyers who are members of the same law firm;

(b) the dispute arises out of an economic relationship between or among lawyers concerning the operation, dissolution, or proposed dissolution of the law firm of which they are members;

(c) at least one of the parties to such dispute resides or maintains an office for the practice of law in the state of North Carolina and is a member of the North Carolina State Bar;

(d) all parties agree in a written submission to arbitration agreement to submit the issues in dispute to binding arbitration under these rules and procedures.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0404 Administration**

The North Carolina State Bar is the administrator of the arbitration program, through its executive director and his designees, to carry out all administrative functions, including those specified in Rules .0406 through .0410 of this subchapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0405 Uniform Arbitration Act**

Except as modified herein, all arbitration procedures will be governed by Article 45A of Chapter 1 of the General Statutes of North

Carolina (Uniform Arbitration Act). Said Uniform Arbitration Act and any amendments thereto are hereby incorporated by reference and constitute a part of these rules.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0406 List of Arbitrators**

The North Carolina State Bar shall establish a list of arbitrators, consisting of attorneys or retired judges, who have been members of the North Carolina State Bar for at least ten years and who have indicated a willingness to serve. The parties shall, in their submission to arbitration agreement, elect to have one or three arbitrators. The administrator shall thereafter provide each party with the list of arbitrators.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0407 Selection of Arbitrators**

If three arbitrators are to be selected, then

(a) each party to the dispute shall, within ten days after receipt of notice from the administrator, select one arbitrator on the approved list who shall be contacted by the administrator concerning his or her ability to serve and dates of availability. The two arbitrators so chosen shall execute an oath and appointment of arbitrator certificate provided by the administrator. Within fifteen days after certification, the two arbitrators shall choose a third from the administrator's approved list, who shall also execute an oath and appointment certificate. Failure of the two arbitrators to choose a third within the allotted time shall constitute a consent to have the third arbitrator chosen by the administrator;

(b) if the opposing parties cannot, because of the number of parties involved, settle upon two arbitrators who are to choose the third as set forth above, then the administrator shall notify the parties and appoint all three arbitrators from the approved list.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0408 Fees and Expenses**

All expenses and the arbitrator(s') fees shall be paid by the parties. Arbitrator(s') compensation shall be at the same rate paid to

retired judges who are assigned to temporary active service as provided in G.S. 7A-52 or any successor statutory provision. The administrator may require from each party an escrow deposit covering anticipated fees and expenses.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0409 Confidentiality**

It is the policy of the North Carolina State Bar to protect the confidentiality of all arbitration proceedings. The parties, the arbitrators, and the North Carolina State Bar shall keep all proceedings confidential, except that any final award shall be enforceable under Chapter 1, Article 45A.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**.0410 Authority to Adopt Amendments and Regulations**

The North Carolina State Bar may, from time to time, adopt and amend procedures and regulations consistent with these rules and amend or supplement these rules or otherwise regulate the arbitration procedure.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CHAPTER 2

### Rules of Professional Conduct of the North Carolina State Bar


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**0.1 Preamble: A Lawyer's Responsibilities**

A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education.

A lawyer should render public interest legal service and provide civic leadership. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, society, the legal

system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Traditionally, the legal profession has been a group of people united in a learned calling for the public good. At their best, lawyers have assured the availability of legal services to all, regardless of ability to pay, and as leaders of their communities, states, and nation have utilized their education and experience to improve society. It is acknowledged that it is the basic responsibility of each lawyer engaged in the practice of law to provide community service, community leadership, and public interest legal services without fee, or at a substantially reduced fee, in such areas as poverty law, civil rights law, public rights law, charitable organization representation, and the administration of justice.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, voluntary efforts by the profession to provide legal assistance in coping with the web of statutes, rules and regulations are imperative for communities and persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

As important as the provision of pro bono legal services is, participation of lawyers in civic leadership is equally important. In the long run, because of their values, education and experience, lawyers who render unpaid service in nonlegal settings to help provide new jobs, improve educational opportunities and meet the spiritual needs

of a community, can enhance the quality of life of all citizens and help mitigate the causes leading to the need for pro bono representation.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. In the nature of law practice, however, conflicting responsibilities are encountered. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of the Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a self-regulated profession.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**0.2 Scope**

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the comments use the term "should." Comments do not add obligations to the rules but provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 4, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be

established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters ordinarily reposed in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules

should be deemed to augment any substantive legal duty of lawyers, or the extra-disciplinary consequences of violating such a duty.

Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The preamble and this note on scope provide general orientation. The comments are intended as guides to interpretation, but the text of each rule is authoritative.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**0.3 Definitions**

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Firm" or "law firm" denotes a lawyer or lawyers in a private firm or professional corporation, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization.

(c) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

(d) "Full disclosure" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(e) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(f) "Partner" denotes a member of a partnership or a shareholder in a law firm organized as a professional corporation.

(g) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(h) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(i) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(j) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON I

### A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

**Rule 1.1 Bar Admission and Disciplinary Matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 4 of this chapter.

Comment

The duty imposed by this rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. It should also be noted that G.S. 84-28(b)(3) defines failure to answer a formal inquiry of the North Carolina State Bar as misconduct for which discipline is appropriate.

This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of the North Carolina Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 1.2 Misconduct**

It is professional misconduct for a lawyer to

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation and professional unfitness.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of an attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, or guardian; agent, officer, director, or manager of a corporation or other organization.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 1.3 Reporting Professional Misconduct**

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the North Carolina State Bar or other appropriate authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 4 of this chapter.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a substantial violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 4 of this chapter. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interest.

If a lawyer were obliged to report every violation of the rules, the failure to report any violation would itself be a professional offense. Such a requirement existed before but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the alleged offense and not the quantum of evidence of which the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON II

### A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

#### Rule 2.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Comment

This rule governs all communications about a lawyer's services, including advertising permitted by Rule 2.2. of this chapter. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (2)(b) of statements that may create "unjustified expectations" would ordinarily preclude advertisements about results obtained on behalf of clients, such as the amounts of damage awards or the lawyer's record in obtaining favorable verdicts and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to specific factual and legal circumstances.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 2.2 Advertising**

(a) Subject to the requirements of Rule 2.1 of this chapter, a lawyer may advertise services through public media, such as telephone directories, legal directories, newspapers or other periodicals, outdoor advertising, radio or television, or through written communications not involving solicitation as defined in Rule 2.4 of this chapter.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization. A lawyer may par-

ticipate in and share the cost of a private lawyer referral service so long as the following conditions are met:

(1) only compensation for administrative service may be paid to a lawyer or layman incident to the operation of the private referral service, which compensation shall be reasonable in amount;

(2) all advertisements shall be paid for by the participants in the service;

(3) no profit in specie or kind may be received other than from legal fees earned from representation of referred clients;

(4) employees of the referral service may not initiate contact with prospective clients; and

(5) all advertisements shall

(A) state clearly and conspicuously that the referral service is privately operated, which statement shall be given the same prominence as the name of the referral service;

(B) state that a list of all participating lawyers will be mailed free of charge to members of the public upon request and state further where such information may be obtained; and

(C) indicate that the service is not operated or endorsed by any public agency or any disinterested organization.

(d) Any lawyer participating in a private lawyer referral service shall be professionally responsible for its operation.

(e) Any communication made pursuant to this rule other than that of a lawyer referral service as described in subsection (c) above shall include the name of at least one lawyer or law firm responsible for its content.

Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services in combination with the lawyer's own rights under the First Amendment ought to prevail over considerations of tradition. Never-

theless, advertising by lawyers entails the risk of practices that are misleading, overreaching, deceptive, coercive, intimidating, or vexatious.

This rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

This rule does not prohibit communications authorized by law, such as notices to members of a class in class action litigation.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 2.3 Firm Names and Letterheads**

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rules 2.1 or 2.2 of this chapter. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise false or misleading. Every trade name used by a law firm shall be registered with the North Carolina State Bar, and upon a determination by the council that such name is potentially misleading, a remedial disclaimer or an appropriate identification of the firm's composition or connection may be required. For purposes of this section, the use of the names of deceased former members of a firm shall not render the firm name a trade name.

(b) A law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of its members and associates in any communication shall indicate the jurisdictional limitations of those not licensed to practice in North Carolina.

(c) A law firm maintaining offices only in North Carolina may not list any person not licensed to practice law in North Carolina as an attorney affiliated with the firm.

(d) The name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and reg-

ularly practicing with the firm, whether or not the lawyer is precluded from practicing by law.

(e) A lawyer shall not hold himself or herself out as practicing in a law firm unless the association is in fact a firm.

(f) No lawyer may maintain a permanent professional relationship with any lawyer not licensed to practice law in North Carolina unless law offices are maintained in North Carolina and in a state where such other lawyer is licensed and practices and a certificate of registration authorizing said professional relationship is first obtained from the secretary of the North Carolina State Bar.

Comment

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Use of trade names in law practice is acceptable so long as they are not misleading and are otherwise in conformance with the rules and regulations of the State Bar.

As it is unlawful for a person trained as an attorney to practice law in North Carolina without a license from the state, it is misleading and improper for such a person to be listed in any firm communication, public or private, as having any continuing affiliation with the firm as a lawyer, unless he or she actively practices and maintains offices in another jurisdiction where he is licensed.

Nothing in these rules shall be construed to confer the right to practice law in North Carolina upon any lawyer not licensed to practice law in North Carolina.

With regard to paragraph (e), lawyers sharing office facilities who are not in fact partners may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

**Rule 2.4 Direct Contact with Prospective Clients**

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-

person or telephone contact even when not otherwise prohibited by paragraph (a) above, if

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, harassment, compulsion, intimidation, or threats.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "This is an advertisement for legal services" on the outside envelope and at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a) above, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan, so long as such contact does not involve coercion, duress, or harassment and is not false, deceptive, or misleading.

Comment

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 2.2 of this chapter offer alternative

means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 2.2 of this chapter are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 2.1. of this chapter. The contents of direct in-person or live telephone conversations between a lawyer and a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family or prior professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 2.4(a) and the requirements of Rule 2.4(c) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 2.1 of this chapter, which involves coercion, duress, harassment, compulsion, intimidation or threats within the meaning of Rule 2.4(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 2.4(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 2.2 of this chapter the lawyer received no response, any further effort to communicate with the prospective client may violate the provisions of Rule 2.4(b).

This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in

establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 2.2 of this chapter.

The requirement in Rule 2.4(c) that certain communications be marked "This is an advertisement for legal services" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

Paragraph (d) of this rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (d) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 2.1, 2.2 and 2.4. of this chapter. See Rule 1.2(a) of this chapter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 2.5 Specialization**

(a) A lawyer may not communicate that the lawyer is a certified specialist or certified in a field of practice except as provided in this rule.

(b) A lawyer may communicate that the lawyer is certified as a specialist or certified in a field of practice when the communication states the name of the certifying organization and is not false or misleading, and

(1) the certification is granted by the North Carolina State Bar; or

(2) the certification is granted by an organization which has been approved by the North Carolina State Bar; or

(3) the certification is granted by an organization which has been approved by the American Bar Association under procedures and criteria which have been approved by the American Bar Association and which have been endorsed by the North Carolina State Bar.

Comment

The use of the word "specialize" in any of its variant forms connotes to the public a particular expertise often subject to recognition by the state. Indeed, the North Carolina State Bar has instituted programs providing for official certification of specialists in certain areas of practice. In order to avoid any confusion, the rule requires that any representation of specialty be not only true, but be accompanied by a disclaimer of state certification if such is not the case. A lawyer may, however, describe his practice without using the term "specialize" in any manner which is truthful and not misleading and forego use of a disclaimer. He may, for instance, indicate a "concentration" or an "interest" or a "limitation" without disclaimer.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 2.6 Fees for Legal Services**

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(c) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or for representing a party in a civil case in which such a fee is prohibited by law or otherwise.

(d) A division of fee between lawyers who are not in the same firm may be made only if

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

(e) Any lawyer having a dispute with a client regarding a fee for legal services must

(1) make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of nonbinding fee arbitration at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

(2) participate in good faith in nonbinding arbitration of the fee dispute if such is subject to the jurisdiction of any duly consti-

tuted fee arbitration committee of the North Carolina State Bar or any of its constituent district bars if the client submits a proper request for fee arbitration.

Comment

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding and is desirable.

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 2.8(a)(3) of this chapter. This does not apply when the advance payment is a true retainer to reserve services rather than an advance to secure the payment of fees yet to be earned. A lawyer may accept property in payment for services, provided this does not involve acquisition of a propriety interest in the cause of action or subject matter of the litigation contrary to Rule 5.3(a) of this chapter. However a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

Once a fee contract has been reached between attorney and client, the attorney has an ethical obligation to fulfill the contract and represent his client's best interests regardless of whether he or she has struck an unfavorable bargain. An attorney may seek to renegotiate his or her fee agreement in light of changed circumstances or for other good cause, but he or she may not abandon or threaten to abandon the client to cut losses or to coerce an additional or higher fee. Any fee contract made or remade during the existence of the attorney-client relationship must be reasonable and freely and fairly made by the client having full knowledge of all material circumstances incident to the agreement.

If a dispute later arises concerning the fee, the burden of proving reasonableness and fairness will be upon the lawyer. All fees, includ-

ing contingent fees, should be reasonable and not excessive as to percentage or amount.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (d) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does not require disclosure to the client of the share that each lawyer is to receive.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 2.7 Agreements Restricting the Practice of a Lawyer**

(a) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of the relationship created by the agreement, except as a condition to payment of retirement benefits.

(b) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his or her right to practice law.

Comment

An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 2.8 Withdrawal from Employment**

(a) In General

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he or she has taken reasonable steps to avoid foreseeable prejudice to the rights of his or her client, including giving due notice to the client, allowing time for employment of other coun-

sel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(b) Mandatory Withdrawal—A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if

(1) the lawyer knows or it is obvious that his or her client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him or her, merely for the purpose of harassing or maliciously injuring any person;

(2) the lawyer knows or it is obvious that his or her continued employment will result in violation of a rule of professional conduct;

(3) the lawyer's mental or physical condition renders it unreasonably difficult for him or her to carry out the employment effectively;

(4) the lawyer is discharged by the client.

(c) Permissive Withdrawal—If Rule 2.8(b) above is not applicable, a lawyer may request permission to withdraw in matters pending before a tribunal and may withdraw in other matters only if

(1) the client

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law;

(B) personally seeks to pursue an illegal course of conduct;

(C) insists that the lawyer pursue a course of conduct that is illegal, repugnant or imprudent or that is prohibited under the Rules of Professional Conduct;

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out his or her employment effectively;

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment

and advice of the lawyer but not prohibited under the Rules of Professional Conduct;

(F) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees;

(G) has used the lawyer's services to perpetrate a crime or fraud.

(2) the lawyer's continued employment is likely to result in a violation of a rule of professional conduct;

(3) the lawyer's inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal;

(4) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the employment effectively;

(5) the lawyer's client knowingly and freely assents to termination of the lawyer's employment;

(6) the lawyer believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client.

A lawyer may withdraw from representation in some circumstances. Withdrawal is justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

The lawyer may never retain papers to secure a fee. Generally, anything in the file which would be helpful to successor counsel should be turned over. This includes papers and other things delivered to the discharged lawyer by the client such as original instruments, correspondence, and cancelled checks. Copies of all correspondence received and generated by the withdrawing or discharged lawyer should be released as well as legal instruments, pleadings, and briefs submitted by either side or prepared and ready for sub-

mission. The lawyer's personal notes and incomplete work product need not be released.

A lawyer who has represented an indigent on an appeal which has been concluded and who obtained a trial transcript furnished by the state for use in preparing the appeal must turn over the transcript to the former client upon request, the transcript being property to which the former client is entitled.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON III

### A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

**Rule 3.1 Aiding Unauthorized Practice of Law**

(a) A lawyer shall not aid a person not licensed to practice law in North Carolina in the unauthorized practice of law.

(b) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(c) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(d) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

Comment

The definition of the practice of law is established by N.C. Gen. Stat. 84-2.1. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (a) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains responsibility for the delegated work. See

Rule 3.3 of this chapter. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

In the absence of statutory prohibitions or specific conditions placed on a disbarred or suspended attorney in the order revoking or suspending the license, such individual may be hired to perform the services of a law clerk or legal assistant by a law firm with which he or she was not affiliated at the time of or after the acts resulting in discipline. Such employment is, however, subject to certain restrictions. A licensed attorney in the firm must take full responsibility for and employ independent judgment in adopting any research, investigative results, briefs, pleadings, or other documents or instruments drafted by such individual. The individual may not directly advise clients or communicate in person or in writing in such a way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters. The disbarred or suspended attorney should have no communications or dealings with or on behalf of clients represented by such disbarred or suspended attorneys or by any individual or group of individuals with whom he or she practiced during the period on or after the date of the acts which resulted in discipline through and including the effective date of the discipline. Further, the employing attorney or law firm should perform no services for clients represented by the disbarred or suspended attorney during such period. Care should be taken to ensure that clients fully understand that the disbarred or suspended attorney is not acting as an attorney, but merely as a law clerk or lay employee. Under some circumstances, as where the individual may be known to clients or in the community, it may be necessary to make an affirmative statement or disclosure concerning the disbarred or suspended attorney's status with the law firm. Additionally, a disbarred or suspended attorney should be paid on some fixed basis, such as a straight salary or hourly rate, rather than on the basis of fees generated or received in connection with particular matters on which he or she works. Under these circumstances, a law firm employing a disbarred or suspended attorney would not be acting unethically and would not be assisting a nonlawyer in the unauthorized practice of law.

An attorney or law firm should not employ a disbarred or suspended attorney who was associated with such attorney or firm at

any time on or after the date of the acts which resulted in the disbarment or suspension through and including the time of the disbarment or suspension. Such employment would show disrespect for the court or body which disbarred or suspended the attorney. Such employment would also be likely to be prejudicial to the administration of justice and would create an appearance of impropriety. It would also be practically impossible for the disciplined lawyer to confine himself or herself to activities not involving the actual practice of law if he or she were employed in his or her former office setting and obliged to deal with the same staff and clientele.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 3.2 Dividing Legal Fees with a Nonlawyer**

A lawyer or law firm shall not share legal fees with a nonlawyer, except that

(a) an agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to his or her estate or to one or more specified persons;

(b) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or disbarred lawyer may pay to the estate of the deceased lawyer or to the disbarred lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or disbarred lawyer;

(c) a lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

Comment

The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 3.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer,

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over a nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would violate the Rules of Professional Conduct if engaged in by a lawyer if

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON IV

## A Lawyer Should Preserve the Confidences of the Client

### Rule 4 Preservation of Confidential Information

(a) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, information

received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance, and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients and to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

(b) Except when permitted under Rule 4(c) below, a lawyer shall not knowingly

(1) reveal confidential information of his or her client;

(2) use confidential information of his client to the disadvantage of the client;

(3) use confidential information of his or her client for the advantage of himself or herself or a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal

(1) confidential information, the disclosure of which is impliedly authorized by the client as necessary to carry out the goals of the representation;

(2) confidential information with the consent of the client or clients affected, but only after full disclosure to them;

(3) confidential information when permitted under the Rules of Professional Conduct or required by law or court order;

(4) confidential information concerning the intention of his or her client to commit a crime and the information necessary to prevent the crime;

(5) confidential information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) confidential information to the extent permitted by the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they may avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule therefore requires that any information received by a lawyer on

behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional attorney-client relationship.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to a specified lawyer or lawyers.

The confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client intends to commit a crime and may reveal that information to prevent the crime. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. Similarly, a lawyer has a duty not to use false evidence. This duty is essentially a special instance of the duty to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 7.2(a)(8) of this chapter, because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in paragraph (c)(4), the lawyer has professional discretion to reveal information in order to prevent the crime. It is, of course, sometimes difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (c)(4) does not violate this rule.

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 4. This rule does not prevent the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (c)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 4(b) requires the lawyer to invoke the attorney-client privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. A lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 4 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

The duty of confidentiality continues after the client-lawyer relationship has terminated.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON V

## A Lawyer Should Exercise Independent Professional Judgment on Behalf of the Client

### Rule 5.1 Conflicts of Interest

(a) A lawyer shall not represent a client if the representation of that client will be or is likely to be directly adverse to another client, unless

(1) the lawyer reasonably believes the representation will not adversely affect the interest of the other client; and

(2) each client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after full disclosure which shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) A lawyer shall have a continuing obligation to evaluate all situations involving potentially conflicting interests and shall withdraw from representation of any party he or she cannot adequately represent or represent without using the confidential information or secrets of another client or former client except as Rule 4 of this chapter would permit with respect to a client.

(d) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after full disclosure.

Comment

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 2.8 of this chapter.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing

economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

A client may consent to representation notwithstanding a conflict. However, as indicated in paragraph (a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The lawyer's own interest should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in lit-

igation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients

are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.2 The Lawyer as Witness**

(a) A lawyer shall not accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that he or she or a lawyer in his or her firm ought to be called as a witness, except that the lawyer may undertake the employment and the lawyer or a lawyer in his or her firm may testify

(1) if the testimony will relate solely to an uncontested matter;

(2) if the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(3) if the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his or her firm to the client;

(4) as to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his or her firm as counsel in the particular case.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in his or her firm may testify under the circumstances enumerated in (a) above.

(c) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or she or a lawyer in his or her firm may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the lawyer's testimony is or may be prejudicial to the client.

Comment

Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.

A witness is required to testify on the basis of personal knowledge while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(3) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for

a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first-hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(4) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.3 Avoiding Acquisition of Interest in Litigation**

(a) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may

(1) acquire a lien granted by law to secure his or her fee or expenses;

(2) contract with a client for a reasonable contingent fee in civil cases, except as prohibited by Rule 2.6 of this chapter.

(b) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Comment

A lawyer's acquisition of a proprietary interest in the client's cause of action or any res involved therein might cloud the lawyer's judgment and impair his or her ability to function as an advocate.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.4 Limiting Business Relations with a Client**

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his or her professional judgment therein for the protection of the client unless the client has consented after full disclosure. A lawyer shall not enter into a business transaction with a client under any circumstances unless it is fair to the client.

(b) Prior to conclusion of all aspects of the matter giving rise to his or her employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which the lawyer acquires an interest in publication rights with respect to the subject matter of the employment or proposed employment.

(c) During or subsequent to legal representation of a client, a lawyer shall not enter into a business transaction with a client for which a fee or commission will be charged in lieu of, or in addition to, a legal fee if the business transaction is related to the subject matter of the legal representation, any financial proceeds from the representation, or any information, confidential or otherwise, acquired by the lawyer during the course of the representation.

Comment

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage or the lawyer's own advantage unless the client consents after full disclosure. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment.

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (b) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to Rules 2.6 and 5.3 of this chapter.

Because of actual and potential conflicts of interests, a lawyer may not sell business services to a client or former client if the proposed transaction relates to the subject matter or the proceeds of representation. For example, a lawyer who is also a securities broker or insurance agent should not endeavor to sell securities or insurance to a client when he knows by virtue of the representation that such client has received funds suitable for investment.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.5 Client Gifts**

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

Comment

A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. The rule recognizes an exception where the client is a relative of the donee or the gift is not substantial.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.6 Fees from Persons Other Than the Client**

A lawyer shall not accept compensation for representing a client from one other than the client unless

(1) the client consents after full disclosure;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of the client is protected as required by Rule 4 of this chapter.

Comment

A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does

not compromise the lawyer's duty of loyalty to the client. For instance, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Rule 5.6 requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 4 of this chapter concerning confidentiality and Rule 5.1 of this chapter concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.7 Settlement of Claims of Multiple Clients**

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas unless each client consents after full disclosure, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.8 Malpractice Liability**

A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a disputed claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation may be appropriate in connection therewith.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.9 Representation of Adverse Parties by Related Lawyers**

A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly

adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after full disclosure regarding the relationship. This provision shall not be construed to disqualify other lawyers in the affected lawyer's firm.

Comment

Rule 5.9 applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 5.1 and 5.10 of this chapter. The disqualification stated in Rule 5.9 is personal and is not imputed to members of firms with whom the lawyers are associated.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.10 Responsibility of Counsel Representing an Organization**

A lawyer who represents a corporation or other organization represents and owes allegiance to the entity and shall not permit his or her professional judgment to be compromised in favor of any other entity or individual.

Comment

A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest, and his or her professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him or her in an individual capacity; in such a case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

The lawyer representing an entity should keep in mind that confidential information received by the lawyer during the course of the professional relationship is protected by Rule 4 of this chapter and may not be disclosed to persons or entities associated with the entity unless such disclosure is explicitly or impliedly authorized by the client in order to carry out the representation or as otherwise permitted by Rule 4 of this chapter.

The lawyer is also obligated to generally comply with Rule 5.1 of this chapter concerning conflicts of interest.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 5.11 Imputed Disqualification: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules of Professional Conduct unless otherwise specifically provided herein.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rule 4 of this chapter that is material to the matter.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) a lawyer remaining in the firm has information protected by Rule 4 of this chapter that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 5.1 of this chapter.

Comment

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization, and lawyers in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association with its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 9.1(a) and (b) of this chapter; where a lawyer represents the government after having served private clients, the situation is governed by Rule 9.1(c) of this chapter. The individual lawyer involved is bound by the rules generally.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 4 and 9.1 of this chapter. However, if the more extensive disqualification in Rule 5.11 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 5.11 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 9.1 of this chapter.

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise

that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disquali-

fication would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 4 of this chapter. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to

a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of Rule 5.11(b) and (c) concerning confidentiality have been met.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON VI

### A Lawyer Should Represent the Client Competently

**Rule 6 Failing to Act Competently**

(a) A lawyer shall not

(1) handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with him or her a lawyer who is competent to handle it. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation;

(2) handle a legal matter without preparation adequate under the circumstances.

(b) A lawyer shall

(1) keep the client reasonably informed about the status of a matter and promptly comply with reasonable requests for information;

(2) explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

(3) act with reasonable diligence and promptness in representing the client.

Comment

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the rel-

ative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to or associate or consult with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education.

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that will permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be acceptable. Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psy-

chiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client and should be obeyed.

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. A lawyer's workload should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 2.8 of this chapter, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON VII

### A Lawyer Should Represent the Client Zealously Within the Bounds of the Law

**Rule 7.1 Representing the Client Zealously**

(a) A lawyer shall not intentionally

(1) fail to seek the lawful objectives of his or her client through reasonably available means permitted by law and these rules, except as provided by Rule 7.1(b) below. A lawyer does not violate this rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process;

(2) fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under Rules 2.8 and 5.1 of this chapter;

(3) prejudice or damage his or her client during the course of the professional relationship, except as required under Rule 7.2(B) of this chapter;

(4) counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(b) In his or her representation of a client, a lawyer may

(1) where permissible, exercise his or her professional judgment to waive or fail to assert a right or position of the client;

(2) refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal;

(3) limit the objectives of the representation if the client consents after full disclosure.

(c) A lawyer shall

(1) abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by

the client's decision as to the plea to be entered, whether to waive jury trial, and whether the client will testify;

(2) consult with the client regarding the relevant limitations on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Comment

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, employment may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 6 of this chapter, or to surrender the right to

terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing except where permitted by Rule 4 of this chapter. However, the lawyer is required to avoid furthering the illicit purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (a)(4) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (a)(4) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (a)(4) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.2 Representing the Client Within the Bounds of the Law**

(a) In representing a client, a lawyer shall not

(1) file a suit, assert a position, conduct a defense, controvert an issue, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action

would be frivolous or would serve merely to harass or maliciously injure another;

(2) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend as to require that every element of the case against the client be established;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly make a false statement of law or fact;

(5) knowingly use perjured testimony or false evidence;

(6) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false;

(7) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;

(8) counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent;

(9) knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule;

(b) A lawyer who receives information clearly establishing that

(1) his or her client intends to or has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and, if the client refuses or is unable to do so, the lawyer shall discontinue representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him or her to withdraw, but without necessarily revealing the reason for wishing to withdraw;

(2) a person other than his or her client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the

client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value. An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. However, an assertion purporting to be of the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 7.1(a)(4) of this chapter not to counsel a client to commit or assist the client in committing a fraud applies in litigation.

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. If the false evidence is introduced before the lawyer discovers its falsity, the lawyer shall reveal the fraud to the tribunal.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must seek to withdraw.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.3 Special Responsibilities of a Prosecutor**

The prosecutor in a criminal or quasi-criminal case shall

(1) refrain from prosecuting a charge that he or she knows is not supported by probable cause, unless otherwise directed by statutory mandate;

(2) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(3) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(4) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when he or she is relieved of this responsibility by a protective order of the tribunal; and

(5) exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with him or her from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 7.7 of this chapter.

Comment

The responsibility of a public prosecutor, which for these purposes includes a government lawyer having a prosecutorial role, differs from that of the usual advocate; the prosecutor's duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of government powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him or her, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.

Paragraph (3) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (4) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.4 Communicating with One of Adverse Interest**

During the course of his or her representation of a client, a lawyer shall not

(1) communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized by law to do so;

(2) give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are, or have a reasonable possibility of being, in conflict with the interests of his or her client;

(3) in dealing on behalf of a client with a person who is not represented by counsel, state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment

This rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

This rule does not prohibit communication with a party, or an employee of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other

party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

After a lawyer for a party has been notified that an adverse or potentially adverse organization is represented by counsel in a particular matter, this rule would prohibit communications by the lawyer concerning the matter with persons having managerial responsibility on behalf of the organization, and with any other employee whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication would be sufficient for purposes of this rule.

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.5 Threatening Criminal Prosecution**

A lawyer shall not present, participate in presenting, or threaten to present criminal charges primarily to obtain an advantage in a civil matter.

Comment

The criminal courts are intended for the use of the state in trying persons accused of violating society's penal laws. They are not intended to provide forums for the adjustment of civil disputes. A lawyer should never institute or threaten to institute criminal proceedings to gain a tactical advantage in a civil dispute.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.6 Trial Conduct**

(a) A lawyer shall not disregard or advise his or her client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

(b) In presenting a matter to a tribunal, a lawyer shall disclose

(1) legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of his or her client and which is not disclosed by opposing counsel;

(2) unless privileged or irrelevant, the identities of the clients the lawyer represents and the persons who employed the lawyer;

(c) In appearing in his or her professional capacity before a tribunal, a lawyer shall not

(1) state or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

(2) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

(3) assert his or her personal knowledge of the facts in issue, except when testifying as a witness;

(4) assert his or her personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; but the lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to the matters stated herein;

(5) fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his or her intent not to comply;

(6) engage in undignified or discourteous conduct which is degrading to a tribunal;

(7) intentionally or habitually violate any established rule of procedure or evidence;

(8) engage in conduct intended to disrupt a tribunal.

Comment

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his or her client, the

lawyer should inform the tribunal of its existence unless his or her adversary has done so; but, having made such disclosure, the lawyer may challenge its soundness in whole or in part.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his or her personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his or her client. However, a lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus, while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, the lawyer is not justified in consciously violating such rules and he or she should be diligent in his or her efforts to guard against unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that the lawyer believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless the lawyer believes that his or her statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing the witness; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.7 Trial Publicity**

(a) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding. A lawyer may state

(1) information contained in a public record;

(2) that the investigation is in progress;

(3) the general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim;

(4) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto;

(5) a warning to the public of any danger.

(b) A lawyer associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until conclusion of jury proceedings, make or cause another person to make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood of interference with a fair jury proceeding and the statement relates to

(1) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused;

(2) the possibility of a plea of guilty to the offense charged or to a lesser offense;

(3) the existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement;

(4) the performance or results of any examination or test or the refusal or failure of the accused to submit to any examination or test;

(5) the identity, testimony, or credibility of a prospective witness;

(6) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(c) Rule 7.7(b) above does not preclude a lawyer during such period from announcing

(1) the name, age, residence, occupation, and family status of the accused;

(2) if the accused has not been apprehended, any information necessary to aid in his or her apprehension or to warn the public of any dangers he or she may present;

(3) a request for assistance in obtaining evidence;

(4) the identity of the victim of the crime;

(5) the fact, time and place of arrest, resistance, pursuit, and use of weapons;

(6) the identity of investigating and arresting officers or agencies and the length of the investigation;

(7) the nature, substance, or text of the charge;

(8) quotations from or references to public records of the court in the case;

(9) the scheduling or result of any step in the judicial proceedings;

(10) that the accused denies the charges made against him or her.

(d) A lawyer shall not make or cause another person to make an extrajudicial statement regarding a civil jury proceeding (or an administrative proceeding from which or ancillary to which the right to a civil jury trial exists) that a reasonable person would expect to be disseminated by means of public communication and that the lawyer knows or reasonably should know will have a reasonable likelihood of materially prejudicing such jury proceeding and impairing the integrity of the judicial process. An extrajudicial statement will likely have such an effect when the statement relates to

(1) the character, credibility, reputation, or criminal record (including arrests, indictments, or other charges of crime, whether past, present, or forthcoming) of a party, witness, prospective party, or witness or the expected testimony of the aforesaid unless such information would be clearly admissible at the proceeding;

(2) a companion criminal case or proceeding in which there is a common core of facts that could result in incarceration, the possibility of a guilty plea to the offense, or the existence or contents of any confession, admission, or statement given by a party, witness, or prospective party or witness or that person's refusal or failure to make a statement unless such information would be clearly admissible at the proceeding;

(3) the performance or results of any examination or test, or the refusal of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented at trial unless such information would be clearly admissible at the proceeding;

(4) any opinion as to the guilt or innocence of a party, witness, or prospective party or witness in a companion criminal case or proceeding in which there is a common core of facts that could result in incarceration;

(5) the details of a settlement offer or the failure of the other party to accept a settlement offer;

(6) information the lawyer knows or reasonably should know is likely to be inadmissible at trial and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;

(7) any statement of law or fact which the lawyer knows to be false and which would, if stated, create a substantial risk of prejudicing an impartial proceeding;

(8) any opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(e) Any word, phrase, or sentence in paragraph (a) above which may be found by a court to be in violation of the Constitutions of the United States or North Carolina shall be deemed severable from all other words, phrases, and sentences of that paragraph.

(f) A lawyer involved in the investigation or litigation of a civil jury matter may state without elaboration

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved, and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that such danger exists; and

(7) in a companion criminal case

(A) the name, age, residence, occupation, and family status of the accused;

(B) if the accused has not been apprehended, any information necessary to aid in his or her apprehension or to warn the public of any dangers he or she may present;

(C) a request for assistance in obtaining evidence;

(D) the identity of the victim of the crime;

(E) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;

(F) the identity of investigating and arresting officers or agencies and the length of the investigation;

(G) the nature, substance, or text of the charge;

(H) quotations from or references to public records of the court in the case;

(I) the scheduling or result of any step in the judicial proceedings.

(g) The foregoing provisions of Rule 7.7 do not preclude a lawyer from replying to charges of misconduct publicly made against the lawyer or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(h) A lawyer shall exercise reasonable care to prevent his or her employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this rule.

(i) A lawyer, in the representation of a client, shall not knowingly make a false statement of fact, state or allude to any matter or any person not reasonably related to the client's case, or use the public record or the processes of the courts to knowingly convey false statements of fact or other information regarding any matter or any person not reasonably related to the client's case.

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and

about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.8 Communication with or Investigation of Jurors**

(a) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.

(b) During the trial of a case

(1) a lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury;

(2) a lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(c) This rule does not prohibit a lawyer from communicating with a venireman or jurors in the course of official proceedings.

(d) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his or her actions in future jury service.

(e) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(f) All restrictions imposed by this rule upon a lawyer also apply to communications with or investigations of members of the family of a venireman or a juror.

(g) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his or her family, of which the lawyer has knowledge.

Comment

To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with a juror is permitted so long as he or she refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his or her behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his or her behalf are subject to the restrictions imposed upon the lawyer with respect to his or her communications with or investigations of veniremen and jurors.

Because of his or her duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.9 Contact with Witnesses**

A lawyer shall not

(a) advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making him or her unavailable as a witness therein;

(b) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case, but a lawyer may advance, guarantee, or acquiesce in the payment of

(1) expenses reasonably incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for his or her loss of time in attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a nonexpert witness an amount in excess of reimbursement for expenses and financial loss incident to his or her being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his or her services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his or her client and lay associates conform to these standards.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 7.10 Contact with Officials**

(a) A lawyer shall not give or lend anything of substantial value to a judge, official, or employee of a tribunal.

(b) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except

(1) in the course of official proceedings in the cause;

(2) in writing, if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(3) orally, upon adequate notice to opposing counsel or to the adverse party if he or she is not represented by a lawyer;

(4) as otherwise authorized by law.

Comment

The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he or she presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he or she is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or his or her client.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON VIII

### A Lawyer Should Assist in Improving the Legal System

### Rule 8.1 Action as a Public Official

A lawyer who holds public office shall not

(a) use his or her public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or herself, or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(b) use his or her public position to influence, or attempt to influence, a tribunal to act in favor of himself or herself or his or her client;

(c) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Comment

Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with his or her official duties.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

### Rule 8.2 Statements Concerning Judges and Other Adjudicatory Officers

(a) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(b) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

(c) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON IX

### A Lawyer Should Avoid Even the Appearance of Professional Impropriety

**Rule 9.1 Successive Government and Private Employment**

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee unless the appropriate government agency consents after full disclosure. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter without the consent of the public agency involved.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person on a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only with the consent of the person about whom the information was obtained.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(d) As used in this rule, the term "matter" includes

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This rule prevents a lawyer from exploiting public office for the advantage of a private client.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 5.1 of this chapter.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government infor-

mation about the client's adversary obtainable only through the lawyer's government service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 5.1 of this chapter and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 9.2 Former Judge or Arbitrator**

(a) Except as stated in paragraph (d) below, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, or law clerk to such a person unless all parties to the proceeding consent after full disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge, other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a) above, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless

(1) the disqualified lawyer is screened from participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment

This rule generally parallels Rule 9.1 of this chapter. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## CANON X

## A Lawyer Should Strictly Preserve the Identity of Funds and Property Held in Trust

### Rule 10.1 Preserving Identity of Funds and Property of a Client

(a) Any property received by a lawyer in a fiduciary capacity shall at all times be held and maintained separately from the lawyer's property, designated as such, and disbursed only in accordance with these rules. These rules shall not be generally applicable to a lawyer serving as a trustee, personal representative or attorney in fact. However, a lawyer serving in such a fiduciary role must segregate property held in trust from property belonging to the lawyer, maintain the minimum financial records required by Rules 10.2(b) and (c) of this chapter, and instruct any financial institution in which property of a trust is held in accordance with Rule 10.2(f) of this chapter. The financial records referred to above shall be subject to audit for cause and random audit in accordance with the Rules of the North Carolina State Bar.

(b) As a prerequisite to the receipt of any money or funds belonging to another person or entity, either from a client or from third parties, a lawyer shall maintain one or more bank accounts, separately identifiable from any business or personal account of the lawyer, which account or accounts shall be clearly labeled and designated as a trust account. The account or accounts shall be maintained at a bank in North Carolina, unless otherwise directed in writing by the client. For purposes of these rules, the following definitions will apply:

(1) a "bank" is defined as a federally or North Carolina chartered bank, savings and loan association, or credit union;

(2) a "trust account" is an account maintained under the Rules of Professional Conduct in which the lawyer holds any funds in a fiduciary relationship, including those held on behalf of or belonging to a client;

(3) the term "lawyer" shall include all members of the North Carolina State Bar and any law firm in which they are members unless the context clearly indicates otherwise;

(4) the term "client" shall include all persons, firms, or entities for which the lawyer performs any services, including acting as an escrow agent;

(5) the term "instrument" shall include any instrument under the Uniform Commercial Code and any record of the electronic transfer of funds.

(c) All money or funds received by a lawyer either from a client or from a third party to be delivered all or in part to a client, except that received for payment of fees presently owed to the lawyer by the client or as reimbursement for expenses properly advanced by the lawyer on behalf of the client, shall be deposited in a lawyer trust account. No funds belonging to the lawyer shall be deposited into the trust account or accounts except

(1) funds sufficient to open or maintain an account, pay any bank service charges, or pay any intangibles tax; or

(2) funds belonging in part to a client and in part presently or potentially to the lawyer. Such funds shall be deposited into the trust account, but the portion belonging to the lawyer shall be withdrawn when the lawyer becomes entitled to the funds unless the right of the lawyer to receive the portion of the funds is dis-

puted by the client, in which event the disputed portion shall remain in the trust account until the dispute is resolved.

(d) Except as authorized by Rule 10.3 of this chapter, interest earned on funds deposited in a trust account (less any deduction for bank service charges, fees of the bank, and intangible taxes collected by the bank with respect to the funds) shall belong to the client or clients whose funds have been deposited. The lawyer shall have no right or claim to such interest. A lawyer shall not use or pledge the funds held in a trust account to obtain credit or other personal financial benefit.

(e) Any property or securities belonging to a client received by a lawyer shall be promptly identified and labeled as the property of the client and placed in a safe deposit box or other place of safekeeping as soon as practicable. The lawyer shall notify the client of the location of the property kept for safekeeping by the lawyer. Any safe deposit box used to safekeep client property shall be located in this state unless the client consents in writing to another location. The lawyer shall not keep any property of the lawyer or the lawyer's law firm which is not clearly identified in such safe deposit box or other place of safekeeping.

(f) Any property or titles to property, personal or real, delivered to the attorney as security for the payment of any fee or other obligation owed to the lawyer by the client shall be held in trust under these rules and shall clearly indicate that the property is held in trust as security for the obligation and shall not appear as a direct conveyance to the lawyer. This provision does not apply where the transfer of the property is for payment of fees presently owed to the lawyer by the client; such transfers are subject to the rules governing fees and other business transactions between the lawyer and client.

Comment

The purpose of an attorney's trust account is to segregate the funds belonging to clients from those belonging to the attorney. The attorney is in a fiduciary relationship with the client and should never use money belonging to the client for personal purposes. Failure to place client funds in a trust account can subject the funds to claims of the attorney's creditors or place the funds in the attorney's estate in the event of death or disability. The general rule is that every receipt of money from a client or for a client which will be used or delivered on the client's behalf is held in trust and should be placed in the trust account. It would not be applicable in cases where a

lawyer handles money for a business, religious, civic, or charitable organization as an officer, employee or other official of that organization. Every attorney who receives funds belonging to clients must maintain a trust account.

The definitions in Rule 10.1(b) are basic and allow the rule to encompass accounts maintained at institutions other than commercial banks. Additionally, the definition of check is intended to encompass any device by which funds may be withdrawn, including nonnegotiable instruments, transfers, and direct computer transfers.

Rule 10.1 is patterned after former Disciplinary Rule 9-102. However, the language used clarifies the deposit requirements. Under the prior rule, there was some confusion as to whether payments of clients to attorneys for payment of expenses should be deposited in the trust account. The new language eliminates the ambiguity. Under the new rule, all money received by the attorney except that to which the attorney is presently entitled must be deposited in the trust account, including funds for payment of expenses. Funds delivered to the attorney by the client for payment of potential expenses are intended to be used for only that purpose and the funds should never be used by the attorney for personal purposes or subjected to the potential claims of the attorney's creditors.

There is a question as to whether a payment of a retainer by the client should be placed in the trust account. The determination depends upon the fee arrangement with the client. A retainer in its truest sense is a payment by the client for the reservation of the exclusive services of the attorney which by agreement of the parties is nonrefundable upon discharge of the attorney. It is a payment to which the attorney is immediately entitled and should not be placed in the trust account. A "retainer" which is actually a deposit by the client of an advance payment of a fee to be billed on an hourly basis is not a payment to which the attorney is immediately entitled. This is really a security deposit and should be placed in the trust account. As the attorney earns the fee or bills against the retainer, the funds should be withdrawn from the account.

The attorney may come into possession of property belonging to the client other than money. Similar considerations apply concerning the segregation of such property from that of the attorney.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

## Rule 10.2 Record Keeping and Accounting for Client Funds or Property

(a) A lawyer shall promptly notify his or her client of the receipt of any funds, securities, or property belonging in whole or in part to the client.

(b) A lawyer shall maintain complete records of all funds, securities, or other property of a client received by the lawyer. A lawyer shall retain the records required under this rule for a period of six years following completion of the transactions generating the records.

(c) The minimum records of funds received and disbursed by the lawyer shall consist of the following:

(1) a journal, file of receipts, file of deposit slips, or checkbook stubs listing the source, client, and date of the receipt of all trust funds. All receipts of trust money shall be deposited intact with the lawyer retaining a duplicate deposit slip or other record sufficiently detailed to show the identity of the item. Where the funds received are a mix of trust funds and nontrust funds, then the deposit shall be made to the trust account intact and a nontrust portion shall be withdrawn when the bank has credited the account upon final settlement or payment of the instrument;

(2) a journal, which may consist of cancelled checks, showing the date, recipient of all trust fund disbursements, and the client balance against which the instrument is drawn. An instrument drawn from the account for payment of fees or expenses to the lawyer shall be made payable to the lawyer and indicate from which client balance the payment is drawn. No instruments drawn on the trust account shall be payable to cash or bearer;

(3) a file or ledger containing a record for each person or entity from whom or for whom trust money has been received which shall accurately maintain the current balance of funds held in the trust account for that person;

(4) all cancelled checks drawn on the trust account, whether or not the checks constitute the journal required in (2) above;

(5) any bank statements or documents received from the bank regarding the account, including, but not limited to, notices of the return of any instrument drawn on the account for insufficient funds.

(d) A lawyer shall reconcile the trust account balances of funds belonging to all clients at least quarterly. A lawyer shall render to the client appropriate accountings of the receipt and disbursement of any funds, securities, or property belonging to the client in the possession of the lawyer. Accountings of funds shall be in writing. An accounting shall be provided to the client upon the completion of the disbursement of the funds, securities, or property held by the lawyer, at such other times as may be reasonably requested by the client, and at least annually if funds are retained for a period of more than one year.

(e) A lawyer shall promptly pay or deliver to the client or to third persons as directed by the client the funds, securities, or properties belonging to the client to which the client is entitled in the possession of the lawyer.

(f) Every lawyer maintaining a trust account shall file with the bank where the account is maintained a directive to the drawee bank as follows: Such bank shall report to the executive director of the North Carolina State Bar, solely for its information, when any check drawn on the trust account is returned for insufficient funds. No trust account shall be maintained in any bank which does not agree to make such reports pursuant to the directive.

(g) A lawyer shall produce any of the records required to be kept by this rule upon lawful demand made in accordance with the Rules and Regulations of the North Carolina State Bar.

(h) If a lawyer discovers that he or she holds any funds, securities, or property in a trust account or in any other fiduciary capacity and does not know either the identity or the location or both of the owner thereof, the lawyer shall take the following steps:

(1) the lawyer shall first make due inquiry of his or her personnel, records, files, and other sources of information to determine the identity and location of the owner thereof;

(2) if the identify and location of the owner are determined, the funds, securities, or other property shall be transferred to the owner forthwith;

(3)(A) If the identity, but not the location, of the owner has been determined and the lawyer has not made disbursement of the whole or part of the funds, securities, or properties to the owner in accordance with the previous provisions of this rule and

(i) the principal of the undisbursed portion of the trust account has not increased or decreased within five years;

(ii) the owner has not accepted payment of principal or income for five years;

(iii) the owner has not corresponded in writing with the lawyer within five years; or

(iv) the owner has not otherwise indicated an interest in the account as evidenced by a memorandum or other record on file with the lawyer within five years, then the funds, securities, or properties shall be deemed abandoned property under the provisions of G.S. 116B-18 and the lawyer shall comply with the requirements of Chapter 116B.

(B) If the identity of the owner cannot be determined for whole or part of the funds, securities or properties in the trust account, the lawyer shall designate such portion of the trust account as abandoned property and shall forthwith transfer the same to the custody of the state treasurer.

(C) Any income or increment due on property deemed abandoned shall not be discontinued or diverted during the period prior to the abandonment unless funds are involved which are subject to the Interest on Lawyers' Trust Accounts (IOLTA) program of the North Carolina State Bar.

(D) Should the lawyer need technical assistance concerning this matter, he or she shall contact the escheat officer, North Carolina State Treasurer, Raleigh. Until they are delivered to the state treasurer, the lawyer shall continue to maintain the funds, securities, or property in accordance with the Rules and Regulations of the North Carolina State Bar.

Comment

The lawyer must notify the client of the receipt of the client's property. It is the lawyer's responsibility to assure that complete and accurate records of the receipt and disbursement of client property are maintained. Therefore, there are minimum record-keeping requirements.

The lawyer is also responsible for keeping his or her client advised of the status of any property held by the lawyer. Therefore, it is essential that the attorney reconcile the trust account regularly. The attorney also has an affirmative duty to produce an accounting for the client in writing and to deliver it to the client, either at the

conclusion of the transaction or periodically if funds are held for an appreciable period. Such accountings must be made at least annually, and can be made at more frequent intervals in the discretion of the attorney.

The lawyer is also responsible for making payments from his or her trust account only as directed by the client or only on the client's behalf.

A properly maintained trust account should not have any checks returned by the bank for insufficient funds. Although even the best maintained accounts are subject to bank errors, such legitimate problems are easily explained. Therefore, the reporting requirement should not be burdensome.

History Note: Statutory Authority G.S. 84-23
Readopted Effective December 8, 1994

**Rule 10.3 Interest on Lawyers' Trust Accounts**

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in the lawyer's good faith judgment, are nominal in amount or are expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. The North Carolina State Bar shall furnish to each lawyer or firm which elects to participate in the Interest on Lawyers' Trust Account Program a suitable plaque or scroll indicating participation in the program, which plaque or scroll shall be exhibited in the office of the participating lawyer or firm. Such scroll or plaque will contain language substantially as follows:

"THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA STATE BAR'S INTEREST ON LAWYERS' TRUST ACCOUNT PROGRAM. Under this program funds received on behalf of a client which are nominal in amount or are expected to be held for a short period of time will be deposited with other similar funds in a joint interest-bearing trust account. The interest generated on all funds so deposited will be remitted to the North Carolina State Bar to fund programs for the public's benefit."

(b) Lawyers or law firms electing to deposit client funds in a trust account under the plan shall direct the depository institution

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance;

(3) to transmit to the depository lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance.

(c) The North Carolina State Bar shall periodically deliver to each nonparticipating lawyer a form whereby the lawyer may elect, by the ensuing January 31, not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan as of that date and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

(d) A lawyer or law firm participating in the IOLTA plan may terminate participation at any time by notifying the North Carolina State Bar or the IOLTA Board of Trustees. Participation will be terminated as soon as practicable after receipt of written notification from a participating lawyer or firm.

(e) Upon being directed to do so by the client, a lawyer may be compelled to invest on behalf of a client in accordance with Rule 10.1 of this chapter those funds not nominal in amount or not expected to be held for a short period of time. Certificates of deposit may be obtained by a lawyer or law firm on some or all of the deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing recodification of the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 21, 1994.

Given over my hand and the Seal of the North Carolina State Bar, this the 5th day of December, 1994.

s/L. Thomas Lunsford
L. Thomas Lunsford, II, Secretary

After examining the foregoing recodification of the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of December, 1994.

s/James G. Exum, Jr.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing recodification of the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in a forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 8th day of December, 1994.

s/James G. Exum, Jr.
James G. Exum, Chief Justice

# ANALYTICAL INDEX

# WORD AND PHRASE INDEX

# ANALYTICAL INDEX

**Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.**

## TOPICS COVERED IN THIS INDEX


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Landlord And Tenant
Larceny

Railroads
Rape And Allied Offenses
Robbery

Social Services And Public Welfare

Taxation

Utilities

## ADMINISTRATIVE LAW AND PROCEDURE

**§ 30 (NCI4th). Adjudication or other resolution of dispute or contested case generally**

The Court of Appeals erred by holding that the Office of Administrative Hearings did not have jurisdiction to conduct a contested case hearing regarding a permit to operate a rock quarry; the Administrative Procedure Act grants the right to a contested case hearing to all persons aggrieved by a state agency decision unless jurisdiction is expressly excluded by the APA or the organic act which created the right. **North Buncombe Assn. of Concerned Citizens v. N.C. Dept. of E.H.N.R.,** 302.

The Court of Appeals erred in holding that the Office of Administrative Hearings was without subject matter jurisdiction over a contested case petition because petitioners failed to file such petition within sixty days of receiving notice of respondents' assessment of civil penalties where the superior court asserted jurisdiction over the assessment and that assertion of jurisdiction was vacated by the Court of Appeals more than sixty days from the notice of assessment. **House of Raeford Farms v. State ex rel. Envir. Mgmt. Comm.,** 262.

**§ 38 (NCI4th). Adjudication of "contested case"; hearing bodies or officers in cases before specified agencies**

Where the State Board of Examiners of Electrical Contractors was unable or unwilling to provide plaintiff with a hearing and decision on his charges against a licensed electrical contractor, plaintiff had a right to a contested case hearing and a proposal for decision on the charges by an administrative law judge designated by the Director of the OAH. **Bryant v. State Bd. of Examiners of Electrical Contractors,** 288.

## APPEAL AND ERROR

**§ 155 (NCI4th). Effect of failure to make motion, objection, or request; criminal actions**

Defendant waived appellate review of instructions concerning intent to kill and diminished capacity and intoxication where the court asked whether the prosecution or defendant had any requests for additions or modifications to the instructions after the jury retired, defendant did not then object to the instruction at issue, and defendant brought the instruction to the attention of the court when the jury returned for further instruction approximately one and one-half hours later. **State v. Hamilton,** 193.

**§ 490 (NCI4th). Conclusiveness of findings generally**

The findings of the trial court as to admission of another offense were binding when they were clearly supported by plenary competent evidence. **State v. Moseley,** 1.

## ASSAULT AND BATTERY

**§ 25 (NCI4th). Assault with intent to kill or inflicting serious injury; sufficiency of evidence generally**

The evidence in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury was sufficient for the jury to find that the victim sustained serious injury as a result of defendant's assault upon him with an air-conditioning compressor as alleged in the indictment where it tended to show that defendant beat the victim in the head with the butt of a gun and struck his shoulder with the compressor, and the victim was hospitalized and received treatment for his shoulder injury as well as his head injuries. **State v. Ramseur,** 502.

### BUILDING CODES AND REGULATIONS

**§ 46 (NCI4th). Local administration and enforcement of building codes and regulations; inspections**

Acts which transferred the responsibility for the administration and enforcement of building codes in New Bern from the City of New Bern to Craven County for all buildings associated with the New Bern-Craven Board of Education, the Craven Community College, and the Craven Regional Medical Center were local acts, and these local acts violated N.C. Const. art. II, § 24(a) because the shifting of responsibility for inspections pursuant to the State Building Code affected health and sanitation. **City of New Bern v. New Bern-Craven Co. Bd. of Educ.**, 430.

### CEMETERIES AND BURIAL

**§ 23 (NCI4th). Criminal liability; desecration of graves**

Defendant could not properly be convicted of removing a part of a brick fence enclosing a family cemetery in violation of G.S. 14-148(a)(2) where the evidence showed that the only body formerly buried in the plot had been removed to another location, and there was no evidence that the plot would be used in the future for the burial of the dead. **State v. Phipps,** 305.

### CONSPIRACY

**§ 33 (NCI4th). Sufficiency of evidence; conspiracies to commit robbery or armed robbery**

The evidence was sufficient to support defendant's conviction of conspiracy to commit armed robbery of an undercover officer who proposed to sell marijuana to defendant. **State v. Bell,** 363.

### CONSTITUTIONAL LAW

**§ 24 (NCI4th). Local, private, and special legislation**

Acts which transferred the responsibility for the administration and enforcement of building codes in New Bern from the City of New Bern to Craven County for all buildings associated with the New Bern-Craven Board of Education, the Craven Community College, and the Craven Regional Medical Center were local acts, and these local acts violated N.C. Const. art. II, § 24(a) because the shifting of responsibility for inspections pursuant to the State Building Code affected health and sanitation. **City of New Bern v. New Bern-Craven Co. Bd. of Educ.**, 430.

The trial court did not err by applying prospectively only its ruling that acts which transferred responsibility for building code inspections of certain buildings in a city from the city to the county were unconstitutional local acts. **Ibid.**

**§ 155 (NCI4th). Permissible extent of state regulations of commerce**

The North Carolina Utilities Commission's exclusion of $1.39 million of capacity costs paid by NC Power to Ultra Cogen (a cogenerator) did not violate the Commerce Clause of the United States Constitution where the costs had been determined by an arbitrator designated by the Virginia State Corporation Commission. **State ex rel. Utilities Comm. v. N.C. Power**, 412.

**§ 280 (NCI4th). Right to appear pro se generally**

The trial court did not err in a first-degree murder prosecution by allowing defendant to proceed pro se where the court followed the mandatory inquiry required by G.S. 15A-1242. **State v. Carter,** 569.

CONSTITUTIONAL LAW — Continued

**§ 283 (NCI4th). Right to appear pro se; defendant as co-counsel**

A criminal defendant represented by counsel was not entitled to personally ask each prospective juror whether the juror would listen to his case and be fair. **State v. Bell,** 363.

**§ 342 (NCI4th). Presence of defendant at proceedings generally**

There was no error in a noncapital first-degree murder prosecution where the jury knocked on the door and indicated that they had a question, the judge instructed the bailiff to give them a yellow pad, stand at the door, and tell them to write out the question, the question had not been produced within fifteen minutes, and the judge sent the defendant to lock-up and worked on other matters. **State v. Watson,** 168.

**§ 371 (NCI4th). Death penalty; first-degree murder**

The North Carolina death penalty is neither vague nor overbroad and is not applied in a discriminatory and discretionary manner. **State v. Carter,** 569.

CONTRACTORS

**§ 31 (NCI4th). Electrical contractors; administrative sanctions; injunctive relief**

A plaintiff who filed charges against another licensed electrical contractor with the State Board of Examiners of Electrical Contractors was entitled to a hearing and decision from the Board on the charges, and where the Board was unable or unwilling to provide plaintiff with a hearing and decision, plaintiff had a right to a contested case hearing and proposal for decision on the charges by an administrative law judge designated by the Director of the OAH. **Bryant v. State Bd. of Examiners of Electrical Contractors,** 288.

CRIMINAL LAW

**§ 78 (NCI4th). Change of venue; circumstances insufficient to warrant change**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree sexual offense, and first-degree rape by denying defendant's motion for a change of venue where defendant contended that he could not receive a fair trial in Stokes County because of extensive media coverage of this case and an earlier trial in Forsyth County. **State v. Moseley,** 1.

The trial court did not err in denying defendant's motion for a change of venue of his first-degree murder trial based on pretrial publicity. **State v. Bell,** 363.

**§ 244 (NCI4th). Continuance; pretrial publicity affecting jurors generally**

A defendant charged with first-degree murder was not denied a fair trial before an impartial jury by the trial court's denial of his motion for a continuance based upon a newspaper article published in the county the day after the mailing of notice for jury duty which revealed that a co-participant in the murder had been convicted of first-degree murder of the victim and sentenced to life imprisonment. **State v. Ward,** 64.

**§ 319 (NCI4th). Joinder or consolidation of charges against multiple defendants; defendants charged with same offense; homicide**

The trial court did not err by denying an assault and murder defendant's motion to sever where defendants were charged with the same offenses, all of which the evidence tended to show arose out of a common scheme and were part of the same transaction, and their defenses were not antagonistic. **State v. Abraham,** 315.

**CRIMINAL LAW — Continued**

**§ 359 (NCI4th). Restraint of witness**

The trial court did not err in a first-degree murder prosecution by allowing defense witnesses to appear shackled and in prison uniform where the court's approach appears to have been to permit the parties to the case to appear in street clothes and unshackled but to draw the line at witnesses who were neither victims nor defendants. **State v. Abraham,** 315.

**§ 370 (NCI4th). Expression of opinion on evidence during trial; questioning relevancy of evidence**

The trial court did not intimate to the jury that the testimony of defendant's mother was not relevant in a capital sentencing hearing when he twice interrupted during her extensive testimony to inquire about the relevancy of her testimony. **State v. Harris,** 129.

**§ 382 (NCI4th). Expression of opinion on evidence during trial; clarification of testimony**

There was no error in a first-degree murder resentencing hearing where the court asked defendant's expert witness questions concerning an opinion involving mitigation. **State v. Spruill,** 612.

**§ 400 (NCI4th). Expression of opinion on evidence during trial; remarks, actions by the court; miscellaneous**

There was no error during a first-degree murder resentencing hearing where the trial judge turned his back during defendant's testimony. **State v. Spruill,** 612.

**§ 411 (NCI4th). Argument and conduct of counsel; selection of jury**

The prosecutor's identification of members of the victim's family during jury selection in a capital trial to determine whether prospective jurors knew them did not require ex mero motu intervention by the trial court. **State v. Bell,** 363.

**§ 415 (NCI4th). Argument of counsel; generally**

Arguments in a first-degree murder resentencing hearing that defendant had enjoyed stalking and killing the victim; was a "hound of hell," lay in wait for the victim "like a durned snake," and changed "like a lizard changes colors"; took notes during the arguments; attempted to lay blame for the murder on his father; perjured himself in testifying that he had not been convicted of possession of stolen property; colluded with his attorneys to present himself as remorseful; and chose to affirm rather than swear to tell the truth were within the wide latitude permitted counsel in arguments to the jury. **State v. Spruill,** 612.

**§ 423 (NCI4th). Argument of counsel; comment on defendant's failure to offer any evidence**

The prosecutor's remarks in his jury argument in a capital trial concerning defendant's failure to produce exculpatory evidence forecasted by defense counsel were not improper comments on defendant's failure to testify but constituted fair and proper comments on defendant's failure to present any evidence. **State v. Ward,** 64.

The trial court did not err in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by refusing to intervene ex mero motu during the prosecutor's closing arguments at the guilt-innocence phase where defendant contended that the prosecutor repeatedly referred to the State's evidence as being uncontradicted and to the failure of the defense to present any witnesses. **State v. Moseley,** 1.

**CRIMINAL LAW — Continued**

**§ 427 (NCI4th). Argument of counsel; defendant's failure to testify; comment by prosecution**

Where the evidence did not support facts contained in the opening statements of defendant's counsel, the prosecutor's closing argument question "What witness said that?" after referring to certain assertions in the opening statements was a fair response to the opening statements and did not constitute an improper comment on defendant's failure to testify. **State v. Harris,** 211.

**§ 433 (NCI4th). Argument of counsel; defendant as professional criminal, outlaw, or bad person**

It was not improper for the prosecutor to refer to defendant in closing arguments as a "cold-blooded murderer" and a "doper." **State v. Harris,** 211.

**§ 434 (NCI4th). Argument of counsel; comment on defendant's prior convictions or criminal conduct**

The prosecutor's jury argument in a robbery-murder case that defendant was already on probation for another crime and that "we don't have a person who has never been in trouble" was supported by substantive evidence and was not improper. **State v. Harris,** 129.

There was no error in a first-degree murder prosecution where a prior shooting had been admitted for identification purposes and the prosecutor referred to that incident in his closing argument and said "Make him stop." **State v. Abraham,** 315.

**§ 438 (NCI4th). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness**

The trial court did not err in a first-degree murder prosecution by not intervening ex mero motu to stop a prosecution argument in which defendant contended that the prosecutor called him a liar. **State v. Bunning,** 483.

**§ 439 (NCI4th). Argument of counsel; comment on character and credibility of witnesses generally**

The prosecutor stated his opinion as to the credibility of a witness in violation of G.S. 15A-1230 when he argued to the jury in a capital sentencing hearing that "I'm sure [defendant's mother] has tried to color this as best she can in the light that is most favorable to [defendant]" and that "I'm not certain that all of these things she has testified about happened exactly the way she said they did," but this error was de minimis and did not require the trial court to intervene ex mero motu. **State v. Harris,** 129.

There was no gross impropriety in a prosecution for first-degree burglary, conspiracy to murder, and first-degree murder by being an accessory before the fact where the prosecutor's argument compared defendant to Hitler, told the jury that the killing was the most brutal in this country or in any land, told the jury that the case was being tried because the victim had been denied his constitutional rights, and told the jury that the status of the economy and the war on drugs was dependent on the jury's verdict. **State v. Wilson,** 244.

The trial court did not err in a first-degree murder prosecution by not intervening ex mero motu to stop a prosecution argument where the statements by the prosecuting attorney were more in the nature of giving reasons for the jury to believe the State's evidence than vouching for his own credibility or that of his witnesses. **State v. Bunning,** 483.

**CRIMINAL LAW — Continued**

**§ 441 (NCI4th). Argument of counsel; comment on expert witnesses**

The prosecutor's jury argument in a capital sentencing hearing that all a psychiatrist who was an expert in addiction medicine knew about defendant was what defendant had told him, although not completely accurate as to the basis of the psychiatrist's diagnosis, was not so grossly improper as to require a new trial. **State v. Harris,** 129.

There was no error in a first-degree murder resentencing hearing where, assuming arguendo that the prosecutors' statements regarding defense experts' testimony concerning his mental disorders were improper and should have been condemned by the trial court, they do not entitle defendant to a new resentencing proceeding. **State v. Spruill,** 612.

**§ 442 (NCI4th). Argument of counsel; comment on jury's duty**

There was no error in a first-degree murder sentencing hearing where defendant contended on appeal that the prosecution had argued at trial that the jury should convict defendant because of public sentiment. **State v. Moseley,** 1.

A prosecutor's argument in a first-degree murder prosecution that the jurors would be blessed by God if they found defendant guilty was not approved, but was not so egregious that the court should have intervened ex mero motu. **State v. Bunning,** 483.

**§ 447 (NCI4th). Argument of counsel; comment on rights of victim, victim's family**

The prosecutor's argument in a capital trial of facts about the victim and the victim's family did not so grossly overstep the evidence or amount to so grossly improper an appeal to the jury's sympathy for the victim or the victim's family as to require the trial court to recognize and correct it ex mero motu. **State v. Ward, 64.**

The prosecutor's argument in a first-degree murder sentencing hearing did not require intervention ex mero motu where the prosecutor argued that "its time we do something for the victims." **State v. Moseley,** 1.

Defendant was not prejudiced by the prosecutor's comments during closing argument about the effect of the killing of the victim upon the victim's family. **State v. Bell,** 363.

The trial court did not err by not intervening ex mero moto in the prosecutor's closing argument in a first-degree murder resentencing hearing where the prosecutor's remarks concerning the victim were indistinguishable from those in *State v. Artis*, 325 N.C. 278. **State v. Spruill,** 612.

**§ 450 (NCI4th). Argument of counsel; comments on violent, dangerous, or depraved nature of offense or conduct**

The prosecutor's statement characterizing defendant's act of killing the victim as "shooting her down just like a dog" did not compare defendant to an animal and was not improper. **State v. Harris,** 211.

**§ 452 (NCI4th). Argument of counsel; comment on aggravating or mitigating circumstances**

While the prosecutor may have overstepped the bounds of what defendant could prove for mitigating circumstances in a capital sentencing hearing when he argued that what defendant's attorneys could submit in mitigation of his punishment was limited only by their own imagination, this argument was not so grossly improper as to violate due process. **State v. Harris,** 129.

**CRIMINAL LAW — Continued**

There was no plain error in a sentencing hearing for first-degree murder where defendant contended that the prosecutor argued that the mitigating circumstances submitted by defendant were in fact aggravating circumstances because defendant had denied his victim mitigating circumstances. **State v. Moseley,** 1.

It would have been improper, and possibly prejudicial, for a prosecutor in a first-degree murder sentencing hearing to argue that mitigating circumstances must justify or excuse a killing or reduce it to a lesser degree of crime. **Ibid.**

**§ 455 (NCI4th). Argument of counsel; comment on deterrent effect of death penalty**

The prosecutor's argument that the jury should recommend the death penalty for defendant as a deterrent to his killing again was not improper. **State v. Ward,** 64.

**§ 458 (NCI4th). Argument of counsel; possibility of parole, pardon, or executive commutations**

The trial court did not err in a first-degree murder sentencing hearing by denying defendant's request to argue parole eligibility.**State v. Moseley,** 1.

There was no error during a first-degree murder resentencing hearing where defense counsel asked the jury not to kill defendant but to put him in prison for the rest of his life and the prosecutor objected with the comment "That's not what happens." **State v. Spruill,** 612.

**§ 461 (NCI4th). Agument of counsel; comment on matters not in evidence**

There was no gross impropriety in a prosecution for first-degree murder and assault from the prosecutor's argument that an officer had identified defendant from a photograph when the jury had not heard evidence concerning the officer's examination of a photograph. **State v. Abraham,** 315.

**§ 465 (NCI4th). Argument of counsel; explanation of applicable law**

The trial court did not err in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by refusing to intervene ex mero motu during the prosecutor's closing arguments at the guilt-innocence phase where defendant contended that the prosecutor impermissibly defined reasonable doubt and the presumption of innocence. **State v. Moseley,** 1.

**§ 467 (NCI4th). Argument of counsel; use of, or reference to physical evidence**

There was no error in a prosecution which resulted in convictions for first-degree murder, first-degree rape, and first-degree sexual offense by allowing prosecutors to use photographs of this victim and the victim in another trial during the closing arguments in the guilt-innocence phase and the sentencing phase. **State v. Moseley,** 1.

**§ 468 (NCI4th). Argument of counsel; miscellaneous comments or actions**

Statements by the prosecutor characterizing defendant's case as "an ingenuity of counsel" and a "fairy tale" were not improper since the prosecutor was commenting on defendant's failure to present forecasted exculpatory evidence rather than unfairly denigrating the defense. **State v. Ward,** 64.

The prosecutor's reference in his closing argument to defense strategy as "ingenuity of counsel" was not so grossly improper as to require the trial judge to intervene ex mero motu. **State v. Harris,** 211.

**CRIMINAL LAW — *Continued***

**§ 497 (NCI4th). Deliberations; use of evidence by the jury**

The trial court did not abuse its discretion by denying the jury's request for copies of the transcript of trial testimony while allowing the jury's request to view exhibits in the jury room. **State v. Abraham,** 315.

**§ 536 (NCI4th). Mistrial; misconduct of persons present at trial at defendant's behest**

The trial court did not abuse its discretion by denying defendant's motion for a mistrial in a capital sentencing proceeding after defendant's profane outburst during the State's cross-examination of his mother about his prior convictions. **State v. Ward,** 64.

**§ 537 (NCI4th). Mistrial; misconduct of victim or victim's family during trial**

The trial court did not err by denying defendant's motion for a mistrial in a first-degree murder trial after an emotional outburst by the victim's husband during defendant's opening statement. **State v. Ward,** 64.

**§ 682 (NCI4th). Peremptory instructions involving particular mitigating circumstances in capital cases; defendant influenced by mental or emotional distrubance**

The trial court committed prejudicial error by refusing to peremptorily instruct the jury on the statutory mental or emotional disturbance mitigating circumstance in a capital sentencing proceeding where defendant presented testimony of four expert witnesses in support of this mitigating circumstance and the State presented no evidence that controverted this testimony. **State v. Holden,** 394.

**§ 709 (NCI4th). Instructions to jury; nonprejudicial inadvertent or inconsequential statements**

The trial court's lapsus linguae in instructing the jury to return a verdict of "guilty" rather than "not guilty" if it had "a reasonable doubt as to one or more of these things" was not prejudicial error where the court repeatedly instructed the jury that the State had the burden of proving defendant guilty beyond a reasonable doubt. **State v. Baker,** 526.

**§ 724 (NCI4th). Instructions; opinion of court on evidence; inadvertent or unintended expression of opinion**

There was no prejudicial error in the instructions to the jury in a noncapital first-degree murder trial where the court instructed the jury that "There is evidence which tends to show that the defendant confessed and—that he committed the crime charged in this case." **State v. Herring,** 271.

**§ 762 (NCI4th). Reasonable doubt; instruction omitting or including phrase "to a moral certainty"**

The trial court did not err in a first-degree murder prosecution by giving an instruction on reasonable doubt which included moral certainty. **State v. Bunning,** 483.

The trial court's instruction on reasonable doubt was not erroneous because it included the words "moral certainty" and "substantial misgiving." **State v. Baker,** 526.

**CRIMINAL LAW — Continued**

**§ 776 (NCI4th). Instructions; relationship of voluntary intoxication to defense of insanity**

There was no error in a first-degree murder prosecution in which defendant was sentenced to life imprisonment where the jury was originally instructed on intoxication or diminished capacity; the jurors returned to the courtroom with questions on intent, premeditation and deliberation, the role of alcohol and the effect of reduction in judgment; and the court's reinstruction included an instruction on sanity. **State v. Hamilton,** 193.

**§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence generally**

The evidence presented at a noncapital first-degree murder trial was sufficient to justify an acting in concert instruction. **State v. Herring,** 271.

**§ 914 (NCI4th). Manner of polling the jury**

The jury poll was not improperly conducted in a prosecution for first-degree murder, two aggravated assaults, and possession of a firearm by a felon where each juror was individually told all of the charges for which the jury had returned a guilty verdict and was asked whether this was the juror's verdict and whether he or she still assented thereto. **State v. Ramseur,** 502.

**§ 928 (NCI4th). Inconsistency of verdict**

The trial court properly declined to accept the original verdict in a prosecution for murder and multiple assaults and properly reinstructed the jury and directed it to retire and deliberate further where the jury first returned guilty verdicts against defendant Cureton for assaulting Hardin with a deadly weapon with intent to kill, of assaulting Foster with a deadly weapon with intent to kill under the theory of acting in concert, of first-degree murder of Gaddy, and of second-degree murder of Gaddy under the theory of acting in concert without premeditation and deliberation. **State v. Abraham,** 315.

**§ 951 (NCI4th). Motion for appropriate relief; hearing generally**

The trial judge did not err by failing to conduct a hearing on defendant's motion for appropriate relief at the end of the guilt phase of a capital trial on the ground that he had ineffective assistance of counsel where the trial judge was able to determine without a hearing the effect of defendant's contention that, because counsel had bone marrow cancer and was in pain, he did not conduct meaningful meetings with defendant or his co-counsel and that the case went to trial without adequate preparation. **State v. Harris,** 129.

**§ 1056 (NCI4th). Sentencing procedures; statement by defendant**

There was no error in a first-degree murder sentencing hearing where defendant's motion for allocution had been granted before jury selection but the court never afforded defendant the opportunity to speak to the sentencing jury. **State v. Moseley,** 1.

**§ 1098 (NCI4th). Fair Sentencing Act; aggravating factors; prohibition on use of evidence of element of offense**

There was no error in sentencing defendant for conspiracy to commit murder and first-degree burglary where the defendant contended that the same evidence used to convict him was used to support the aggravating factors that he induced others to participate in the commission of the offense and that he occupied a position of leadership or dominance. **State v. Wilson,** 244.

CRIMINAL LAW — Continued

**§ 1100 (NCI4th). Fair Sentencing Act; prohibiting same evidence to support more than one aggravating factor**

A defendant was entitled to a new sentencing hearing for conspiracy to commit murder and first-degree burglary where the terms for each exceeded the presumptive and the aggravating factors that the offense was committed to disrupt the lawful exercise of the enforcement of the laws and that it was committed to hinder the lawful exercise of the enforcement of the laws were based on the same evidence. **State v. Wilson,** 244.

**§ 1133 (NCI4th). Fair Sentencing Act; statutory aggravating factors; position of leadership or inducement of others generally; facts indicative of defendant's role**

The trial court did not err by finding as aggravating factors for conspiracy to murder and first-degree burglary that defendant induced others to participate and that he occupied a position of leadership or dominance where there was testimony that defendant handed a shotgun to another with the order that that person kill the victim, defendant ordered another person to accompany the first or be killed himself, and all of the participants described defendant as the leader of the group. **State v. Wilson,** 244.

**§ 1142 (NCI4th). Fair Sentencing Act; statutory aggravating factors; disruption or hindrance of governmental function of enforcement of laws**

There was sufficient evidence when sentencing defendant for conspiracy to commit murder and first-degree burglary to support the aggravating factors that the offenses were committed to disrupt the lawful exercise of the enforcement of the laws and to hinder the lawful exercise of the enforcement of the laws. **State v. Wilson,** 244.

**§ 1310 (NCI4th). Capital sentencing proceeding; necessity of prejudice from admission or exclusion of evidence**

Assuming that the trial court committed constitutional error in a capital sentencing proceeding by allowing the prosecutor to elicit testimony concerning defendant's refusal to testify at the trial of his co-participant, this error was harmless where the prosecutor argued that this refusal to testify obviated the mitigating value of evidence that defendant rendered assistance in the apprehension of the co-participant, but the jury rejected this argument and found the statutory mitigating circumstance that defendant aided in the apprehension of a capital felon. **State v. Ward,** 64.

**§ 1312 (NCI4th). Capital sentencing proceeding; evidence of prior criminal record or other crimes**

There was no error in a first-degree murder resentencing hearing where the prosecutor, while cross-examining a psychiatrist, read from a report made by a Central Prison psychiatrist after defendant's first trial which contained a reference to the death row. **State v. Spruill,** 612.

There was no error in a first-degree murder resentencing hearing from the introduction of photographs of the cellblock in which defendant had lived since 1985 and the argument that defendant was under a twenty-four hour watch in the most secure cellblock in the most secure prison in the State of North Carolina. **Ibid.**

**CRIMINAL LAW — Continued**

**§ 1315 (NCI4th). Capital sentencing proceeding; competence of evidence; aggravating and mitigating circumstances; character or reputation**

The trial court in a capital sentencing hearing did not err by permitting the State to ask defendant's brother on cross-examination, "Your brother just won't work, will he?" where the witness answered that he would say defendant is sick. **State v. Harris,** 129.

**§ 1316 (NCI4th). Capital sentencing proceeding; competence of evidence; prior criminal record or other crimes**

The prosecutor could properly cross-examine defendant's mother about defendant's prior convictions to rebut his good character evidence offered in mitigation. **State v. Ward,** 64.

The trial court did not err in a first-degree murder sentencing hearing by admitting testimony from defendant's probation officer concerning drugs and testimony concerning incidents in which defendant had hit and spit on his girlfriend, been arrested, and haggled with a courtroom deputy. **State v. Carter,** 569.

**§ 1320 (NCI4th). Capital sentencing proceeding; instructions; consideration of evidence**

There was no plain error in a first-degree murder sentencing hearing where the trial court did not instruct the jury that it could not consider the same evidence to find more than one aggravating circumstance, as it should have done, but defendant neither objected to the instructions given nor requested limiting instructions and there was clearly sufficient, independent evidence to support each of the aggravating circumstances in question. **State v. Moseley,** 1.

**§ 1323 (NCI4th). Instructions; aggravating and mitigating circumstances generally**

The trial court did not err by instructing the jury in a capital sentencing proceeding that it could exclude evidence of nonstatutory mitigating circumstances from its consideration if it deemed the evidence to have no mitigating value. **State v. Ward,** 64.

The trial court did not err by instructing the jury that it could consider nonstatutory mitigating circumstances which it found to have mitigating value. **State v. Harris,** 129.

The trial court did not err during a first-degree murder sentencing hearing by instructing the jury that it "may" rather than "must" consider any mitigating circumstances found by the jury. **State v. Carter,** 569.

There was no plain error in a first-degree murder resentencing hearing where defendant contended that the court erred by instructing the jury that jurors could exercise their discretion in deciding whether to consider any mitigating circumstance found in Issue Two when answering Issues Three and Four. **State v. Spruill,** 612.

There was no error in a first-degree murder resentencing hearing where the court combined aspects of defendant's mitigating evidence when submitting nonstatutory mitigating circumstances. **Ibid.**

**§ 1324 (NCI4th). Aggravating and mitigating circumstances; list of issues**

The trial court did not err in a first-degree murder sentencing hearing by instructing the jury that it was to continue to issue four if the mitigating circumstances were of equal weight to the aggravating circumstances. **State v. Moseley,** 1.

**CRIMINAL LAW — Continued**

**§ 1325 (NCI4th). Unanimous decision as to mitigating circumstances**

The trial court did not err by instructing the jury in a capital sentencing hearing that, in weighing the aggravating circumstances against the mitigating circumstances, each juror "may" consider any mitigating circumstance or circumstances that the juror determines to exist by a preponderance of the evidence. **State v. Harris,** 129.

**§ 1334 (NCI4th). Consideration of aggravating circumstances; notice**

The trial court properly denied defendant's motion for a bill of particulars disclosing the statutory aggravating circumstances on which the State intended to rely in seeking the death penalty. **State v. Baker,** 526.

**§ 1336 (NCI4th). Particular aggravating circumstances generally**

The trial court erred during a first-degree murder sentencing hearing by submitting to the jury the aggravating circumstance that defendant had previously been convicted of another capital felony when defendant had pleaded guilty to first-degree murder in Virginia in 1973 and Virginia's death penalty had been held unconstitutional in 1972. **State v. Bunning**, 483.

**§ 1337 (NCI4th). Particular aggravating circumstances; previous conviction for felony involving violence**

The trial court's instruction in a capital sentencing hearing that the jury should find the aggravating circumstance that defendant had previously been convicted for a felony involving violence if it found "that on or about the alleged date the defendant had been convicted of robbery and that the defendant killed the victim after he committed robbery" was not improper in light of the court's instruction in the previous sentence that defendant's conviction must have been based on conduct that occurred before the events out of which the murder arose. **State v. Harris,** 129.

There was no error in a first-degree murder sentencing hearing where the jury was permitted to find as separate aggravating circumstances that defendant had previously been convicted of assault with a deadly weapon inflicting serious injury and attempted second-degree sexual offense where defendant contended that both convictions arose from the same course of conduct against one victim and that submission of both was redundant. **State v. Moseley**, 1.

Evidence of defendant's prior conviction for attempted second-degree rape consisting solely of the judgment against the defendant for that offense satisfies the State's burden of proving the aggravating circumstance that the defendant had previously been convicted of a felony "involving the use or threat of violence to the person." Even if defendant's prior conviction could have been for having sexual intercourse with a person who was mentally defective, mentally incapacitated, or physically helpless as prohibited by G.S. 14-27.3(a)(2), additional evidence that violence or a threat of violence accompanied defendant's prior offense was not required because there is no "non-violent" rape or attempted rape under North Carolina law. **State v. Holden,** 394.

**§ 1339 (NCI4th). Particular aggravating circumstances; capital felony committed during commission of another crime**

There was no error in a first-degree murder sentencing hearing where the trial court instructed the jury that it could consider as two aggravating circumstances that the murder was committed while defendant was engaged in a first-degree sexual offense and first-degree rape of the same victim. **State v. Moseley,** 1.

The trial court did not err during a sentencing hearing for first-degree murder and attempted rape by submitting to the jury the aggravating circumstance that defendant

**CRIMINAL LAW — Continued**

engaged in a course of conduct including other violent crimes and that the murder was committed during the course of an attempted rape. **State v. Carter,** 569.

The trial court did not err in a first-degree murder sentencing hearing by submitting the aggravating circumstance that the murder was committed during an attempted rape where defendant contended that there was no evidence of an initiation of sexual intercourse, forcible or otherwise, between defendant and the victim. **State v. Carter,** 569.

**§ 1343 (NCI4th). Particular aggravating circumstances; particularly heinous, atrocious, or cruel offense; instructions**

The aggravating circumstance that a murder was especially heinous, atrocious or cruel was not unconstitutional on its face or as applied, and there was sufficient evidence to warrant submitting the circumstance to the jury. **State v. Moseley,** 1.

The especially heinous, atrocious, or cruel aggravating circumstance is not unconstitutionally vague. **State v. Spruill,** 612.

**§ 1345 (NCI4th). Consideration of aggravating circumstances; particularly heinous, atrocious, or cruel offense; evidence sufficient to support finding**

The trial court in a first-degree murder sentencing hearing did not err by submitting the especially heinous, atrocious or cruel aggravating circumstance to the jury. **State v. Carter,** 569.

**§ 1347 (NCI4th). Particular aggravating circumstances; murder as course of conduct**

The course of conduct aggravating circumstance, G.S. 15A-2000(e)(11), is not unconstitutional. **State v. Moseley,** 1.

The trial court did not err during a sentencing hearing for first-degree murder and attempted rape by submitting to the jury the aggravating circumstance that defendant engaged in a course of conduct including other violent crimes. **State v. Carter,** 569.

**§ 1348 (NCI4th). Consideration of mitigating circumstances; definition**

The trial court did not err in a first-degree murder resentencing hearing by denying defendant's request for an instruction defining "mitigation." **State v. Spruill,** 612.

**§ 1354 (NCI4th). Particular mitigating circumstances generally**

The trial court erred by submitting an issues and recommendation form to the jury in a capital trial which permitted the jury to determine whether the two statutory mitigating circumstances, as well as the five nonstatutory mitigating circumstances, submitted to the jury had mitigating value. **State v. Baker,** 526.

**§ 1355 (NCI4th). Particular mitigating circumstances; lack of prior criminal activity**

The trial court erred by failing to properly submit the statutory mitigating circumstance of "no significant history of prior criminal activity" to the jury in a capital sentencing proceeding where the court varied the language of this circumstance by submitting an issue as to whether "defendant has no record of criminal convictions," and the jury's consideration of this circumstance was limited to defendant's criminal record and did not include his criminal history of threats and assaults against the victim. **State v. Baker,** 526.

**CRIMINAL LAW — Continued**

There was no plain error in a first-degree murder resentencing hearing where defendant contended that the court's wording of its instruction on the statutory mitigating circumstance that the defendant had no significant history of prior criminal activity expressed the court's opinion by presenting the evidence in the light most favorable to the State. **State v. Spruill,** 612.

**§ 1357 (NCI4th). Particular mitigating circumstances; mental or emotional disturbance; instructions**

The trial court did not err by failing to submit to the jury the statutory mitigating circumstance that defendant was under the influence of mental or emotional disturbance when he committed a murder based on evidence that defendant had a history of drug addiction and that he smoked some amount of crack cocaine eight hours before the murder, and on the testimony of a psychiatrist tending to show that defendant was unable to control his drug habit or temper. **State v. Ward,** 64.

There was no plain error in a first-degree murder resentencing hearing in the instructions on mental or emotional disturbance. **State v. Spruill,** 612.

**§ 1360 (NCI4th). Particular mitigating circumstances; impaired capacity of defendant; instructions**

The trial court did not err by refusing to submit the statutory impaired capacity mitigating circumstance to the jury in a first-degree murder sentencing hearing where the evidence tended to show that defendant historically abused drugs and that he had smoked an indeterminate amount of crack cocaine more than eight hours before the murder. **State v. Ward,** 64.

There was no plain error in a first-degree murder resentencing hearing in the instructions on impaired capacity. **State v. Spruill,** 612.

**§ 1361 (NCI4th). Particular mitigating circumstances; impaired capacity of defendant; intoxication**

The trial court did not err by requiring the jury to find both that defendant was suffering from the disease of alcoholism and that he was intoxicated in order to find the impaired capacity mitigating circumstance. **State v. Harris,** 129.

**§ 1362 (NCI4th). Particular mitigating circumstances; age of defendant**

The trial court erred by failing to submit to the jury in a capital sentencing proceeding the statutory mitigating circumstance of defendant's age at the time of the crime where defendant was thirty-nine years old but presented the testimony of a clinical psychologist that defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten-year-old child than to those of a person in his thirties. **State v. Holden,** 394.

The trial court did not err in a first-degree murder resentencing hearing by failing to submit the mitigating circumstance of defendant's age. **State v. Spruill,** 612.

**§ 1363 (NCI4th). Other mitigating circumstances arising from the evidence**

The trial court in a first-degree murder sentencing hearing did not err by refusing to submit as possible nonstatutory mitigating circumstances that defendant's capacity to make and carry out plans on the day of the crime was impaired and that the influence of drugs greatly affected defendant's participation in the crime. **State v. Ward,** 64.

**CRIMINAL LAW — Continued**

The trial court did not err by refusing to allow defendant to present evidence in a capital sentencing proceeding concerning the life sentence received by a co-participant for the same murder and to submit this proposed circumstance to the jury. **Ibid.**

The trial court did not err in a first-degree murder resentencing hearing where defendant argued that the court failed to submit that defendant had no prior felony involvement. **State v. Spruill,** 612.

The trial court did not err in a first-degree murder resentencing hearing by instructing the jurors that it was for them to determine whether the nonstatutory mitigating circumstances in fact possessed mitigating value. **Ibid.**

**§ 1373 (NCI4th). Death penalty held not excessive or disproportionate**

A sentence of death for a first-degree murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor, the aggravating circumstances were supported by the evidence, and the death sentence was not disproportionate. **State v. Moseley,** 1.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where the jury found defendant guilty upon theories of lying in wait, premeditation and deliberation, and felony murder, the murder was committed to rob the victim, and defendant did not demand the victim's possessions but simply started shooting when the victim got out of her truck after she arrived home with the proceeds from a small convenience store the victim owned. **State v. Ward,** 64.

A sentence of death imposed upon defendant for first-degree murder was not disproportionate where defendant was convicted on the basis of both premeditation and deliberation and felony murder, defendant and his accomplice stabbed the victim in the back while on his boat, robbed him and threw the victim overboard, and the victim later died from loss of blood. **State v. Harris,** 129.

A death sentence for first-degree murder was not disproportionate. **State v. Carter,** 569; **State v. Spruill,** 612.

**DECLARATORY JUDGMENT ACTIONS**

**§ 26 (NCI4th). Awarding of costs; interest**

The trial court did not abuse its discretion by apportioning the costs of a declaratory judgment action in which statutes were held to be unconstitutional equally between plaintiff city and each defendant. **City of New Bern v. New Bern-Craven Co. Bd. of Educ.,** 430.

**EVIDENCE AND WITNESSES**

**§ 84 (NCI4th). Relevancy of evidence; relation of evidence to facts in issue**

Questions concerning whether defendant's father abandoned him, when defendant's drug use began, the nature of the area where the murder-robbery in question occurred, and the reasons the victim's husband was in jail were not material to any issue in this murder and armed robbery case and were properly excluded. **State v. Harris,** 211.

**§ 116 (NCI4th). Evidence incriminating persons other than accused; evidence creating inference or conjecture; remoteness**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by refusing to

**EVIDENCE AND WITNESSES — Continued**

admit testimony that the victim was assaulted by someone other than defendant on the night she was murdered. **State v. Moseley,** 1.

**§ 175 (NCI4th). Facts indicating premeditation and deliberation**

Evidence of a rifle telescope was relevant and admissible in a first-degree murder trial to show that defendant and a co-participant armed themselves to hit a distant target at night in low light and thus that defendant premeditated and deliberated the killing. **State v. Ward,** 64.

**§ 184 (NCI4th). Facts indicating intent in homicide cases**

Evidence that a murder victim's husband was incarcerated on felony drug charges on the night of the murder was not relevant to show that defendant did not have the specific intent to kill the victim but went to the victim's home to steal cocaine. **State v. Ward,** 64.

**§ 213 (NCI4th). Events prior to crime**

The trial court did not err in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by allowing a witness to testify that he contacted law enforcement officers after seeing on television that defendant had been charged with another murder to say that he had seen defendant dancing with the victim on the night she disappeared at the same club from which the other victim had disappeared. **State v. Moseley,** 1.

**§ 254 (NCI4th). Collateral source rule; workers' compensation**

There was no prejudicial error in the exclusion of evidence of Virginia workers' compensation payments from a negligence action arising from an accident involving a pedestrian and two vehicles. Evidence of out-of-state workers' compensation payments is admissible in actions against third parties, but there was no prejudice from the exclusion of that evidence in this case. **Frugard v. Pritchard,** 508.

**§ 263 (NCI4th). Character or reputation of persons other than witness, generally; defendant**

The trial court did not err in a first-degree murder prosecution by excluding evidence tending to show that defendant played with younger children where defendant contended that the jury should be allowed to infer from this that he was immature. **State v. Huggins,** 494.

**§ 284 (NCI4th). Character or reputation of persons other than witness; specific acts of victim to prove self-defense**

The trial court did not err in a noncapital first-degree murder prosecution by sustaining the State's objection to cross-examination of a prosecution witness concerning the character of the deceased where there was no showing that defendant had knowledge of the witness's opinion of the victim's dangerousness. **State v. Watson,** 168.

**§ 305 (NCI4th). Other crimes, wrongs, or acts; similarity of modus operandi or mode of operation**

The trial court did not err in a prosecution for a first-degree murder committed in 1989 by admitting evidence of an assault committed by defendant in 1981, when he was thirteen, where there were unusual facts and strikingly similar acts in both crimes so as to permit admission of the 1981 assault for purposes of proving identity. **State v. Carter,** 569.

**EVIDENCE AND WITNESSES — Continued**

**§ 315 (NCI4th). Other crimes, wrongs, or acts; to show identity of defendant; rape and other sex offenses**

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty. **State v. Carter,** 569.

**§ 318 (NCI4th). Other crimes, wrongs, or acts; to show identity of defendant; homicide offenses**

The trial court did not err in a prosecution which resulted in convictions for first-degree murder, first-degree rape, and first-degree sexual offense by admitting evidence of another murder of which defendant was convicted where the evidence was highly probative of the identity of the murderer and of the existence of a plan and common modus operandi and the trial court repeatedly gave limiting instructions to the jury. **State v. Moseley,** 1.

The trial court did not err in a first-degree murder prosecution by allowing evidence of a prior shooting involving defendants where the evidence was offered under G.S. 8C-1, Rule 404(b) to prove the identity of the assailants in this shooting. **State v. Abraham,** 315.

The trial court did not err in a murder and assault prosecution where defendant Cureton contended that he was unfairly prejudiced by the amount of time the State devoted to developing a prior shooting incident. **Ibid.**

**§ 345 (NCI4th). Other crimes, wrongs, or acts; to show intent; rape and other sex offenses**

The trial court did not err in a prosecution for attempted rape and first-degree murder by admitting evidence of another rape to which defendant pled guilty. **State v. Carter,** 569.

**§ 353 (NCI4th). Other crimes, wrongs, or acts; homicide; concealment of other crimes as motive**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first degree sexual offense by admitting testimony of defendant's prior sexual assault on another victim to show that defendant knew from past experience that he would suffer the consequences if his victim were left alive. **State v. Mosely,** 1.

**§ 370 (NCI4th). Other crimes, wrongs, or acts; to show common plan, scheme, or design; rape and other sex offenses involving adult victim**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by admitting the testimony of defendant's ex-wife that defendant had anally assaulted her during their marriage where, although there are dissimilarities, the similarities tend to support a reasonable inference that defendant committed the assaults on both women and the probative value of the similarities was sufficient to outweigh the risk of unfair prejudice to defendant. **State v. Moseley,** 1.

The trial court did not err in an attempted rape and first-degree murder prosecution by admitting evidence of another rape to show identity on the theory of common scheme or plan. **State v. Carter,** 569.

**EVIDENCE AND WITNESSES — Continued**

**§ 419 (NCI4th). Hypnotically refreshed identification testimony**

Testimony by a witness that he was "positive" and had "no doubt whatsoever" that he saw defendant with the victim on the morning the victim was murdered did not violate the ban on hypnotically refreshed testimony where it referred to facts the witness related before his hypnotic session. **State v. Baker,** 526.

**§ 664 (NCI4th). Ruling on objections; effect of trial court's revision of ruling**

Exceptions to the exclusion of competent testimony became immaterial when the trial judge subsequently revised his ruling and admitted the testimony. **State v. Bell,** 363.

**§ 701 (NCI4th). Limitation of evidence; content or sufficiency of limiting instruction**

There was no error in a first-degree murder and attempted rape prosecution where the court admitted evidence of a prior assault and defendant contended that the court improperly instructed the jury as to the purpose of the evidence by failing to specify the charged offense for which the evidence could be considered. **State v. Carter,** 569.

There was no error in a prosecution for attempted rape and first-degree murder in the trial court's limiting instruction on evidence of another rape. **Ibid.**

**§ 760 (NCI4th). Cure of prejudicial error by admission of other evidence; victim's character, lifestyle, or other personal matters**

There was no prejudicial error in a first-degree murder prosecution where a psychologist was not allowed to testify that a person with the deceased's blood alcohol level would be more irritable and more prone to act on emotions where there was testimony that the deceased was a violent man and wild when drinking. **State v. Bunning,** 483.

**§ 761 (NCI4th). Cure of prejudicial error by admission of other evidence; miscellaneous evidence; substantially similar evidence admitted without objection**

There was no prejudicial error in a prosecution for murder and multiple assaults where, assuming that out-of-court statements were inadmissible hearsay because they went so far beyond the witness' in-court testimony as not to be corroborative, there was no prejudice because the other evidence established clearly and overwhelmingly that either defendant Cureton or defendant Abraham, acting in concert with the other, shot and killed one victim as he attempted to flee. **State v. Abraham,** 315.

There was no prejudice in a first-degree murder prosecution from the court's exclusion of testimony concerning a bullet mark on the porch of the apartment where the killing occurred and the direction from which the bullet came where there was other testimony to the same effect and there was nothing particularly significant about the direction from which the shots were fired. **State v. Perry,** 457.

**§ 876 (NCI4th). Hearsay; to show state of mind, plan, motive, knowledge, and the like of victim**

The trial court did not err in a first-degree murder resentencing hearing by admitting hearsay statements of the victim relating to her state of mind. **State v. Spruill,** 612.

**EVIDENCE AND WITNESSES — Continued**

**§ 963 (NCI4th). Statements for purposes of medical diagnosis or treatment; admissibility where alleged purpose of treatment was trial preparation**

Defendant's statements to a psychiatrist were made in preparation for his murder trial and were thus not admissible under the medical diagnosis or treatment exception to the hearsay rule. **State v. Harris,** 211.

**§ 981 (NCI4th). Exceptions to hearsay rule; declarant unavailable**

There was no error in a first-degree murder prosecution where the court determined that a witness from defendant's first trial was unavailable where the witness had been hospitalized in a psychiatric wing after she testified at the prior trial and told the judge that she did not want to testify and would refuse to do so if ordered. **State v. Carter,** 569.

**§ 1006 (NCI4th). Residual exception to hearsay rule generally**

The trial court's conclusion that a murder victim's statements to six witnesses concerning defendant's threats and her fear of defendant possessed circumstantial guarantees of trustworthiness was supported by the court's findings. **State v. Baker,** 526.

**§ 1007 (NCI4th). Residual exception to hearsay rule; necessity that declarant be unavailable**

The trial court made a sufficient preliminary finding that a declarant (a murder victim) was unavailable to testify for the admission under Rule 804 of hearsay testimony by various witnesses who related statements of the victim about threats defendant made against her and her fear of him. **State v. Baker,** 526.

**§ 1025 (NCI4th). Statements against penal interest generally**

Defendant's statements to a psychiatrist were not admissible as statements against penal interest, even if defendant may assert his own unavailability, where the only additional incriminating information in the statements served merely to reduce defendant's potential criminal liability. **State v. Harris,** 211.

**§ 1070 (NCI4th). Flight as implied admission; sufficiency of evidence to support instructions**

There was sufficient evidence in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense to instruct the jury on flight. **State v. Moseley,** 1.

The evidence in a prosecution for first-degree murder, conspiracy to commit murder, and burglary supports a finding by the jury that defendant was in flight, and the pattern jury instruction on flight was a correct statement of law. **State v. Wilson,** 244.

The trial court did not err in a noncapital first-degree murder prosecution by instructing the jury on flight as evidence of guilt. **State v. Watson,** 168.

The evidence was sufficient to support an instruction on flight in a prosecution for murder and assault where both defendants were seen by an officer walking away from the scene shortly after the shooting occurred; defendants detoured across a parking lot as the officer approached; defendants denied hearing any shooting and continued to walk away; and defendant Cureton was arrested three weeks later after an officer found him hiding in a closet underneath a pile of clothing. **State v. Abraham,** 315.

**EVIDENCE AND WITNESSES — *Continued***

**§ 1248 (NCI4th). Confessions and other inculpatory statements; warnings as to rights; necessity that warnings be repeated in particular situations**

Where defendant had been properly advised of his Miranda rights and had asserted his right to counsel twelve hours before he initiated communications with the sheriff, the sheriff was not required to again advise defendant of his Miranda rights before interrogating him, and defendant's subsequent confession to the sheriff was not inadmissible because the sheriff failed to ask defendant if he wanted a lawyer at that time. **State v. Harris,** 129.

**§ 1255 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel; post-invocation communication initiated by defendant**

Defendant initiated further communication with the sheriff after he had earlier asserted his right to counsel, and his confession to the sheriff was admissible in this capital trial, where defendant's brother visited him in jail and then went to the sheriff's office and told the sheriff that defendant wanted to talk with him. **State v. Harris,** 129.

**§ 1298 (NCI4th). Waiver of constitutional rights; nervousness or other emotional disturbance**

The trial court did not err in a first-degree murder prosecution by not suppressing defendant's statement to an officer where a psychiatrist testified concerning defendant's history of manic episodes but could not give an opinion as to whether defendant understood his rights at the time he gave his inculpatory statement to the officer, and a nurse who saw defendant several hours after he was arrested testified that he was upset, tense, and nervous and in her opinion delusional and could not have understood his rights, but also testified that he was able to understand the questions asked of him and that he responded in a reasonable manner to those questions. **State v. Perry,** 457.

**§ 1422 (NCI4th). Introduction of real evidence; necessity of establishing relevance**

Assuming that the trial court in a murder-robbery trial erred by admitting walkie-talkies, a crowbar, a rifle scope, ammunition, and a rifle found in defendant's apartment because these items were not linked to the crimes charged, there is no reasonable possibility that the admission of these items affected the outcome of the trial. **State v. Harris,** 211.

**§ 1688 (NCI4th). Photographs of victims prior to crime**

A photograph of a murder victim wearing his police uniform and standing in front of a patrol car was not introduced merely to inflame the passions of the jury but was properly admitted to illustrate a detective's testimony concerning the size and weight of the victim to show that a much larger man attacked the victim and knocked him down and defendant then shot and killed him. **State v. Bell,** 363.

**§ 1693 (NCI4th). Photographs of homicide victims, generally**

The trial court did not abuse its discretion in a prosecution which resulted in convictions for first-degree murder, first-degree rape, and first-degree sexual offense by admitting photographs and slides into evidence during the guilt-innocence phase and the sentencing phase where there was no evidence that the photographs were used excessively and solely to arouse the passions of the jury. **State v. Moseley,** 1.

**EVIDENCE AND WITNESSES — Continued**

There was no plain error in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense in the trial court's failure to give a limiting instruction on the use of photographs of the victim in another trial in which defendant was also convicted. **Ibid.**

The trial court did not err in a first-degree murder prosecution by admitting two black and white photographs of the victim's fatal wound. **State v. Huggins,** 494.

**§ 1694 (NCI4th). Photographs of homicide victims; location and appearance of victim's body**

There was no plain error in an attempted rape and first-degree murder prosecution in the admission of photographs of the victim and the scene where the photographs were used to illustrate the pathologist's testimony concerning wounds on the body, the cause of death, and the crime scene. **State v. Carter,** 569.

**§ 1994 (NCI4th). Parol or extrinsic evidence affecting writings; contracts, leases, and agreements generally**

The language of a lease was not ambiguous and the superior court was not in error in excluding evidence of negotiations or representations made by either party prior to the execution of the lease. **IRT Property Co. v. Papagayo, Inc.**, 293.

**§ 2047 (NCI4th). Opinion testimony by lay persons generally**

An SBI agent's testimony, in response to an inquiry as to why a State's witness was a suspect for only a short time, that the witness had no motive for the murder was admissible under Rule 701 as an inference rationally based on the perception of the witness and helpful to the determination of a fact in issue. **State v. Baker,** 526.

**§ 2170 (NCI4th). Basis for expert's opinion; necessity of actual knowledge or assumed facts**

There was no error in a noncapital first-degree murder prosecution where defendant contended that an SBI agent's expert testimony on gunshot residue analysis amounted to an opinion based on an assumed fact unsupported by evidence, but his opinion was that his findings were consistent with the victim raising his hand in response to the attack and was not based on any assumed fact. **State v. Watson,** 168.

**§ 2211 (NCI4th). DNA analysis**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by allowing an SBI serologist to testify that DNA testing excluded two individuals as donors of the semen found in the victim where the agent testified that DNA samples were taken from the victim's former boyfriend, her friend's boyfriend, and defendant, that DNA analysis excluded the other two men, and that defendant's DNA profile matched on five of the six autorads analyzed. **State v. Moseley,** 1.

**§ 2241 (NCI4th). Opinion testimony by experts; health matters; conclusion based on other than own observation; statements of patient**

Where a forensic psychiatrist who examined defendant to determine his competency to stand trial for first-degree murder stated his opinion that defendant suffered from possible alcohol or drug addiction, the trial court erred by refusing to permit defendant to elicit testimony by the psychiatrist that defendant reported to him that he was a drug abuser and was unable to remember what happened the night of the crime

**EVIDENCE AND WITNESSES — Continued**

in order to show the basis for the psychiatrist's opinion, but this error was harmless. **State v. Ward,** 64.

Assuming that statements defendant made to a psychiatrist should have been admitted in defendant's trial for first-degree murder, armed robbery and conspiracy to murder to show the basis for the psychiatrist's expert opinion regarding defendant's mental disorders, defendant was not prejudiced by the exclusion of those statements. **State v. Harris,** 211.

**§ 2264 (NCI4th). Particular subjects of expert testimony; opinion as conclusion on ultimate issue to be determined**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by allowing the pathologist who performed the autopsy of the victim in another trial in which defendant was also convicted to testify that that victim's wounds were torture wounds and characteristic of overkill. **State v. Moseley,** 1.

**§ 2302 (NCI4th). Expert testimony; specific intent; malice; premeditation**

Opinion testimony by a psychiatrist that defendant could not premeditate and deliberate was properly excluded because it relates to a legal standard. **State v. Harris,** 211.

**§ 2477 (NCI4th). Exclusion or sequestration of witnesses; generally; discretion of trial court**

The trial court did not err by failing to find a violation of its sequestration order based on the prosecutor's alleged joint pretrial conferences with witnesses where the order contemplated nothing more than the sequestration of witnesses during their testimony. **State v. Abraham,** 315.

**§ 2522 (NCI4th). Psychiatric examination of witness**

The trial court did not err in a prosecution for murder and assault by denying defendant Cureton's request to have a State's witness undergo a mental examination. **State v. Abraham,** 315.

**§ 2877 (NCI4th). Cross-examination in particular prosecutions; homicide**

The State's cross-examination in a murder trial of defendant's son concerning his use of marijuana and defendant's wife concerning her knowledge of her son's involvement with illegal drugs was not an attempt to impeach the character of the witnesses for truthfulness in violation of Rule 608(b) but was properly permitted under Rule 611(b) to rebut defendant's contention that he went to the crime scene to confront the State's informant about his attempts to lure defendant's son into using and selling drugs rather than to steal drugs from the victim and the informant. **State v. Bell,** 363.

**§ 2878 (NCI4th). Cross-examination in particular actions or prosecutions; drug prosecutions**

The trial court did not err in a prosecution for first-degree murder, conspiracy to commit murder, and first-degree burglary by prohibiting defendant from introducing evidence regarding his presence in Warren County where one of the State's theories was that defendant came down from New York to orchestrate a drug ring in North Carolina and defendant complains that he was not allowed to elicit testimony that defendant had relatives in Warren County. **State v. Wilson,** 244.

**EVIDENCE AND WITNESSES — Continued**

**§ 2916 (NCI4th). Impeachment of credibility; cross-examination; scope and extent**

There was no error in a first-degree murder and attempted rape sentencing hearing where defendant contended that the court erred by permitting the State to cross-examine his psychologist beyond the scope of direct examination. **State v. Carter,** 569.

**§ 2986 (NCI4th). Witnesses subject to impeachment generally**

The trial court did not err in a prosecution for assault and murder by not allowing the defendant to question one of the victims regarding charges against him which had been the subject of a plea arrangement. **State v. Abraham,** 315.

**§ 3015 (NCI4th). Scope of inquiry when witness admits conviction; on cross-examination**

The trial court properly restricted defendant's cross-examination of the State's key witness about his prior convictions for breaking and entering and larceny to the time and place of the convictions and the penalties imposed thereon. **State v. Bell,** 363.

**§ 3018 (NCI4th). Impeachment of credibility; criminal charges**

The trial court did not err in a prosecution for murder and multiple assaults by not allowing defendant to impeach a victim by having him admit that a charge of larceny of an automobile was dismissed pursuant to a plea to a drug offense, by not allowing defendant to question the victim about a pending warrant for his arrest for possession of a firearm without a license, or by sustaining the State's objection when trial counsel asked another State's witness whether there were any charges pending against him when counsel interviewed him. **State v. Abraham,** 315.

**§ 3032 (NCI4th). Impeachment of credibility; specific instances of conduct; actions involving fraud, trickery, deceit, or cheating others generally**

While the trial court should have permitted defendant to cross-examine a State's witness in a murder-robbery trial concerning an attempt by the witness to lure an acquaintance from his home so his accomplices could break into and steal property from the residence in order to show the propensity of the witness to deceive and defraud others, the exclusion of this testimony was not prejudicial error. **State v. Bell,** 363.

**§ 3052 (NCI4th). Impeachment of credibility; specific instances of conduct; drug use or addiction**

The State's cross-examination of defendant's son concerning his use of marijuana and defendant's wife concerning her knowledge of her son's involvement with illegal drugs was not an attempt to impeach the character of the witnesses for truthfulness in violation of Rule 608(b) but was properly permitted under Rule 611(b) to rebut defendant's contention that he went to the crime scene to confront the State's informant about his attempts to lure defendant's son into using and selling drugs rather than to steal drugs from the victim and the informant. **State v. Bell,** 363.

**§ 3054 (NCI4th). Impeachment of credibility; specific instances of conduct; drug possession**

The trial court did not err by refusing to permit defendant to question a State's witness in a murder-robbery trial about several prior unrelated acts of misconduct involving possession of marijuana. **State v. Bell,** 363.

**EVIDENCE AND WITNESSES — Continued**

**§ 3039 (NCI4th). Impeachment of credibility; specific instances of conduct; larceny**

The trial court did not err by refusing to permit defendant to question the State's witness in a murder-robbery trial about several prior unrelated acts of misconduct involving larceny. **State v. Bell,** 363.

**§ 3090 (NCI4th). Proof of inconsistent statements by other witnesses; material matter**

Testimony by a medical examiner that she heard second hand from a deputy that a neighbor of the victim told the deputy that he heard between three and five gunshots on the night of a murder was inadmissible to prove a prior inconsistent statement by the neighbor. **State v. Ward,** 64.

**HOMICIDE**

**§ 86 (NCI4th). Self-defense; effect of aggression or provocation by defendant generally**

A defendant charged with felony murder, as the aggressor in the underlying felony, forfeits his right to claim self-defense absent a reasonable basis for the jury to disbelieve evidence of the underlying felony, a showing that defendant clearly articulated his intent to withdraw, or a showing that the dangerous situation no longer existed. **State v. Bell,** 363.

**§ 237 (NCI4th). Sufficiency of evidence of first-degree murder; prior altercations, threats, and the like, along with other evidence**

The evidence was sufficient to sustain defendant's conviction of first-degree murder where it tended to show that defendant and the victim fought earlier in the evening, defendant followed the victim to continue the fight, and the victim had turned his back to defendant and was walking away from him when defendant shot the victim. **State v. Ross,** 280.

The State's evidence, including prior threats, was sufficient to support defendant's conviction of first-degree murder of his estranged wife after kidnapping her from the convenience store she managed. **State v. Baker,** 526.

**§ 245 (NCI4th). Sufficiency of evidence; manner of proving premeditation and deliberation; circumstantial evidence**

Defendant in a noncapital first-degree murder prosecution was not entitled to an instruction on second-degree murder on the theory that his intoxication negated the elements of premeditation and deliberation and that the jury was free to disregard the evidence of premeditation and deliberation because it was entirely circumstantial. **State v. Herring,** 271.

**§ 252 (NCI4th). First-degree murder; sufficiency of evidence; malice, premeditation and deliberation; statements and actions after killing**

The trial court did not err in a first-degree murder prosecution by denying defendant's motion to dismiss the charge of first-degree murder due to insufficient evidence of premeditation and deliberation where defendant's statements to the effect that he shot the victim to retaliate for the victim's earlier threats to the defendant's brother were clearly sufficient evidence from which the jury reasonably could have inferred that the defendant intentionally killed the victim after premeditation and deliberation. **State v. Perry,** 457.

**HOMICIDE — Continued**

**§ 257 (NCI4th). First-degree murder; sufficiency of evidence of malice, premeditation, and deliberation; where defendant took weapon with apparent intent to use weapon**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss for lack of evidence showing premeditation and deliberation where defendant argued that all of the evidence showed that his intent to kill the victim was formed under the influence of the provocation of the quarrel with the victim where defendant procured a gun before the argument ensued. **State v. Watson,** 168.

The evidence in a first-degree murder prosecution was sufficient to support the trial court's instruction on premeditation and deliberation where it tended to show that defendant carried a pistol with him to a meeting with the victim and readied the weapon for firing, defendant intended to rob the victim of marijuana, and defendant shot the victim after his accomplice knocked the victim to the ground. **State v. Bell,** 363.

**§ 262 (NCI4th). Sufficiency of evidence; what constitutes murder in perpetration of felony; unbroken chain of events**

The trial court did not err by submitting to the jury first-degree murder based on felony murder where defendant was seen shooting at one man and a different person was killed. **State v. Abraham,** 315.

**§ 315 (NCI4th). Sufficiency of evidence; voluntary manslaughter; effect of matters in mitigation; self-defense, heat of passion, and the like**

The trial court did not err in a first-degree murder prosecution by not instructing the jury on voluntary manslaughter where the victims' actions did not rise to the level of provocation which would render the mind incapable of cool reflection. **State v. Huggins,** 494.

**§ 371 (NCI4th). Suffiency of evidence; accessory before the fact**

There was sufficient evidence of accessory before the fact to murder. **State v. Wilson,** 244.

Convictions for conspiracy to commit murder and for first-degree murder by being an accessory did not merge because the same evidence was used to prove both offenses because each offense contained an essential element not a part of the other. **Ibid.**

**§ 374 (NCI4th). Sufficiency of evidence; acting in concert; conspiracy; first-degree murder**

Convictions for conspiracy to commit murder and for first-degree murder by being an accessory did not merge because the same evidence was used to prove both offenses because each offense contained an essential element not a part of the other. **State v. Wilson,** 244.

The trial court did not err by denying defendant Abraham's motion to dismiss for insufficient evidence; since the evidence supports the guilt of both defendants as to all of the felonious assaults, it makes no difference which of the felonious assaults is the underlying felony or which defendant actually fired the fatal shots or whether defendants intended that Gaddy be killed. **State v. Abraham,** 315.

**HOMICIDE — Continued**

**§ 384 (NCI4th). Suffiency of evidence to establish self-defense and defense of others; fear of death or great bodily harm**

The trial court did not err in a noncapital first-degree murder prosecution by denying defendant's motion to dismiss on the ground that the State failed to prove that defendant did not act in self-defense. **State v. Watson,** 168.

**§ 393 (NCI4th). Sufficiency of evidence to establish defenses; intoxication**

The trial court did not err in a noncapital first-degree murder prosecution by refusing to submit voluntary intoxication to the jury where the evidence shows that defendant may have been intoxicated but does not show that he was utterly incapable of forming a deliberate and premeditated purpose to kill. **State v. Herring,** 271.

**§ 432 (NCI4th). Instructions; presumption or inference of unlawfulness and malice; use of deadly weapon generally**

The trial court properly instructed the jury that it could infer that a killing was unlawful and committed with malice if it found that defendant intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death. **State v. Bell,** 363.

**§ 470 (NCI4th). Instructions; burden of proof; intoxication**

The trial court did not err in a first-degree murder prosecution by not giving the proffered pattern jury instruction on the burden of proof and reasonable doubt. **State v. Hamilton,** 193.

**§ 476 (NCI4th). Propriety of instructions on intent**

The trial court did not err by instructing the jury that it must find that defendant formed the intent to kill the victim over some period of time, however short, in order to find defendant guilty of first-degree murder based upon premeditation and deliberation. **State v. Bell,** 363.

**§ 478 (NCI4th). Propriety of instructions on transferred intent**

The failure to submit a first-degree murder case to the jury on a transferred intent theory was not detrimental to defendant where the felony murder theory upon which the case was submitted was fully supported by the evidence. **State v. Abraham,** 315.

**§ 489 (NCI4th). Instructions on premeditation and deliberation; use of examples in instructions**

Even if the trial court instructed on several circumstances from which premeditation and deliberation could be inferred which were not supported by the evidence, defendant failed to object to the instruction given, and the instruction was not plain error. **State v. Bell,** 363.

**§ 490 (NCI4th). Necessity of instruction on mental condition or disorder in relation to premeditation and deliberation**

The trial court did not err in a first-degree murder prosecution by instructing the jury on premeditation, intent to kill, and deliberation conjointly, rather than separately, when charging with regard to voluntary intoxication and diminished mental capacity. **State v. Hamilton,** 193.

HOMICIDE — Continued

**§ 493 (NCI4th). Instructions; premeditation and deliberation; lack of just cause, excuse, or justification**

There was no plain error in a noncapital prosecution for first-degree murder by instructing the jury that premeditation and deliberation could be inferred from certain circumstances, including the victim's lack of provocation. **State v. Watson,** 168.

**§ 495 (NCI4th). Instructions; anger, passion, and the like where killing was product of premeditation and deliberation**

The trial court did not err in a first-degree murder prosecution by not instructing on second-degree murder where defendant contended that the evidence tended to show that he acted in extreme anger and that his actions were provoked by the acts of the victim and his companions, but the evidence would not support a reasonable finding that his faculties or ability to reason were disturbed to the point of negating his ability to premeditate or deliberate. **State v. Perry,** 457.

**§ 497 (NCI4th). Instructions; felony murder rule generally**

The trial court properly instructed that the jury could consider only an attempted armed robbery charge as the underlying felony for felony murder and did not permit the jury to consider a conspiracy charge as the underlying felony. **State v. Bell,** 363.

**§ 520 (NCI4th). Instructions; second-degree murder; intent to kill**

The trial court did not err in a first-degree murder prosecution by not instructing on second-degree murder where the evidence did not support a reasonable finding that defendant only intended to frighten the victim. **State v. Perry,** 457.

**§ 555 (NCI4th). Instructions; second-degree murder as lesser included offense of first-degree murder; effect of evidence indicating lack of premeditation and deliberation**

The trial court did not err in a first-degree murder prosecution by not giving an instruction on second-degree murder where defendant argued that he lacked the mental capacity to form a premeditated and deliberate specific intent to kill due to his mental illness. **State v. Perry,** 457.

**§ 566 (NCI4th). Voluntary manslaughter as lesser-included offense of homicide; effect of self-defense**

A defendant on trial for first-degree murder was not entitled to an instruction on voluntary manslaughter based on imperfect self-defense where the undisputed evidence showed that defendant shot the unarmed victim in the back as the victim was walking away from defendant and fired three more shots into the victim as the victim lay prone and unable to defend himself. **State v. Exxum,** 297.

**§ 583 (NCI4th). Instructions; acting in concert**

There was no plain error in the trial court's instructions on acting in concert in a first-degree murder and assault prosecution where defendant Cureton was convicted of feloniously assaulting with a deadly weapon with intent to kill the victim Hardin, convicted of the same crime against the victim Foster on a theory of acting in concert with defendant Abraham, and convicted of first-degree felony murder of the victim Gaddy. **State v. Abraham,** 315.

The trial court did not err in a first-degree murder prosecution by instructing the jury on acting in concert where defendant's brother testified that when he was threatened the defendant and Scottie Thompson appeared on the scene and began to shoot

**HOMICIDE — Continued**

at his assailants in a concerted effort to protect him; either the defendant or Scottie Thompson fired the fatal bullets; and evidence that Thompson disposed of the defendant's weapon after the killing also tended to show that the defendant was acting in concert with Thompson. **State v. Perry**, 457.

**§ 588 (NCI4th). Instructions on imperfect self-defense**

The trial court did not err in a first-degree murder prosecution by not instructing on voluntary manslaughter based on imperfect defense of another. **State v. Perry,** 457.

**§ 589 (NCI4th). Instructions; defenses; perfect self-defense**

The trial court did not err in failing to instruct the jury on the State's burden of proof with regard to self-defense in a first-degree murder trial where all of the evidence tended to show that the victim was unarmed and walking away from defendant when defendant shot him in the back. **State v. Ross,** 280.

**§ 612 (NCI4th). Instructions; apprehension of death or great bodily harm; existence of necessity to take life; reasonableness of apprehension generally**

The trial court did not err in a first-degree murder prosecution by not instructing the jury that it could find that decedent's hands were a deadly weapon. **State v. Bunning**, 483.

**§ 615 (NCI4th). Instructions; self-defense; effect of honest but unreasonable belief regarding necessity to kill**

There was no plain error in a noncapital first-degree murder prosecution in which self-defense was an issue where the trial court charged the jury in terms of defendant's *belief in a need to kill, rather than in terms of his belief in a need to use deadly force.* **State v. Watson,** 168.

**§ 620 (NCI4th). Instructions; self-defense; aggression or provocation by defendant generally**

The trial court did not err by instructing the jury that the defense of self-defense was unavailable to defendant if the jury concluded that defendant killed the victim in the perpetration of a felony where the evidence tended to show that defendant was the aggressor in that he and an accomplice went to the crime scene to rob the victim and another person of marijuana. **State v. Bell,** 363.

**§ 622 (NCI4th). Instructions; self-defense; determination of whether defendant was aggressor**

There was sufficient evidence that defendant was the aggressor to support the trial court's instruction in a first-degree murder case that defendant may not claim self-defense if the jury finds defendant was the aggressor in the encounter leading to the fatal shooting. **State v. Bell,** 363.

**§ 625 (NCI4th). Instructions; self-defense; effect of withdrawal from combat; notice**

The evidence did not require the trial court in a first-degree murder case to give defendant's requested self-defense instruction that "as long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to *accept any statement indicative of an intent to discontinue the assault.*" **State v. Bell,** 363.

## HOMICIDE — Continued

**§ 628 (NCI4th). Instructions; self-defense; amount of force used; jury question**

The evidence in a prosecution for first-degree murder of an undercover police officer presented a question for the jury as to whether defendant used excessive force so that the trial court properly instructed the jury that, if it found defendant to have used excessive force in defending himself, he was entitled, at most, to the defense of imperfect self-defense. **State v. Bell,** 363.

**§ 635 (NCI4th). Instructions; self-defense; duty to retreat; right to stand ground generally**

The trial court did not err in a noncapital first-degree murder prosecution by failing to instruct ex mero motu that a person who is without fault and who reasonably believes that an attack is being made with felonious intent has no duty to retreat where the evidence was that the victim quit the argument and returned to his vehicle, defendant left his vehicle, walked to the victim's car and began shooting, and the evidence revealed no attack or attempted attack by the victim. **State v. Watson,** 168.

**§ 727 (NCI4th). Propriety of additional punishment for underlying felony as independent criminal offense on conviction for felony murder; merger**

Where a defendant is convicted of first-degree murder based upon both premeditation and deliberation and felony murder, the underlying felony does not merge with the murder conviction and the trial court is free to impose a sentence thereon. **State v. Bell,** 363.

## INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

**§ 54 (NCI4th). Variance; place; persons and names**

The trial court was without authority to allow an amendment to an indictment to change the name of the victim where one of the victims of a shooting apparently gave a false name to officers and that name was used on the indictment. **State v. Abraham,** 315.

## INDIGENT PERSONS

**§ 21 (NCI4th). Supporting services; medical experts**

The trial court did not err in a prosecution for first-degree murder, first-degree rape, and first-degree sexual offense by denying defendant's motion for funds to employ a pathologist to assist in his defense where the pathologist who had performed the autopsy in this case in Stokes County also supervised an autopsy in Forsyth County and testified in the Forsyth County case as to the similarities between the two cases. **State v. Moseley, 1.**

**§ 24 (NCI4th). Supporting services; other experts**

The trial court did not err in a first-degree murder prosecution by denying defendant Cureton's motion for an expert in eyewitness identification where defendant failed to show how an expert would have assisted him materially. **State v. Abraham,** 315.

## JURY

**§ 80 (NCI4th). Effect of erroneous excusal of prospective juror**

Assuming the trial court erred by excusing for cause a prospective juror who stated he had negative feelings toward the district attorney but could apply the law fairly, a juror who indicated he knew defendant but could give the State and defendant a fair trial, and a juror who stated he did not want to spend the time necessary for a first-degree murder trial, defendant failed to show he was prejudiced thereby where he evidenced his satisfaction with the empaneled jury by failing to exhaust his peremptory challenges. **State v. Harris,** 211.

**§ 103 (NCI4th). Examination of veniremen individually or as group; sequestration of venire; generally**

The trial court did not err in a first-degree murder resentencing hearing by denying defendant's motion for individual jury voir dire. **State v. Spruill,** 612.

**§ 111 (NCI4th). Examination of veniremen individually or as group; sequestration of venire; prejudice resulting from exposure to pretrial publicity**

The trial court did not err by denying defendant's motion for sequestration and individual voir dire of prospective jurors in a capital trial because of widespread pretrial publicity about the case. **State v. Ward,** 64.

The trial court did not err by failing to allow defendant to individually question each prospective juror during voir dire in a capital trial with respect to pretrial publicity. **State v. Bell,** 363.

**§ 114 (NCI4th). Motion for sequestration and individual voir dire to give fair trial in capital cases**

The trial court did not err by denying defendant's motion for sequestration and individual voir dire of prospective jurors in a capital trial on the ground that the Eighth and Fourteenth Amendments required individual voir dire to ensure the sincerity of the responses of potential jurors with respect to their capital punishment views. **State v. Ward,** 64.

**§ 127 (NCI4th). Voir dire examination; questions relating to juror's qualifications, personal matters, and the like generally**

The trial court did not err during jury selection for a first-degree murder prosecution by sustaining an objection to defendant's question as to whether any of the jurors had taken classes in psychology and psychiatry. **State v. Bunning,** 483.

**§ 132 (NCI4th). Voir dire examination; questions relating to ability to be fair and follow court's instructions**

It was not improper for the prosecutor to ask prospective jurors in a capital trial whether they could give defendant, the victim's family, and the State a fair trial. **State v. Bell,** 363.

**§ 141 (NCI4th). Voir dire examination; parole procedures**

There was no error in jury selection for a first-degree murder resentencing hearing where the trial court denied defendant's motion to permit questioning of prospective jurors on their beliefs about parole eligibility. **State v. Spruill,** 612.

**JURY — Continued**

**§ 145 (NCI4th). Voir dire examination; in relation to case involving capital punishment generally**

The trial court did not err in a first-degree murder prosecution by making statements which defendant says diminished the responsibility of each individual member of the jury to make an individual decision but the court was correcting an impression which could have been left by defendant's question that a prospective juror alone had to determine defendant's fate. **State v. Bunning**, 483.

There was no error during jury selection for a first-degree murder resentencing hearing where defendant on appeal addressed an argument to the voir dire of a particular juror but did not include an assignment of error, assigned error to two others but did not include an argument, and the court granted challenges for cause for all three. **State v. Spruill,** 612.

**§ 148 (NCI4th). Propriety of prohibiting voir dire or inquiry into attitudes toward capital punishment**

There was no prejudicial error in a first-degree murder prosecution where the trial court forbade defendant from asking a prospective juror whether he or she could think of circumstances under which he or she would not impose the death penalty, but defendant peremptorily challenged the prospective jurors to whom the question was addressed and was allowed to ask the other jurors whether they would automatically vote for the death penalty and whether they would vote for life if they felt the evidence did not warrant death. **State v. Bunning**, 483.

**§ 150 (NCI4th). Propriety of rehabilitating jurors challenged for cause due to opposition to death penalty**

The trial court did not err in a first-degree murder resentencing hearing by denying defendant the right to examine each juror challenged by the State during death qualification. **State v. Spruill,** 612.

**§ 154 (NCI4th). Propriety of nondeath qualifying questions**

The trial court did not err by refusing on two occasions to permit defense counsel to ask prospective jurors in a capital trial whether they understood that "our law only requires you to consider the death penalty." **State v. Ward,** 64.

**§ 183 (NCI4th). Challenges for cause; generally**

The trial court did not err in a trial in which defendant was convicted of a first-degree murder, first-degree rape, and first-degree sexual offense in failing to excuse prospective jurors for cause where defendant contended that answers on voir dire revealed that jurors held views that would substantially impair their ability to follow the jury instructions and the law. **State v. Moseley,** 1.

**§ 197 (NCI4th). Challenges for cause; physical or mental infirmity**

The trial court did not err in a first-degree murder prosecution by excusing for cause a prospective juror who was in her eighth month of pregnancy and who had indicated that she could go into labor if the trial lasted more than two weeks. **State v. Carter,** 569.

**§ 201 (NCI4th). Challenges for cause; prejudice and bias; preconceived opinions generally**

The trial court did not err in a first-degree murder prosecution in its examination of a potential juror, by excusing that potential juror, or by denying defendant the

**JURY — Continued**

opportunity to rehabilitate the juror where the juror stated that defendants' failure to testify might prejudice them in her deliberation. **State v. Abraham,** 315.

There was no error during jury selection for a first-degree murder resentencing hearing where defendant argued that the court showed partiality during jury selection in denying his motions to excuse for cause prospective jurors after questions regarding crime and the death penalty. **State v. Spruill,** 612.

**§ 202 (NCI4th). Challenges for cause; effect of preconceived opinions, prejudices, or pretrial publicity**

The trial court did not abuse its discretion in a prosecution in which defendant was convicted for first-degree murder, first-degree rape, and first-degree sexual offense by not excusing two prospective jurors for cause on its own motion where one recalled seeing in the paper that defendant had previously been tried in Forsyth County and another initially indicated that he would vote for the death penalty if the jury found defendant guilty. **State v. Moseley,** 1.

**§ 203 (NCI4th). Challenges for cause; preconceived opinions or pretrial publicity; where juror indicated ability to be fair and impartial**

The trial court did not err in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by limiting the scope of defendant's voir dire questions concerning the extent of jury exposure to pretrial publicity and the content of the information heard by the jurors. **State v. Moseley,** 1.

**§ 205 (NCI4th). Challenges for cause; family, social, business, and professional relationships generally; acquaintance or friendship**

The trial court did not abuse its discretion in a prosecution in which defendant was convicted of first-degree murder, first-degree rape, and first-degree sexual offense by limiting defendant's voir dire of a prospective juror who had indicated that he was a neighbor of the victim's family. **State v. Moseley,** 1.

The trial court did not err in a first-degree murder prosecution by excusing for cause two prospective jurors after making its own inquiry of them and deciding that they could not be fair and impartial because of their prior acquaintance with defendant or a relative of defendant. **State v. Carter,** 569.

**§ 219 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; necessity that juror be able to follow trial court's charge and state law**

The trial court did not err in excusing a prospective juror for cause in a capital trial where the juror's responses show that if the recommendation were for death, she could not fulfill a juror's duty to state this when polled. **State v. Baker,** 526.

**§ 223 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; application of *Witherspoon* decision**

Since defendant was not sentenced to death, he was not harmed by any improper exclusion of jurors on the basis of their death penalty views. **State v. Harris,** 211.

**§ 226 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; rehabilitation of jurors**

The trial court did not err by excusing for cause in a capital trial prospective jurors who stated that they would be unable to vote for the death penalty but that they could follow the law as to sentence recommendation without affording defendant the opportunity to question them. **State v. Ward,** 64.

**JURY — Continued**

**§ 232 (NCI4th). Constitutionality of death qualification of juries**

The practice of death qualifying the jury did not violate defendant's right to a fair trial. **State v. Harris,** 211.

**§ 258 (NCI4th). Use of peremptory challenge to exclude on basis of race; effect of some blacks not being peremptorily challenged by State, along with other circumstances**

Defendant failed to make a prima facie showing of racial discrimination in the State's exercise of a peremptory challenge to remove a black male juror from the jury in defendant's trial for first-degree murder where the prosecutor accepted two black females for the jury and did not exercise any other peremptory challenges. **State v. Ross,** 280.

**§ 259 (NCI4th). Sufficiency of evidence to show racial discrimination in use of peremptory challenges**

The evidence in a first-degree murder prosecution was not sufficient to show racial discrimination by the prosecution in the use of peremptory challenges during the jury selection. **State v. Spruill,** 612.

**§ 260 (NCI4th). Peremptory challenges; effect of racially neutral reasons for exercising challenges**

There was no error during jury selection in a first-degree murder prosecution where the defendant contends that the State exercised its peremptory challenges to exclude black jurors on the basis of race, but the prosecutor voluntarily gave reasons for the dismissal of each of the jurors in question, so that the question of whether defendant has made a prima facie showing of discrimination need not be addressed, and the State's excusal of the jurors was based on race-neutral reasons that were clearly supported by the individual jurors' responses during voir dire. **State v. Carter,** 569.

**KIDNAPPING AND FELONIOUS RESTRAINT**

**§ 21 (NCI4th). Confinement, restraint, or removal for purpose of doing serious bodily harm to or terrorizing person**

The evidence was sufficient to support defendant's conviction for first-degree kidnapping because it supported an inference that defendant forcibly removed the victim from the convenience store she managed and restrained her for many hours for the purpose of killing her. **State v. Baker,** 526.

**LANDLORD AND TENANT**

**§ 12 (NCI4th). Use and enjoyment or premises; particular uses employed by tenant**

The words "shopping center," "mall," and "Galleria" in the portions of the lease describing the premises do not unambiguously refer to areas which contain only retail establishments, as defendant contended. **IRT Property Co. v. Papagayo, Inc.** 293.

## LARCENY

**§ 195 (NCI4th). Instructions to jury; misdemeanor larceny as lesser included offense of felonious larceny**

The trial court did not err in a prosecution for felonious larceny by not instructing on misdemeanor larceny when the only evidence of the value of the stolen truck indicated that it was worth more than the threshold amount for felonious larceny. **State v. Huggins,** 494.

## RAILROADS

**§ 13 (NCI4th). Abandonment of rights of way**

The first sentence of G.S. 1-44.2(b), which creates a conclusive presumption that the title to land underlying an abandoned railroad easement vested in the adjacent property owner if no contrary claim of good and valid title was filed by another person within the statutory one-year period, is unconstitutional as applied against record title holders in possession because it does not provide notice, an opportunity to be heard, and just compensation before divesting owners of a valuable property interest. **McDonald's Corp. v. Dwyer,** 445.

## RAPE AND ALLIED OFFENSES

**§ 147 (NCI4th). Lack of consent**

The trial court did not err by failing to dismiss a first-degree rape charge where defendant conceded that the pathologist found sperm in the victim's vagina but defendant contended that the murder of the victim raises no more than a conjecture that any sexual conduct was nonconsensual where there was evidence that the victim was beaten while she was alive and the jury could reasonably infer that she was forced to have sexual intercourse against her will. **State v. Moseley,** 1.

## ROBBERY

**§ 55 (NCI4th). Sufficiency of evidence of common law robbery generally; to submit to jury**

The State's evidence was sufficient to support defendant's conviction of common law robbery where $2,500 was missing from the convenience store managed by defendant's estranged wife after he abducted and killed his wife. **State v. Baker,** 526.

**§ 84 (NCI4th). Sufficiency of evidence; attempted armed robbery generally**

The evidence was sufficient to support defendant's conviction of attempted armed robbery of an undercover police officer who proposed to sell marijuana to defendant. **State v. Bell,** 363.

## SOCIAL SERVICES AND PUBLIC WELFARE

**§ 17 (NCI4th). Aid to families with dependent children; eligibility for benefits**

The policy of the N. C. Division of Social Services under the AFDC program which requires that a needy caretaker relative and all needy children, siblings and non-siblings, when living in the same household, be included in the same AFDC assistance unit does not contravene federal availability statutes and regulations or federal regulations that mandate equitable treatment for AFDC recipients. **Morrell v. Flaherty,** 230.

## TAXATION

**§ 92 (NCI4th). Intangible personal property**

The North Carolina intangibles tax levied on corporate stock pursuant to G.S. 105-203 does not violate the Commerce Clause of the U.S. Constitution because the statute taxes more heavily stock of corporations doing business outside North Carolina. **Fulton Corp. v. Justus,** 472.

## UTILITIES

**§ 117 (NCI4th). Rates for electric power sold by small power producers to public utilities**

The Utilities Commission's disallowance of $1.39 million in expenses for capacity payments for the Ultra Cogen cogeneration projects did not violate the Public Utility Regulatory Policies Act to the extent it only excluded the amount above avoided costs. **State ex rel. Utilities Comm. v. N.C. Power**, 412.

It was not unreasonable in a general rate case involving the purchase of power from a cogenerator by NC Power for the North Carolina Utilities Commission to use a competitive bidding measure in determining avoided costs. **Ibid.**

**§ 154 (NCI4th). Ratemaking; current revenue and operating expenses**

The North Carolina Utilities Commission properly disallowed expenses for unreasonably high payments to a cogenerator. **State ex rel. Utilities Comm. v. N.C. Power**, 412.

The Utilities Commission did not err in a general rate making case involving Virginia Electric and Power Company, which operates as North Carolina Power in North Carolina, by excluding $28,000 in officers' salaries. **Ibid.**

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